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WITH KEY-NUMBER ANNOTATIONS

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CASES ARGUED AND DETERMINED
IN THE

CIRCUIT COURTS OF APPEALS AND DISTRICT COURTS OF THE UNITED STATES

OCTOBER — NOVEMBER, 1916

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JUDGES

OF THE

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'ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

DOWD v. UNITED MINE WORKERS OF AMERICA et al. *
(Circuit Court of Appeals, Eighth Circuit. July 21, 1916.)

No. 4623.

1. Appeal and Error \$\sim 866(1)\$—Review—Questions Considered—Judgment on Demurrer.

On writ of error from a judgment dismissing an action on demurrer to the complaint, the appellate court is not limited to a consideration of the particular ground of demurrer sustained by the trial court, but all questions raised by the demurrer are reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3467-3473; Dec. Dig. \$\$866(1).]

2. MONOPOLIES =28—ANTI-TRUST ACT—ACTION FOR VIOLATION—PARTIES DEFENDANT—"ASSOCIATIONS."

In Anti-Trust Act, July 2, 1890, c. 647, § 8, 26 Stat. 210 (Comp. St. 1913, § 8830), providing that the word "person" or "persons," whenever used in the act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country, the word "associations" includes unincorporated associations, such as labor organizations recognized by federal and state legislation as lawful, and such an organization may be sued by its name, under section 7, by one injured in his business or property by its action in violation of the provisions of the act.

For other definitions, see Words and Phrases, First and Second Series, Association.]

3. Monopolies &= 28—Anti-Trust Act—Action for Damages—Sufficiency of Complaint.

The complaint in an action brought under sertion 7 of the Anti-Trust Act by the receiver of certain coal companies against a labor organization and its constituent organizations to recover damages for injury to the business and property of the coal companies by reason of a conspiracy and combination of defendants in violation of the act, and acts done by them pursuant thereto, considered, and held to state a cause of action as against a general demurrer.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. \$28.]

4. Monopolies —28—Anti-Trust Act—Action for Damages—Defenses.

That a plaintiff in such an action was not, at the time of the alleged unlawful acts of defendants, actually engaged in interstate commerce,

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 235 F.—1 *Rehearing denied November 20, 1916.

does not deprive him of a right of action, where he was preparing to so engage, and was prevented by the wrongful acts of defendants.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig.

\$38.]

5. Monopolies \$\iff 28\$—Anti-Trust Act—Action for Damages—Defenses.

That the alleged unlawful acts of defendants did not relate directly to interstate commerce is not a defense, where it was their purpose to restrain such commerce, and that was their necessary, although indirect, effect.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. \$28.]

In Error to the District Court of the United States for the Western

District of Arkansas; Frank A. Youmans, Judge.

Action at law by A. S. Dowd, as receiver for the Coronado Coal Company and others, against the United Mine Workers of America and others. Judgment for defendants, and plaintiff brings error. Reversed.

Henry S. Drinker, Jr., of Philadelphia, Pa., and James B. Mc-Donough, of Ft. Smith, Ark. (Walter Gordon Merritt, of New York City, on the brief), for plaintiff in error.

G. L. Grant and Webb Covington, both of Ft. Smith, Ark. (Henry Warrum, of Indianapolis, Ind., on the brief), for defendants in error.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

CARLAND, Circuit Judge. Dowd, hereafter called plaintiff, as receiver of nine coal mining companies, commenced this action against the defendants in error, hereafter called defendants, to recover damages resulting from an alleged unlawful conspiracy and combination formed by them in restraint of trade and commerce among the several states of the United States, in violation of the act of July 2, 1890 (26 Stat. 209). The defendants named in the complaint are the United Mine Workers of America, about 27 local unions of the same, and numerous individual defendants, comprising, among others, the president and other officers of the United Mine Workers of America and the presidents and other officers of the district branches and local unions of the same.

The complaint alleges that the United Mine Workers of America is an unincorporated association of mine workers, engaged in or about the work of mining and shipping coal in and from the different mines throughout the United States, its headquarters being located at the city of Indianapolis, in the state of Indiana; that the members of said association are subdivided into about 30 districts, and numerous local unions are located therein, each district having jurisdiction of the local unions within its territory; that every member of said local unions is a member of the United Mine Workers of America, and subject to the rules laid down in its constitution and by-laws, as well as the constitution and by-laws of the various district and local unions having jurisdiction over them, respectively; that the membership of the United Mine Workers of America exceeds 400,000 miners; that

each of the district branches and local unions, which are a part of the United Mine Workers of America, are created by said United Mine Workers of America to carry out the purposes and business of said national organization, and more particularly to act with and for said national organization in carrying out the combination and conspiracy in respect of interstate trade and commerce set forth in the complaint; that the defendant United Mine Workers of America, District 21, is one of the said district branches of said United Mine Workers of America, and has jurisdiction over all union mines and miners in the states of Arkansas, Oklahoma, and Texas, and that all of the defendant local unions above named are affiliated with and subject to the laws of District 21; that the local unions named as defendants are unincorporated associations of mine workers in the state of Arkansas.

The United Mine Workers of America and the several unions demurred to the complaint upon the following grounds: (1) The court had no jurisdiction of the subject of the action, as it appeared from the complaint that neither of the coal companies were engaged in interstate commerce at the time of the alleged acts causing the damages sued for, within the meaning of the act of July 2, 1890. (2) The complaint failed to disclose that the court had any jurisdiction of the cause of action, for the reason that the acts complained of were not an interference with interstate commerce or a violation of the above act. (3) The court had no jurisdiction of the defendant or the subject of the action, for the reason that defendants United Mine Workers of America and the several local unions are voluntary unincorporated associations, and as such have no power to sue and cannot be sued. (4) The complaint does not allege any contract, combination, or conspiracy in restraint of trade or commerce within the meaning of the above act. (5) The complaint does not allege any acts of defendants monopolizing or attempting to monopolize, combining or conspiring to monopolize, any part of such trade or commerce within the meaning of the above act. Two other grounds of demurrer were mentioned, namely, a misjoinder of parties plaintiffs, and a misjoinder of causes of action. These grounds are not argued in the briefs, and will be deemed abandoned. The individual defendants demurred to the complaint upon the same grounds, except that no point was made that these defendants could not be sued. The court below sustained the demurrers upon the specific ground, as recited in the judgment:

"That the complaint fails to disclose that this court has any jurisdiction of the cause of action therein set forth, for the reason that the acts of defendants complained of were not an interference with interstate commerce, or a violation of the federal statute upon which the complaint is predicated."

The other grounds of demurrer were in terms overruled.

[1] As the plaintiff alone sued out a writ of error, it is contended that our power to review is limited to the point ruled against the plaintiff; but it was the demurrers that were sustained, and the scope of our power to review cannot be limited by the specific reason given by the court below for its judgment. Such judgment may be right or wrong, notwithstanding the reason given for it. The plaintiff

elected to stand upon the complaint, which was thereupon dismissed. Claiming the point to be jurisdictional, the United Mine Workers of America and the several unions made a motion in this court to dismiss the writ of error, upon the ground that defendants are voluntary unincorporated associations or labor unions, having no legal entity, not registered under any trade union law of the United States or of any state or territory, and cannot sue or be sued, and are not en-

gaged in any kind of business.

All of the defendants made a similar motion, for the reason that the writ of error in this case should have issued from the Supreme Court of the United States. This motion is denied, for the reason that the judgment is properly reviewable by this court, the writ of error sued out by the plaintiff from the Supreme Court of the United States has been dismissed, and the point in reference to the plaintiff's right to sue the United Mine Workers of America and the different local unions by name, having been one of the grounds of demurrer in the court below, will be considered here on this writ of error, for the reasons hereinbefore stated, as the defendants still insist upon the point. The questions then for consideration are: (1) May the United Mine Workers of America and the different local unions be sued in the name of the association? (2) Does the complaint state a cause of action?

[2] The complaint was filed September 1, 1914, and the acts of which complaint is made are alleged to have occurred early the same year. Taking up the first question suggested, we find that section 7 of the act of July 2, 1890, reads as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 8 of the same act provides:

"The word 'person,' or 'persons,' wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country."

Section 4 of the act of Congress of October 15, 1914 (38 Stat. 731, c. 323), provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

It will be noticed that section 4 of the act of October 15, 1914, eliminates any description of the persons or corporation by whom the injury shall be committed, leaving the party injured free to pursue any one who causes the injury. It is claimed by the defendants the United Mine Workers of America and the several local unions that the word

"associations" found in section 8, above quoted, means associations which have a legal entity by reason of having been organized under the laws of the United States, their territories, the states, or the laws of a foreign country; that the words "existing under" or "authorized by" mean that the word "association" refers only to an association having a legal entity by force of law; and that the United Mine Workers of America and the local unions, not having been shown in this case to be organized under any particular law, may not be held liable under section 7, above quoted, in the name of the association. Such a construction of the law would relieve labor organizations generally from all liability.

The United States Supreme Court in Loewe v. Lawler, 208 U. S. 274, 301, 28 Sup. Ct. 301, 310 (52 L. Ed. 488, 13 Ann. Cas. 815), said:

"The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act, and that all these efforts failed so that the act remained as we have it before us."

We are of the opinion that it was clearly not the intention of Congress to exempt any one from liability for injuries caused by combinations and conspiracies in restraint of interstate trade. We therefore decide that the word "associations," in section 8, includes unincorporated associations, such as the defendants are shown to be. The defendants, of course, will not take the position that the associations are outlaws, for they are continually recognized in the legislation of Congress and of the several states as lawful associations. A notable instance of this is contained in section 6 of the act of Congress of October 15, 1914, where it is said:

"Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

The defendants, composing an organization of 400,000 miners, capable of doing great good or wrong, claim they are not liable to be sued in the name of the association, but that the injured plaintiff must pursue the individual members whom he can show were liable for the injury, leaving the powerful organization to go free. We do not think it can be said that the defendants United Mine Workers of America and the local unions are not associations existing under or authorized by law within the meaning of section 8, above quoted. But, if defendants are associations within the meaning of the law, it is next insisted that an unincorporated association cannot be sued in the name of the association. It is true that, in the absence of a specific statute to the contrary, the rule at common law, and under the Codes, is that an unincorporated association is not recognized as having a legal existence apart from its members. The action lies against the members individually, but not against the unincorporated association in its col-

lective capacity and name. In many of the states statutes have been passed changing this rule, so that unincorporated associations not having corporate powers may be sued in the name of the association. It has also been ruled that the common-law rule, that only entities known to the law are capable of being sued, may not only be modified by express enactment, but also by statutory implication. Taff Vale R. Co. v. Amalgamated R. Servants' Society, 85 L. T. Rep. (N. S.) 147.

If we are correct in our view that voluntary unincorporated associations are included in the word "associations" as used in section 8, above quoted, then we are of the opinion that there is a clear and necessary implication that the association may be sued in its own name; otherwise the provision in the law that the association should be liable could not be enforced, and the law would fail as against all such associations, the remedy of the injured party being confined to an action against the mere agents and employés of the association, in most cases unable to respond in damages. The question as to the liability of an unincorporated labor organization to be sued under the act of July 2, 1890, in the name of the association, does not seem to have been discussed in any reported case which we have been able to find. The fact that labor organizations were before Congress seeking to be exempted from the act is of course conclusive evidence that Congress knew of such organizations, and did not intend to exempt them, while by Clayton Act Oct. 15, 1914, § 4, a remedy is given to one injured in his business or property by reason of anything forbidden in the anti-trust laws, regardless of who shall commit the injury.

The case of Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, and Lawlor v. Loewe, 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341, known as the Danbury Hatters' Case, was twice before the United States Supreme Court. In this case the defendants were members of the United Hatters of North America and also of the American Federation of Labor. The Association by name was not a party defendant, but a large verdict in damages was recovered, and the recovery sustained on appeal. The case of Eastern States Retail Lumber Dealers' Association v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788, was a case brought by the United States for a violation of the act of July 2, 1890, against various lumber associations composed largely of retail lumber dealers in New York, New Jersey, Pennsylvania, Connecticut, Massachusetts, Rhode Island, Maryland, and the District of Columbia, and the officers and directors of the associations. No objection to suing the defendants in the name of the association was made in this case. The case of the United States v. Workingmen's Amalgamated Council (C. C.) 54 Fed. 994, 26 L. R. A. 158, was cited with approval by the Supreme Court of the United States in Loewe v. Lawlor, 208 U. S. 301, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815. No objection was made that this suit was against the association by The result of what has been said is that the United Mine Workers of America and the local unions were properly sued in the name of the association. Whether they are in fact liable in this action is another question, not now to be considered.

[3] We now come to the question as to whether the complaint states a cause of action. The complaint is necessarily voluminous as it describes an alleged conspiracy. A copy appears in the margin.¹ It will not be necessary or convenient to restate in this opinion the allegations of the complaint, as they are fully stated in the copy set out in the margin. A careful consideration of the same has led to the conclusion that it sufficiently alleges a combination and conspiracy in restraint of interstate trade and commerce between the defendants, that the acts alleged to have been committed by them in pursuance of said combination and conspiracy resulted in damage to some or all of the coal companies, and that when these acts were committed the operating coal companies were engaged in interstate trade and commerce in the mining and shipment of coal. It is objected that the complaint fails to show that the plaintiffs were engaged in interstate trade or commerce at the time of the commission of the alleged wrongs, or that the plaintiffs have suffered damages to interstate trade or commerce by reason of defendant's acts. The complaint alleges that at the time the receiver was appointed and for many years prior thereto certain of the coal companies were engaged in the production, loading, and shipment of coal for interstate trade and commerce from coal lands located in Sebastian county, Ark. It is claimed that, as the complaint does not allege the date when the receiver was appointed, it is impossible to determine when the coal companies were engaged in interstate commerce in relation to the mining and shipment of coal. This contention is without merit.

It is not claimed that the causes of action have been barred by the statute of limitations, and the complaint fully shows that 75 per cent. of all coal mined and shipped was shipped to customers outside of the state of Arkansas. It is alleged in the complaint that by reason of the combination and conspiracy pleaded, and the acts done in pursuance thereof, such companies have suffered great loss and injury to their business and property, in the sum of \$427,820.77. This allegation is followed by an itemized statement of the character and amount of damage. Whether they have been damaged as alleged only a trial can determine. Certainly on general demurrer the complaint must be held to allege some damage.

[4] Some of the coal companies were not actually engaged in interstate commerce at the time the alleged acts were committed by the defendants; but they were preparing to do so, and were prevented from so doing, as they allege, by the wrongs of the defendants. It was held in Pennsylvania Sugar Refining Co. v. American Sugar Refining Co. et al., by the Circuit Court of Appeals of the Second Circuit, 166 Fed. 254, 92 C. C. A. 318, that:

"A conspiracy to prevent a manufacturer who procures his supplies and disposes of his products by means of interstate commerce from engaging in business at all necessarily places restraints upon such commerce. Its flow is restricted and interrupted. The importation and exportation of articles of commerce are directly prevented, and none the less so because the conspiracy may be of so wide a scope as to interfere with interstate commerce also."

¹ See note at end of case.

To the same effect is Thomsen et al. v. Union Castle Mail Steamship

Co. et al., 166 Fed. 251, 92 C. C. A. 315 (2d Circuit).

[5] It is next objected that the alleged wrongs of the defendants do not constitute an interference with interstate trade or commerce. We do not think, since the case of Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, and Lawlor v. Loewe, 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341, it can be said that this can be considered an open question. In rendering the opinion of the Supreme Court when the case was last before it, Justice Holmes said:

"The substance of the charge is that the plaintiffs were hat manufacturers who employed non-union labor; that the defendants were members of the United Hatters of North America and also of the American Federation of Labor; that, in pursuance of a general scheme to unionize the labor employed by the manufacturers of fur hats (a purpose previously made effective against all but a few manufacturers), the defendants and other members of the United Hatters caused the American Federation of Labor to declare a boycott against the plaintiffs, and against all hats sold by the plaintiffs to dealers in other states and against dealers who should deal in them; and that they carried out their plan with such success that they have restrained or destroyed the plaintiff's commerce with other states."

This charge being proven, the learned justice further said (235 U. S. 534, 35 Sup. Ct. 172, 59 L. Ed. 341):

"We agree with the Circuit Court of Appeals that a combination and conspiracy forbidden by the statute were proved, and that the question is narrowed to the responsibility of the defendants for what was done by the sanction and procurement of the societies above named."

The Sherman Act has been so frequently and recently construed by the Supreme Court as to require no extended discussion now. Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; United States v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663; United States v. St. Louis Terminal, 224 U. S. 383, 32 Sup. Ct. 507, 56 L. Ed. 810; Standard Sanitary Manufacturing Co. v. United States, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107; United States v. Union Pacific R. R. Co., 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124; United States v. Reading Co., 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243; United States v. Patten, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325; Nach v. United States, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232; Straus v. American Publishers' Association, 231 U. S. 222, 34 Sup. Ct. 84, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369; Eastern States Lumber Association v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788. As was said in the case last cited:

"It broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce."

It is next contended that, if plaintiffs have suffered damage to their interstate commerce or trade, such damage is indirect, incidental, and too remote to entitle them to recover in this action. As against a general demurrer the complaint, as we have stated, is good so far as the question of damages is concerned. The law provides that any person who shall be injured in his business or property rights by reason of anything forbidden or declared unlawful by the act shall recover threefold the damages by him sustained. It is the source of the injury, and not the character of the property injured, which constitutes the test of recovery. Assuming that an unlawful conspiracy or combination in restraint of interstate commerce exists, then, if any person is injured by it in his business or property rights, he may recover. Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241. The complaint alleges actual interference with and destruction of cars of common carriers to be used in interstate commerce for the transportation of coal. This fact alone would show an interference with interstate commerce. Steers v. United States, 192 Fed. 1, 112 C. C. A. 423; United States v. Reading Co., 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243.

In Swift v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, it was said:

"Although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not accidental, secondary, remote, or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single state, is an object of attack. * * * Moreover, it is a direct object. It is that for the sake of which the several specific acts and courses of conduct are done and adopted."

In United States v. Reading Co., 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243, it was said:

"The mere fact that the sales and deliveries took place in Pennsylvania is not controlling when, as here, the expectation was that the coal would, for the most part, fall into and become a part of the well-known current of commerce between the mines and the general consuming markets of other states.

* * The purchase and delivery within the state was but one step in a plan and purpose to control and dominate trade and commerce in other states for an illegal purpose."

After considering the complaint and the decisions of the Supreme Court and other courts, we can come to no other conclusion than that the case made by the complaint falls within that class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of interstate trade, except on conditions that the combination imposes, and therefore violates the act of July 2, 1890.

In United States v. Patten, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325, it was said:

"Section 1 of the act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce and restrict the common liberty to engage therein."

and the control of t The control of Judgment below reversed, and the case remanded, with instructions to overrule the demurrer, and allow defendants to answer the complaint, if they shall be so advised.

NOTE.

"3. That the Hartford Coal Company, the Mammoth Vein Coal Company the Mammoth Vein Coal Mining Company, the Coronado Coal Company and the Prairie Creek Coal Mining Company, and each and every one of them, were at the time of the appointment of said receiver and for many years prior thereto operating coal companies engaged in the production, loading, and shipment of coal for interstate trade and commerce, and the coal lands of each of said companies from which said coal was mined and shipped were located in Sebastian county in the state of Arkansas."

"4. That prior to the year 1914 and before the commencement of the difficulties hereinafter set forth, the Hartford Coal Company employed about seventy men, the Mammoth Vein Coal Company employed about three hundred men, the Coronado Coal Company employed about two hundred and fifty men, and the Prairie Creek Coal Mining Company employed about two hundred and fifty men, and that all of said operatives were employed by said respective companies in connection with the production, loading, and shipment of coal in or about their respective mines for interstate trade and commerce, and that the value of the annual shipments and sale of coal by said mines respectively exceeded the following:

Hartford Coal Company	\$ 50,000
Mammoth Vein Coal Company	120,000
Coronado Coal Company	
Prairie Creek Coal Mining Co	

"That seventy-five per cent. of the coal shipped by each of said mines was sold and shipped to customers outside of the state of Arkansas in the ordinary

course of interstate trade and commerce.

"That prior to April in the year 1914 the Mammoth Vein Coal Mining Company entered into a written contract with the Mammoth Vein Coal Company and the Prairie Creek Coal Mining Company wherein and whereby it agreed to operate and produce coal from mines of the said Mammoth Vein Coal Company and the Prairie Creek Coal Mining Company for and in behalf of said companies, said Mammoth Vein Coal Company and said Prairie Creek Coal Mining Company continuing to sell and ship the coal so produced from their said respective mines as theretofore, the Prairie Creek Coal Mining Company selling and shipping the coal mined by said Mammoth Vein Coal Mining Company from the mines formerly operated by the Prairie Creek Coal Mining Company, and the Mammoth Vein Coal Company continuing to sell and ship the coal produced by the Mammoth Vein Coal Mining Company from the mines formerly operated by said Mammoth Vein Coal Company, and that 75 per cent. of the output of each of said mines was so produced, loaded, and shipped for customers outside of the state of Arkansas in the course of interstate trade and commerce.

"That the Denman Coal Company, the Bache-Denman Coal Company, the Sebastian County Coal Company, the Mammoth Vein Coal Company, and the Mammoth Vein Royalty Company, and each and every one of them, were financially interested in one or more of the aforesaid operating companies, either through contracts or the lease of coal lands on which said operating coal companies were working or through the ownership of all or the majority

of the stock of said operating companies.

"5. That the mining of coal, as conducted by said operating companies, is not a manufacturing business, but includes only the taking of the coal in its natural condition from the earth and loading it on the cars of common carriers for transportation by them over their lines to the respective consignees, and that about 75 per cent. of the shipments of said operating companies were made by common carriers on interstate trains to points outside of the state of Arkansas, including the states of Oklahoma, Kansas, Nebraska, Texas, and Missouri; that among the employés, which each of said companies required for the conduct of said interstate trade and business, were those who placed

the cars of interstate carriers in convenient places on the side tracks of said carriers for loading for interstate shipment, those who loaded said cars of common carriers on said tracks with coal for shipment to points outside of the state, and those who placed said cars so loaded for points outside of the state in their proper place on the tracks of said carriers where they could be hauled by the engines of said carrier over the tracks of said carriers and attached to interstate freight trains for transportation to points outside of the state, and that the work of shipping coal, when hereinafter mentioned, includes said loading and placing of said cars on the tracks of said carriers; that the ownership and operation of said mines, and the taking and producing of coal therefrom, was but one step in the said interstate trade and business of said companies, and that said companies were dependent for the profitable conduct of their business upon the trade which it secured from customers outside of the state of Arkansas, and owned and operated said mines in said state of Arkansas for the purpose of carrying on said interstate trade and business, and would not have purchased or attempted to operate said mines, except for the purpose of carrying on said interstate trade and business, and one of the principal assets of said companies was their good will, trade, and business with customers outside of the state of Arkansas, and said companies employed agents and salesmen in other states in order to protect, preserve, build up, and increase said interstate trade, business, and good will."

"11. That said United Mine Workers of America and the combination of the defendants hereinafter described divides all coal mines in the several states of the United States into two classes, one class being called 'union' or organized mines, because they are operated under an agreement with the United Mine Workers of America, or one of its district branches, to employ none but members of that union in or about the work of producing, loading, and shipping coal and to comply with all the rules and regulations of the United Mine Workers of America and its district branch having jurisdiction over the respective mines in accordance with their geographical location; the second group of said mines as so designated and classified by the defendants are known as non-union, unorganized, or 'open shop' mines, because they refuse to make such agreement with the defendants' combination to employ only members of the United Mine Workers of America exclusively, although many of them do not discriminate against or refuse to employ any person on the ground that he is a member of said union. That the coal produced by said union mines is hereinafter described or designated as union coal, and the coal produced by the unorganized, non-union or 'open shop' mines is at times hereinafter designated as non-union coal.

"12. That owing to the restrictions and unreasonable regulations which the United Mine Workers of America imposes on all union or organized mines, said mines are conducted wastefully and inefficiently, and the cost of production and the selling price of union coal is thereby unreasonably and unnecessarily enhanced, and cannot successfully compete with the products of non-union mines throughout the course of interstate trade and commerce, and it is because of this fact, and to protect said union mines against said non-union competition in coal of the lower selling price, that the United Mine Workers of America and those acting in conjunction with them have divided all mines in the United States into two classes, to be designated respectively as union mines or non-union mines, in order that they may more readily and effectively prevent and restrain all interstate trade and competition in the products of non-union mines.

"13. That, except for the anthracite coal mines in the state of Pennsylvania, practically the entire business of mining and shipping coal in the United States is done by what is known as bituminous mines located in the states of Washington, Wyoming, Utah, and Montana in the Northwest, Illinois, Ohio, Indiana, and Michigan in the northern Middle States; Iowa, Colorado, New Mexico, Kansas, Missouri, Oklahoma, Arkansas, Texas, Kentucky, Tennessee, and Alabama in the Middle and Southern States, and Pennsylvania, Virginia, West Virginia, and Maryland in Eastern States; that each and every one of the bituminous mines in the several states above mentioned is engaged in or subject and liable to competition in the course of interstate trade, from the

mines in one or more of the other states above named, and nearly every one of said mines is subject to competition of the mines of each and every one of the several states above named in reaching or attempting to reach different markets of the United States in various industrial centers in different states through the course of interstate trade made possible by transportation of common carriers from one state to another.

"14. That the mines for which the plaintiff is acting as receiver, when in operation, compete directly with the mines of Illinois, Kentucky, Alabama, New Mexico, Colorado, Kansas, Oklahoma, and the other mines of Arkansas for the markets of Louisiana, Texas, Oklahoma, Nebraska, Kansas, Missouri, Iowa, and Minnesota, and are subject to the competition of said mines in endeavoring to reach the various markets of other states through the channels of interstate trade and commerce. That the mines of Illinois sell coal through the course of interstate trade and commerce to markets in Louisiana, Texas, Missouri, Nebraska, Kansas, and other states, and the operating companies for which plaintiff. Dowd, is acting as receiver, sold coal through the course of interstate trade and commerce to purchasers in said markets and states, and thereby entered into interstate competition with said mines of Illinois in said states, and others, and are subject to and affected by the interstate competition of said mines and others in many other states. cept for the unlawful interference of the defendants hereinafter set forth, each of said mines would have engaged in interstate competition with the said mines of other states as aforesaid in the year 1914.

"15. That all of said coal mines of Illinois, Ohio, Indiana, Wyoming, Michigan, Missouri, Iowa, Texas, Arkansas, and Oklahoma are union, and part of the bituminous mines of Pennsylvania, Kentucky, and West Virginia are union, and that said mines of Colorado, New Mexico, Alabama, Virginia, and Tennessee are non-union or unorganized; that the annual output of bituminous coal in the United States is a little less than 500,000,000 tons, of which the state of Pennsylvania produces over one-third, the states of Ohio, Illinois, and Indiana produce over one-fifth, and the state of West Virginia produces about one-seventh; that at least 60 per cent. of the entire production of bituminous coal in the aforesaid states of the United States is produced by the so-called union or organized mines; that if the attempts of the United Mine Workers and those working in conjunction with them in the unlawful conspiracy hereinafter set forth are successful in carrying out their conspiracy to unionize all the bituminous coal mines of Pennsylvania, West Virginia, Virginia, and Colorado as hereinafter set forth, then about 90 per cent. of the bituminous coal produced in the United States which enters into Interstate trade and commerce will be coal produced by the so-called union mines, and if the United Mine Workers of America were successful in all the attacks which it has made in different districts upon non-union mines in furtherance of said unlawful conspiracy, the said combination would have substantially a complete monopoly of interstate trade and commerce in coal in the United States and the amount of non-union coal which entered into interstate commerce would be negligible.

"16. That the United Mine Workers of America, the defendants, and many other persons to the plaintiffs unknown, now are, and for many years past have been, engaged in an unlawful combination and conspiracy, as hereinafter more fully set forth, in unlawful restraint of trade and commerce in coal among the different states of the United States, and through means whereof are unlawfully attempted to monopolize and are monopolizing said trade and commerce; that in furtherance of said unlawful combination and conspiracy, the defendants, the United Mine Workers of America and those confederated together with them in said unlawful scheme, have combined and conspired together to exclude and drive out of interstate trade and commerce, and to restrain and prevent all interstate trade and commerce in, any and all coal produced, loaded, and shipped by so-called non-union and unorganized mines, by hampering, preventing, and interfering with the production, loading, and shipment of coal for interstate commerce in any of the coal-mining states by any so-called unorganized or non-union mines, so that it cannot become a subject or commodity of interstate trade and commerce, and cannot enter into interstate competition with the products of so-called union or organized mines located in divers states, and to further carry out said conspiracy by hampering and interfering with the production, loading, and shipment for interstate trade and commerce by said non-union or unorganized mines in any and all the several states where said mines are or may be located, with the purpose and intent of increasing the cost of production, loading, and shipment of said commodities so destined for interstate trade and commerce, and the resulting selling price thereof in the markets of the different states reached by said interstate shipments, so that said commodities cannot successfully compete in said markets with the coal produced, loaded, and shipped by the so-called union or organized mines working under agreement with said unlawful combination in the several states where located.

"17. That one of the objects of said unlawful combination and conspiracy in restraint of interstate trade is to monopolize the trade or occupation of mining coal for the members of the United Mine Workers of America and prevent the employment of non-union men in any part of the United States at the trade or craft of mining coal, and prevent the products of the labor of non-union mines from becoming subjects or commodities of interstate trade and commerce, in order thereby to more effectually compel them to abandon the trade or vocation of coal mining or become members of the said United Mine Workers of America, and thereby to secure complete monopoly and unification in control and management, so far as labor is concerned, of all competing mines in all parts of the United States as has already been achieved by said combina-

tion in many states as aforesaid.

"18. That the scope and object of said illegal scheme is to suppress and destroy the business of all non-union and unorganized mines whose products enter into interstate trade and by various means to prevent any mining company from engaging in the business of selling coal for interstate trade as an unorganized mine and prevent any of the so-called union or organized mines from commencing operations as a non-union or unorganized mine, and thus by such suppression, obstruction, and destruction of the business of any of the independent and competing mines in the several states which are operating or may hereafter operate on a non-union or unorganized basis, to completely monopolize interstate trade and commerce for union coal produced under the domination of the United Mine Workers of America, and maintain the price of said union coal in interstate commerce by protecting it from interstate competition of coal which but for said combination would be mined by the more efficient non-union mines.

That the object and purpose of said combination in extending its domination and control over separate and competing mines in different states, which in the absence of said unlawful combination would be engaged in interstate competition with each other, and the sole object and purpose of said combination in destroying or preventing interstate shipments of coal by all mines in any of the coal-mining states, which do not acquiesce in its control and domination, is to prevent any coal not produced by union mines from becoming a subject of interstate commerce and entering into interstate competition with the products of so-called union mines and to further carry out agreements and understandings hereinafter described, between the proprietors of the so-called union mines and said unlawful combination to the effect that the defendants and others acting in conjunction with them in said unlawful conspiracy will protect interstate trade and business of said union mines from the competition of unorganized mines by employing all the means available to organized labor to prevent the production, loading, and shipment of coal for interstate trade and commerce by unorganized mines.

"20. That in furtherance of said unlawful combination and conspiracy to unduly restrain interstate trade and commerce, and to exclude the products of all unorganized mines and non-union miners from interstate trade and commerce, the United Mine Workers of America working through their district organizations, and the defendants, have ordered and coerced strikes of employes employed by unorganized mines in different states and by violence, intimidation, mobs, and riots prevented the employment of any miners in said mines for production, loading, or shipment of coal for interstate commerce, and by dynamite and arson and other unlawful means have destroyed the facilities of said unorganized mines for producing, loading, and shipping coal for

interstate commerce, and by divers other means have hampered, interfered with, prevented, and attempted to unduly enhance the cost of producing, loading, and shipping of coal by said unorganized mines for interstate commerce, so that it would no longer be marketable as an article or commodity of interstate trade and commerce in competition with union coal.

"That each and every one of the acts hereinafter set forth, wherein and whereby the production, loading, and shipment of coal by the plaintiffs, or any other unorganized mines, was destroyed, interrupted, hampered, or interfered with, were done and carried out in furtherance of the aforesaid combination and conspiracy to unduly and directly restrain interstate trade and commerce, and with the intent, purpose, and effect thereof as hereinabove set forth, and with the purpose or effect of inducing and forcing persons and corporations formerly engaged in interstate trade as non-union mines to refrain therefrom until such times as they would carry on said business as union mines upon

terms dictated by said combination and conspiracy.

"21. That in furtherance of the combination and conspiracy to restrain interstate trade and commerce in bituminous coal and to prevent any nonunion coal from entering into interstate trade and commerce, the United Mine Workers of America and its district branches have from time to time since 1898 entered into negotiations, understandings, and agreements with the operators of union mines in the states of Ohio, Illinois, and Indiana and other states, wherein and whereby it was understood and agreed that in consideration of said operators agreeing to or continuing to operate union mines, the sald United Mine Workers of America, the defendants and those working in conjunction with them in said unlawful scheme and purpose, would by strikes and the usual unlawful means which invariably accompany all strikes conducted by the United Mine Workers or any of its branches, prevent the production and shipment of bituminous coal by all so-called non-union and unorganized mines in other states whose products come into interstate competition with the products of said union mines through the course of interstate trade and commerce, and that said agreement and understanding required said United Mine Workers and its said branches to use all means in its power to interfere with and prevent interstate commerce in bituminous coal by all unorganized mines, and by all competitive mines which should thereafter become non-union or unorganized, and that the combination and conspiracy herein described to interfere with and destroy the business of the mines for which plaintiff, Dowd, is acting as receiver, and all acts in furtherance thereof hereinafter described were done in pursuance of said illegal arrangement, contracts, and understandings between the said United Mine Workers and said union operators to destroy and prevent interstate trade and commerce in bituminous coal from unorganized fields by destroying or interfering with the facilities of said unorganized mines for the production and shipment thereof.

"22. That in furtherance of said illegal combination and conspiracy to restrain and prevent interstate trade and commerce in bituminous coal, and drive all non-union coal out of interstate trade and commerce, the said United Mine Workers of America and those working in conjunction with them did at various times since 1898 embark and engage upon a general campaign and crusade to prevent all the non-union bituminous mines in the state of Pennsylvania, which were producing about 12 per cent. of the entire output of bituminous coal in the United States, from engaging in interstate trade and commerce in non-union coal, by ordering a strike of employés in said mines and through violence, intimidation, and threats preventing the employment of any operatives for the production, loading, and shipment of coal, and by the use of fire and explosives destroying the facilities of said mines for the

production, loading, and shipment of said coal.

"And that in or about the year 1911 said United Mine Workers and those acting in conjunction with them did undertake to and did employ said means in furtherance of said unlawful design against certain non-union mines in Westmoreland and Irwin districts in the state of Pennsylvania, known as the Westmoreland and Irwin mines, in order to prevent said mines from engaging in interstate trade and commerce in non-union coal.

"That in furtherance of said illegal combination and conspiracy to restrain

trade among the several states in coal, as hereinabove set forth, said United Mine Workers and those acting in conjunction with them did in the year 1913 enter into a general campaign and crusade against non-union mines in the state of Colorado, and agreed to and did order a strike of said employés of said various competing miners of said state, and by violence, threats, and intimidation did prevent said mines from procuring further employes to produce, load, or mine coal for the interstate trade and commerce of said mines, and did by the use of fire and explosives destroy the facilities of said mines for the production, loading, and shipment of coal for interstate trade and commerce, in order thereby to destroy interstate trade and commerce in non-union coal.

"That at various times since 1906, and in furtherance of said unlawful scheme to restrain trade in bituminous coal among the several states, said United Mine Workers and those acting in conjunction with them did engage in a general campaign and crusade to destroy interstate trade and business of the non-union bituminous mines in West Virginia by ordering strikes of the employes of said companies engaged in the work of producing, loading, and shipment of coal for interstate trade and commerce, and by violence, threats, and explosives, and by preventing the employment of other operatives to carry on said work, and by fire and explosives destroying the facilities of said mines for the production, loading, and shipment of said coal for interstate trade and commerce; and that said United Mine Workers and those working in conjunction with them have from time to time on other occasions employed all of said means to destroy the business of all of said non-union companies in Pennsylvania, West Virginia, Colorado, and other states, in order thereby to prevent said companies from shipping non-union coal for interstate trade and commerce.

"23. That early in the year 1914 all said companies for which the plaintiff, Dowd, is acting as receiver decided that said operating companies should be conducted on a non-union or open shop basis, without discrimination against any employé on the ground that he was or was not a member of any union, and that about the middle of March, 1914, the Mammoth Vein Coal Company and the Prairie Creek Coal Mining Company closed down their said mines and discontinued operation as union mines, preparatory to reopening upon the nonunion or open shop basis in the month of April, 1914; that the Hartford Coal Company had not been in operation for over a year previous thereto, but it was the plan and intention of said company to also reopen upon the non-union or open shop basis as soon as it became expedient so to do, or at least in the summer of 1914; that the Coronado Coal Company continued operation as a union company until April 18, 1914, when its employes were ordered out on a strike by the defendants in furtherance of the unlawful conspiracy herein set forth, because some of the individuals interested in said mines that were going to be operated as open shops had also financial interests in said Coronado Coal Company and might use their profits from said company to carry on interstate commerce in non-union coal from said other mines; that before said strike took place, and early in the year 1914, as aforesaid, it was the intention of the said Coronado Coal Company and the persons and corporations financially interested in it that said company should be placed upon the nonunion or open shop basis of operation as soon as expedient, or at least by the summer of 1914; that said plan of operation for said mines was in part to be carried out by having the Mammoth Vein Coal Mining Company operate the mines of the Mammoth Vein Coal Company and the Prairie Creek Coal Mining Company under its written contract described in paragraph marked '4' herein.

"24. That in the year 1914 each of said operating companies for which the plaintiff, Dowd, is acting as receiver had made preparations to do a large and profitable business with dealers in coal in other states, and to renew, manage, and conduct said interstate trade and commerce upon a non-union and 'open shop' basis, and the condition of the market outside of the state of Arkansas in which said companies would sell their said coal, and the condition of the business of said companies, was such as to warrant the full belief that the ensuing season would be a profitable one to said companies, and that in the year 1914, when the defendants undertook to destroy the business of said

operating companies, for which the plaintiff, Dowd, is now acting as receiver, some of said operating companies had actually commenced, and were engaged in carrying on, said interstate trade and business, and enjoying said interstate good will, and were shipping non-union coal to customers in other states in the course of interstate trade and commerce, and the rest of said operating companies were prepared to commence and renew their interstate trade and business, and were intending to renew said interstate trade and business, on a non-union basis.

"25. That at all times after April 1, 1914, the defendants and those acting in conjunction with them, in furtherance of the unlawful conspiracy hereinafter set forth, well knew of said intention, plans, and costly preparations of said companies, persons, and corporations in control thereof to operate each and every one of said mines in the future upon the open shop or non-union basis, and to sell and ship non-union coal in interstate commerce in competition with union mines, as soon as possible, and that all of the acts hereinafter described, which were done by the defendants and those acting in conjunction with them to injure and destroy the business and property of said companies, were done in furtherance of said unlawful scheme and conspiracy to prevent interstate trade and commerce in bituminous coal produced, loaded, or shipped by so-called non-union or open shop mines.

"26. That in April, 1914, and at various times thereafter, in furtherance of said plans to have all said companies engaged in interstate trade as non-union mines, some of said operating companies for which plaintiff, Dowd, is acting as receiver began to operate their said mines on an open shop basis, or as nonunion or unorganized mines, and from time to time in the year 1914 employed large numbers of men engaged respectively in the work of mining, loading, and shipping coal for interstate trade and commerce, preparatory to employing additional miners and opening additional mines for the purpose of carrying on an interstate trade and commerce on a still larger scale, and preparatory to having all of said operating companies do likewise. That none of the said miners so employed belonged to, or had any connection or association with, the United Mine Workers of America, or any of its district branches, or any of the defendants, but that the defendants, the United Mine Workers of America and those acting in conjunction with them, in furtherance of their combination and conspiracy to drive non-union coal out of interstate trade and commerce, and to restrain and prevent interstate trade and commerce therein, and in furtherance of their understanding with the proprietors of union mines competing with said mines, combined and conspired together, in furtherance of said conspiracy, to ruin and destroy the interstate trade and commerce of said mines, and to prevent them from commencing or engaging or continuing therein, by interfering with and preventing the production, loading, and shipment of coal for interstate commerce by said mines, and in furtherance of said combination and conspiracy they agreed upon and did the following acts: By threats, intimidation, violence, and unlawful assemblies, they drove and frightened away all of the men employed by said mines at the work of mining, loading, and shipping coal for interstate trade and commerce, including those men employed at the work of placing cars of interstate carriers at the proper place on the tracks of said carriers where they could be loaded with coal for shipment outside of the state, and including those men employed in loading said cars of the common carriers, and those who placed the cars after loading upon the proper part of the tracks of the common carrier where they could be taken up by the interstate trains of said carriers for transportation to points outside of the state, and by threats, violence, murder, mobs, and riots, prevented the said companies from employing or obtaining for employment any other operatives to load said cars of interstate carriers, and to manipulate and place said cars before and after loading for interstate transportation in their proper place on the tracks of the carrier, and by the same unlawful methods prevented said companies from employing or obtaining for employment any miners whatsoever to perform any of the work of mining, loading, and shipping coal for said mines, and by the use of fire, dynamite, and other explosives they did destroy the structures and other valuable facilities of said mines for the production, loading, and shipment of coal for interstate trade and commerce, and did destroy the cars of interstate carriers, which were stationed at or about the mines waiting to be loaded with interstate shipments, and destroyed cars of said carriers and shipments already loaded thereon to be hauled away by interstate carriers for transportation to consignees outside of the state of Arkansas, and destroyed the business of other concerns in which the same persons were interested, in order to impoverish said persons and prevent their carrying on said non-union coal-mining business. That by said unlawful means said defendants and those acting in conjunction with them prevented any of said companies from engaging or continuing to engage in interstate trade and commerce; and the defendants well knew and intended that the destruction of the coal mines of said operating companies located in Sebastian county. Arkansas, and their interference with the operations thereof, would result in the destruction of the interstate trade and commerce of said companies, and the defendants destroyed said mines for the express purpose of entirely destroying and ruining said interstate trade and business. That none of the defendants or any one acting in conjunction with them had any interest or object in destroying said property and interfering with the operation of said mines as aforesaid, except in so far as said destruction and interference prevented the sale and shipment of coal by the said companies in competition with union mines in which said combination was interested, and their primary and direct object in so doing was to destroy the interstate trade and commerce of said companies, because it constituted 75 per cent. of the trade and commerce conducted by them, and that the destruction of the working organization and production facilities of the said companies was but a step in a scheme and purpose to destroy interstate trade and commerce in non-union coal, and prevent it from coming into competition with union coal in the course of interstate trade and commerce.

"27. That except for the unlawful combination and conspiracy of the defendants, and the acts done in furtherance thereof as aforesaid, the said Hartford Coal Company, the Mammoth Vein Coal Company, the Coronado Coal Company, the Prairie Creek Coal Mining Company, and the Mammoth Vein Coal Mining Company would have, long prior to the commencement of this action and in a short time, secured employés to man their mines and engage in the work of producing, loading, and shipping coal for interstate trade and commerce, and would as non-union and unorganized mines have successfully shipped coal to the amount of over \$600,000 annually in the aggregate, and would have been able to realize a large profit thereon.

"28. That by reason of said combination and conspiracy of the defendants in restraint of interstate trade and commerce, and the acts done in furtherance thereof to injure and destroy the business of the said companies for which the plaintiff, Dowd, is acting as receiver, the said companies have suffered great loss and injury to their said business and property, in the total sum of \$427,820.77, and that said damages are more fully itemized as follows. * * *"

BAKER v. CENTRAL TRUST CO. OF NEW YORK et al.

CARPENTER et al. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. May 12, 1916. On Petition for Rehearing, July 7, 1916.)

Nos. 2732, 2764.

1. RAILROADS \$\simes 138\to Receivership\to Liens\to Traffic Contracts.

A traffic contract between two railroad companies for the interchange of business, which by its terms was to continue for a stated number of years, and bound one company to pay to the other a percentage of its receipts from the traffic interchanged, if necessary to meet the interest on an issue of bonds to be made by the latter, conceding its validity, created no lien on the property or income of the promisor as against subsequent

creditors or purchasers, but may be repudiated by its receiver, if deemed unprofitable, leaving to the other party or its bondholders only a general claim for damages for its breach.

Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 436-439; Dec. Dig. \$\infty\$138.]

2. RAILROADS \$\infty\$171(1)-PRIORITIES OF CREDITORS.

The fact that bondholders of the other company bought their bonds with knowledge of the traffic contract which was pledged by the mortgage for their security created no equity which entitles them to preference over subsequent lienholders of the promisor company, since they were also charged with knowledge of the legal effect of the contract, and that it gave them no lien.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 554-556, 568,

3. Corporations 479—Mortgages—Foreclosure—Parties Represented BY TRUSTEE.

The trustee in a corporation mortgage represents the bondholders only in matters affecting the enforcement of the security and administration of the trust property under the terms of the trust.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872-1874; Dec. Dig. € 479.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Suit in equity by the Central Trust Company of New York, trustee, against the Wheeling & Lake Erie Railroad Company and others. From the decree, Horace F. Baker, receiver of the Wabash-Pittsburgh Terminal Railway Company, and E. E. Carpenter and others, crosscomplainants, appeal. Affirmed.

See, also, 218 Fed. 273, 134 C. C. A. 69.

Pursuant to a plan to obtain for the Wabash Railroad Company (herein called "Wabash"), a line from Toledo, its eastern terminus, to, and an entrance into, and facilities in and about, Pittsburgh, by utilizing the line of the Wheeling & Lake Erie Railroad Company (herein called "Wheeling"), from Toledo, and by acquiring and constructing terminals at Pittsburgh, and a connection thence westwardly to the Wheeling, George J. Gould, a director of the Wabash, and Joseph Ramsey, Jr., its president, caused (February 1, 1901) a syndicate to be formed, with a subscribed capital of \$20,000,000, for the acquirement and construction of terminal and belt facilities at Pittsburgh, and the purchase of equipment for their proper operation when completed. Of the subscribers, five were directors of the Wabash. The syndicate having acquired a majority of the stock of the Wheeling, elected in May, 1901, as directors, members of the Wabash directory and others under its control, and proceeded to acquire several railroad and coal properties at or about Pittsburgh, including the West Side Belt, and to construct the Pittsburgh, Carnegie & Western Railroad to a connection with the Wheeling.

The syndicate, thus in control of the Pittsburgh properties and the Wheeling, brought about a contract (May 10, 1902) by which, in consideration of the great outlay of the Pittsburgh, Carnegie & Western for the terminals, and as an inducement to it to construct its road, the Wheeling and the Wabash agreed that for 20 years, in fixing schedules and percentages on interchanged traffic, that road would be given an arbitrary of 100 miles as against its actual 60 miles and an arbitrary of 10 cents per ton for traffic originating on its line. Certain trackage rights were given including the operation by

each of the parties of its through trains over the tracks of the others.

To provide more money for the enterprise, to permit the syndicate to realize on their investment, and to vest the practical ownership and actual control of the Terminal properties and the Wheeling in the Wabash, a plan was devised by which the Pittsburgh properties were, May 7, 1904, consolidated under the name The Wabash-Pittsburgh Terminal Railway Company (herein called "Terminal"); the Terminal stock was transferred to the Wabash, which paid \$6,000,000 in cash for \$6,600,000 of the Terminal's first mortgage bonds secured by mortgage May 10, 1904, to Mercantile (afterwards Bankers') Trust Company, of New York; the syndicate received \$13,400,000 first mortgage bonds and an entire issue of \$20,000,000 in second mortgage bonds (\$2,000,000 for expenses), secured by mortgage to Equitable Trust Company of New York, and \$10,000,000 of the Wabash stock. Under the plan a supplemental contract was agreed upon, but executed later (October 10, 1904). by which the first contract was extended to 1954, the date of maturity of the Terminal's bonds, and a requirement was added that the Wheeling and the Wabash pay an additional sum on interchanged traffic equal, when taken with the Terminal's net earnings, to the interest on the Terminal's bonds to the extent, if necessary, of 25 per cent, of each of those two roads' revenue from traffic interchanged with the Terminal.

The mortgages contained a specific pledge of "contracts, trackage agreements, or operating arrangements, covenants and agreements, terms, or parts of terms, including all the rights of the Railway Company under a certain Traffic and Trackage Contract dated October 10, 1902, and executed by The Wabash Railroad Company, The Wheeling & Lake Erie Railroad Company and the Pittsburgh, Carnegie & Western Railroad Company (of which lastnamed company the Railway Company, party hereto of the first part is the successor), and under a certain contract bearing even date herewith supplemental to said Traffic and Trackage Contract (a counterpart originals of which original and supplemental contracts have been deposited with the trustee hereing stock,

The Terminal, with the exception of 1,000 coal cars, held under lease by the West Side Belt, had practically no equipment. The Wheeling had considerable, though inadequate, equipment for the purposes of its own traffic, but in 1902 and 1903 apparently took care of its own traffic reasonably well. Operations of the combined roads began in July, 1904, but interchange of traffic not until at or about the time of the execution of the supplemental contract (October 10, 1904). Then began a diversion of a large part of the Wheeling's equipment to the hauling of traffic from the Terminal, to the detriment of the Wheeling and the shippers along its line. Early in March, 1905, the Terminal contracted with manufacturers for 62 locomotives, and 2,000 coal cars, 1,000 of which were delivered prior to August, 1905, and 1,000 not long afterwards. All the Terminal first mortgage bonds which could be issued had been disposed of, and it had no way of paying for this equipment. Money must be had, both to provide equipment to carry the traffic from the Terminal, and to make betterments and improvements on the Wheeling to enable it to properly handle its own and the Terminal's heavy coal trains, as well as other traffic, and to pay the Wheeling's floating debt of some \$2,000,000 and a large sum coming due on its then outstanding mortgage bonds.

The Wabash, in the effort to save the enterprise, and the millions it had already invested in it, caused a plan to be adopted by which these obligations of the Wheeling could be paid, the betterments made, and the equipment contracted for by the Terminal paid for and utilized. It took the Wheeling's \$8,000,000 3-year (due August 1, 1908) gold notes at 95 per cent., and, having guaranteed their payment, sold them to bankers at New York at the same price, who sold them to the public in the usual course of business. These were secured by \$12,000,000 of bonds issued under the general mortgage of the Wheeling to the Central Trust Company of New York, as trustee, dated August 1, 1905. On the same day, the Wheeling entered into a trust agreement (called note agreement) with the New York Trust Company, by which it vested that company, the Terminal agreeing thereto, with the title of the equipment, and pledged with the trustee the \$12,000,000 of bonds secured by the general mortgage, to secure the holders of the \$8,000,000 in notes. The equipment was leased by the trustee to the Wheeling at a nominal price. The Wabash

handled the proceeds of the notes (\$7,600,000 and some accrued interest) and paid to Blair & Co. and Read & Co., bankers of New York, some \$2,200,000, including accrued interest, advanced by them to pay the equipment manufacturers contracted with by the Terminal, about \$2,000,000 to pay the Wheeling's unsecured floating debt, large sums for interest on the Wheeling's underlying bonds, as well as some interest on the general mortgage bonds, and expenditures chargeable to capital account made in current operations, and about \$3,425,000 to the Wheeling for betterments and improvements. There is no reason to doubt that all the money was spent on or for the Wheeling.

The interchange gave the Wheeling large increased tonnage. Its own equipment, the equipment acquired on the Terminal's contract, the equipment certain shippers on its own lines provided to assist in hauling their freight, and equipment leased to it at a fair rental by the Wabash in 1907, were used for the primary purpose of carrying the traffic interchanged with the Terminal at a great loss to the Wheeling and to the diminution of the revenues it would have received from shippers on its own line, as well as to the destruction of its plan of reorganization of its Coal Company (the Wheeling & Lake Erie Coal Company).

The Wheeling's own burdens, the burdens put upon it for the benefit of the Wabash, the Terminal, and the Terminal's bondholders, including large sums paid and due on interchanged business under the traffic contracts, the loss of its own business, by reason of the diversion of its equipment, together with the business depression of 1907, and the approaching maturity (August 1, 1908) of the gold notes, required legal proceedings for the appointment of a receiver. These were had by procurement of the Wabash, June 8, 1908, and B. A. Worthington was appointed receiver the next day. A few days before (May 29th), at the suit of the Wabash, receivers were appointed for the Terminal.

Default by the Wheeling in the payment of its gold notes due August 1, 1908, and its inability to pay interest on general mortgage bonds due August 1st, being certain, the Wabash, to protect its guaranty, arranged with Blair & Co. and Kuhn, Loeb & Co., bankers in New York, by agreement (July 31, 1908), to purchase the notes for it from their holders, who were notified by the bankers, by public advertisement, to present the same for payment at the office of Blair & Co. On August 1st \$7,083,000 of the notes, and later in the year the remaining \$917,000, were taken up by the bankers. August 1st the bankers presented \$200,000 of the notes, and (August 31st) \$7,716,000 were presented by the Wabash, as owner, to the Wheeling for payment, which was refused. At that time the Wabash was in full life, but, being insolvent, December 18, 1911, receivers were appointed. The money to take up the notes was advanced by Kuhn, Loeb & Co. (\$3,000,000), Blair & Co. (\$2,000,000), George J. Gould (\$2,000,000), and E. H. Harriman (\$1,000,000).

These bankers knew all about the traffic contracts and their pledge, and the pledge of a majority of the capital stock of the Wheeling for the benefit of the Terminal's bondholders—a knowledge doubtless shared by the street when the syndicate's bonds were put upon the market, and by their bankers in the fall of 1904, and by a number of other bankers who bought and sold a number of the Terminal's bonds, including probably some bought from the syndicate bankers.

The application (February 18, 1905) to the Stock Exchange for the listing of the Terminal's bonds, and the circulars of the bankers of a subsequent date, recite the pledge of the stock and the traffic agreements, the former stating the contracts as existing for the terms of the first and second mortgage bonds; that under them also the Wabash and the Wheeling had the right to run trains into Pittsburgh, and the Terminal had similar rights over their lines, and that the effect of the contracts was to unite the three roads as closely as it was possible to do so by operating agreement; and the most specific of the latter (Read & Co., June, 1905, closely identified with the Wabash and the syndicate) describing the Terminal as a terminal railway extension into Pittsburgh for the Wabash and the entire Gould system of 15,000 miles; that the bonds were secured by pledge of these valuable contracts, and that the control of the Terminal and the Wheeling by the Wabash inter-

wove the interests of the Wabash, the Wheeling, and the Terminal as one system not likely to be parted with under any conceivable circumstances. It does not appear expressly that any bondholder bought his bonds with knowledge of, or in reliance upon, any of these statements.

In September, 1908, the authority of the court first had, the receiver of the Wheeling repudiated both contracts and thereupon agreed with the receivers of the Terminal on a basis of compensation on interchanged traffic shown to be fair between the roads. On this basis the loss to the Wheeling during the operation of the contracts from 1904 to 1908 was about \$900,000. In addition, there was evidence tending to show, though not, as found by the trial judge, of such satisfactory character as to be made the basis of a finding of an exact amount, that the loss in not being able to take care of the traffic on its own line, in that period, was a large sum of money.

The diversion of the Wheeling's equipment brought about the destruction of the plan formulated by it for the reorganization, under the name the Wheeling & Lake Erie Coal Company, of a coal company owned by it on its line and controlled by it as a subsidiary company, through which it carried on the business of mining coal, the railroad furnishing the coal's only outlet. The old coal company was in the hands of a receiver, with outstanding obligations of a mortgage securing about \$1,000,000 of bonds, receivers' certificates, and other debts prior to the bonds. The plan and pertinent facts will be found in the case in this court of Wheeling & Lake Erie R. R. Co. et al. v. Carpenter, 218 Fed. 273, 134 C. C. A. 69, and their repetition would be useless here, except to say that the plan contemplated the ownership by the Wheeling of all the stock of the Coal Company, as reorganized, the bondholders accepting new bonds at 25 per cent, of the old, the retirement, within ten years, of \$200,000 of "prior lien obligations," covering receivers' certificates, expenses of reorganization, etc., and, during that time, some of the new bonds on allotment out of the surplus earnings of the Coal Company. The mines were leased by the Coal Company to Hanna & Co.'s Mining Company, which agreed to mine a certain minimum number of tons a year at a price agreed upon, the Wheeling to contribute, for the benefit of the bondholders, a certain sum on every ton of coal transported by it, less such coal as it used for fuel purposes. The plan failed, primarily because the Wheeling did not furnish cars sufficient to haul away the coal the Mining Company was willing to mine, and could have mined and sold. In 1902 and 1903 the Mining Company mined more than the minimum, which was transported by the Wheeling with such equipment as it then had. Beginning with 1904, the falling off each year from the minimum was many thousand tons.

It had been held by the District Court at the suit of Carpenter et al. (the Coal Company's bondholders' committee) that the Wheeling, by its contribution contract, agreed to pay the prior lien obligations in full; but questions of priority between those bondholders, the holders of Wheeling general mortgage bonds, and the bondholders under the Terminal mortgages asserting liens on the Wheeling because of the traffic contracts, were reserved and transferred for final determination to the suit against the Wheeling, in which the trustee under the Wheeling general mortgage and the trustees under the Terminal mortgages were asserting liens on the Wheeling, each claiming priority over the other. The Carpenter Case coming here on appeal by the Wheeling and its receiver (218 Fed. 273, 134 C. C. A. 69), the decree of the District Court was modified on the ground that the Coal Company's bondholders' claim did not rest upon the Wheeling's express contribution contract, but sounded in damages for breach of an implied contract to furnish sufficient cars to haul away the coal Hanna & Co.'s Mining Company had agreed to mine; and the District Court was instructed to ascertain the exact amount due the bondholders on the basis of computation set forth in the court's opinion. This computation has not been made, so far as appears.

While the appeal was pending in the Carpenter Case, the District Court denied the Coal Company's bondholders' claim of priority by the same decree in which were adjudicated the claims of the trustee of the bondholders of the Wheeling under the general mortgage, and the claims of the trustees of the holders of the bonds of the Terminal for a lien upon the Wheeling and

priority in right of payment over the general mortgage bonds, the claim of the receiver of the Terminal, for it and its creditors, including the bondholders, for a specific performance of the traffic and trackage contracts, and claims for damages by the Wheeling and the Wabash against each other, as all these various claims were made, in substance now set forth:

Duncan, receiver of the Wheeling, for it and its minority stockholders, alleging the control and domination by the syndicate, the Wabash and the Terminal, from 1901 to 1908, setting forth the two traffic contracts made under that control; the invalidity of the contracts under the statutes of Ohio and the by-laws of the Wheeling; the unfairness of the contracts, and the diversion of the Wheeling's income and the Wheeling's equipment to the Terminal, to the Wheeling's loss; and praying that the contracts be canceled, that the claims of the Terminal against the Wheeling under the terms of the contract, be denied, that a note for \$300,000, given by the Wheeling to the Terminal, and indorsed by the Wabash, be canceled, and that an accounting be had of the moneys paid under the contract and the losses sustained by the Wheeling, and that such sums be set off against other claims of the Terminal and Wabash asserted in the foreclosure proceedings.

Baker, receiver of the Terminal, claiming the importance of the two contracts as security to the Terminal and its bondholders, and the Terminal's right to their specific performance, both as against the Wabash and the Wheeling, alleging the attempt of the Wabash, through the Wheeling's general mortgage and gold notes and receivership of the Wheeling, to destroy the rights of the Terminal in the contracts and their security to the holders of its mortgage bonds; the invalidity of the \$12,000,000 of Wheeling general mortgage bonds, and the irreparable injury to the Terminal and its bondholders if the contracts were terminated; and prayed that the contracts be sustained as constituting a lien upon the property and earnings of the Wabash and the Wheeling railroads superior and paramount to all claims under the Wheeling general mortgage, and under the trust agreement executed to the New York Trust Company, and that those companies be required to specifically perform all of the terms of the contracts, that the Wheeling general mortgage be declared void, or, in any event, subordinate to the rights of the Terminal, its bondholders and creditors, and that the \$8,000,000 of gold notes either be held invalid or be subordinated to the rights of the Terminal and its bondholders.

The Mercantile Trust Company (afterwards Bankers' Trust Company), trustee of the Terminal's first mortgage bonds, and the Equitable Trust Company, trustee of the Terminal's second mortgage bonds, filed bills to foreclose their respective mortgages, and make the same claims and prayers, in the interests of the holders of the bonds issued under those mortgages, as does the receiver of the Terminal.

The Central Trust Company, for the holders of \$12,000,000 of general mortgage bonds, and the New York Trust Company, for the holders of the \$8,000,000 of notes, filed bills to foreclose, and allege, in appropriate pleadings, that the traffic contracts are invalid, because ultra vires the Wheeling Company, and void under sections 3300 and 3301, Bates' Ann. Ohio Statutes (sections 8806 and 8809; Ohio Gen. Code), as made in aid of the Terminal; that they were fraudulent; that, in any event, they were subordinate to the general mortgage and its bonds; that the Terminal and its mortgagees have no standing as creditors or stockholders of the Wheeling to attack the validity of its mortgage or pledge of its bonds; that the bonds were legally pledged, and, if not so strictly, are good to the extent of 75 per cent. under section 3290, Bates' Ann. Ohio Stat., 3d Ed. (section 8797, Ohio Gen. Code), and the holders of Wheeling notes are entitled to a lien upon the Wheeling property because it was intended by all the parties that they should have one.

Carpenter, Leonard, Jr., and McCaddon, for the bondholders of the Coal Company, allege that the bondholders of the Coal Company should be paid in preference to all other claims against the Wheeling, except the receivers' certificates, because to deny such relief would be a fraud upon the bondholders; that they are entitled to a preference over the Wheeling's gold notes because the notes were made in fraud of their rights, and other creditors of

the Wheeling; that the bonds are entitled to a preference over the claim of the Wabash Railroad and the interest of Gould in the three-year notes, because they were directly responsible for the mismanagement of the Coal Company and the Wheeling, and the diversion of the assets of those companies, and the resultant loss to the bondholders of the Coal Company; and that the bondholders of the Coal Company are entitled to priority over the bonds of the Wheeling, because the income of the Wheeling during the receivership, in an amount more than sufficient to pay the claims of these bondholders, has been diverted and used for the permanent upbuilding and improving of the Wheeling property covered by the mortgage to the Central Trust Company.

The District Court found the pledge of the general mortgage bonds in the sum of \$10,133,333.33, to be valid; that the proceeds of the notes were used and expended for the purpose of purchase of additional equipment, and for additions to, and betterments of, the Wheeling, and for its other proper corporate purposes, and that the note agreement with the New York Trust Company is a paramount lien upon that sum in principal amount of those bonds, and the equipment pledged under the agreement; that the general mortgage is a lien upon all of the property of the Wheeling, subject to all prior mort-gages and equipment covered by them; that neither of the traffic contracts constituted a lien in favor of the Terminal or its receivers, or the bondholders under its first and second mortgages, upon the property of the Wheeling, or prior to the Wheeling general mortgage, or the gold notes secured thereby, nor did they raise any equity superior to the general mortgage, or the notes: that certain of those constituting and controlling the syndicate were officers and directors and large and influential stockholders of the Wabash, who caused the execution by the Wheeling of the original traffic contract; that the syndicate, in the execution of the supplemental traffic contract, and in turning over the control of the Terminal, which controlled the Wheeling, acted in the interests of the Terminal; that the contracts were illegal under the laws of Ohio, were unfair to the Wheeling, and made in the interests of the Terminal; that the supplemental contract was a fraud upon the Wheeling and its stockholders; that from its date (May 10, 1904) to the time the receiver of the Wheeling was appointed (June 9, 1908) the Wabash and Terminal dominated and controlled the Wheeling, and wrongfully caused it to carry out the provisions of the two contracts; and that upon demands and counter demands between the Wheeling and the Wabash, growing out of the operation of the contracts and for equipment, rentals, ties, etc., there was a balance in favor of the Wabash of a large sum of money.

But the claim of the Wheeling against the Wabash, the Terminal, the bond-holders of the Terminal, and its mortgagees, as trustees and individually, for damages for losses in its operations during the years 1904 to 1908, were denied, as not established by the evidence. The claims of the trustees of the Terminal mortgages, in the interests of their bondholders, and of the receivers of the Terminal, as well as the claim of Duncan, receiver of the Wheeling, for it and its minority stockholders, to priority over the general mortgage and the bonds secured thereby, and the holders of the gold notes, were denied; and the court, while holding that the Coal Company was an adjunct and agency of the Wheeling for the operation of its coal properties, denied the Coal Company's bonds were a preferred indebtedness of the Wheeling and denied all other claims of the bondholders hereinbefore set forth.

The Wabash, the Central Trust Company, trustee under the general mortgage, the New York Trust Company, trustee for the holders of the \$8,000,000 in notes, the receiver of the Wheeling, representing that road, and its minority stockholders do not appeal. Baker, receiver of the Terminal, for it and the Terminal's bondholders, and Carpenter et al., for the bondholders of the Coal Company, appeal to the extent of the errors they assign.

The assignments of error relied on by Baker, receiver, are that the District Court erred in refusing to hold the Wheeling Company had power to enter into the original traffic contract; that the two contracts were entered into by the Wheeling in conformity with the laws of Ohio and the by-laws of the Wheeling; that some of the directors of the Wheeling were also members of the Terminal and Wabash, did not affect the validity of the contract;

that a majority of the stock of the Wheeling was owned by the Terminal when the supplemental contract was made, did not affect its or the original contracts' validity; that the contracts were fair and in the interests of all parties to them; that the Wheeling and its receiver and stockholders are barred by their laches from questioning the contracts; that the contracts were valid between the parties, and equally valid between the mortgagees of the Terminal and the mortgagee of the Wheeling; that the holders of the gold notes were not bona fide purchasers and cannot make claim of priority over the Terminal's mortgagees; that the general mortgage bonds were pledged at

less than 75 per cent. in violation of the statutes of Ohio.

Carpenter et al. assign as error the refusal of the District Court to direct the receiver of the Wheeling to pay off the prior lien obligations of the Coal Company; to direct an accounting of the moneys diverted from the Coal Company by the Wheeling and its receiver; to decree the general mortgage void as against the bondholders of the Coal Company; to direct an accounting of the Coal Company's bonds, and to direct the receiver of the Wheeling to pay the amount found due in preference to the general mortgage bonds, or the claims of the holders of the \$8,000,000 notes secured thereby; and in deciding that neither its former decree in the suit of Carpenter et al., finding that the obligation of the Wheeling to pay the prior obligations, nor the cause of action upon which that decree was based, constituted a preferred claim against the Wheeling; and that the decree in the cause of action in that case was not entitled to priority of payment by the receiver of the Wheeling over other creditors, and that the claim of the bondholders was only a general claim to the extent that the decree of the District Court respecting the same should be affirmed on the appeal pending therefrom.

Gould was not made a party to the suits.

In Case No. 2732:

Louis Marshall, of New York City, for appellant.

H. A. Kelley, of Cleveland, Ohio, for appellee Central Trust Co. of New York.

F. H. Ginn and J. G. Fogg, both of Cleveland, Ohio, for appellee Wheeling & Lake Erie R. R. Co.

W. R. Begg, of New York City, for appellee New York Trust Co. In Case No. 2764:

D. A. Holmes, of New York City, for appellants.

W. R. Begg, of New York City, A. L. Smith, of Toledo, Ohio, and J. G. Fogg, of Cleveland, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges, and HOLLISTER, District Judge.

HOLLISTER, District Judge (after stating the facts as above). [1] The receiver of the Terminal and its bondholders present their case in the alternative, claiming, first, that the contracts, being executory and specifically enforceable, and providing a fund for the payment of interest on these bonds, are, in their nature, liens upon, or confer rights in, the Wheeling's property or its income and revenue on continued interchanged business, and, as such, are prior in interest to subsequent lienholders with notice, and should, in equity, be specifically performed by the Wheeling and its receiver. Logically such a claim would include subsequent purchasers and mortgagees, with notice, until the contracts expire by time limitation. The argument proceeds upon the ground that the contracts were made in good faith through proper corporate action for the mutual and reciprocal advantage of the contract-

ing parties and sanctioned by law as declared in a number of important decisions. The general proposition is not disputed, and, for the purposes of this case, it may be assumed that the contracts were fair, that the Wheeling had power to make them, that corporate action precedent to their execution was regular, and the consideration for them was adequate. Nevertheless we are of opinion that they could not become a lien upon or charge against the Wheeling or its property while in the hands of its receivers or in any way supplant the rights of the holders of its general mortgage bonds with or without notice, or the purchasers of its property at a judicial sale made now or at any future time. The mere fact that they were executory and continuing in their nature, and gave rights to the Terminal in the future earnings of the Wheeling and to the Terminal's bondholders rights in those earnings as a fund to which they might look for the payment of their interest, does not alter the essential quality of the contracts, which involve only a personal promise by the Wheeling, for the breach of which an action for damages would lie, or for which a specific performance might be decreed, if the Wheeling were in full life and carrying on its business, if that equitable remedy gave more adequate relief than would damages at law. Such contracts do not run with the land or impose any lien upon the property. They convey no title in the railroad itself, or any interest in it, nor do they secure any particular sum of money. Express Co. v. Railroad Co., 99 U. S. 191, 200, 25 L. Ed. 319; Des Moines, etc., R. Co. v. Wabash, etc., R. Co., 135 U. S. 576, 581, 582, 10 Sup. Ct. 753, 34 L. Ed. 243.

It is sought to bring them within the principles upon which Joy v. St. Louis, 138 U. S. I, 11 Sup. Ct. 243, 34 L. Ed. 843, and Cumberland Valley R. R. Co. v. Gettysburg & Harrisburg Ry. Co., 177 Pa. 519, 35 Atl. 952, were decided; but a consideration of these cases will show that, in the former, the contract in question under which the Colorado Railroad successfully claimed the right, as against subsequent mortgagees of the Wabash and the purchaser at the judicial sale on their foreclosure, to use the Wabash tracks through Forest Park at St. Louis, was the very instrument under which the Wabash itself acquired its trackage rights through the park. The contract was held to be a link in the Wabash's title, and specifically enforceable in favor of another railroad whose necessities in reaching the St. Louis Union Station required it to go through the park on the Wabash's tracks. In the latter case, the railroads, parties to the agreement, were, from the standpoint of equity, all in full life, notwithstanding certain consolidations, and no rights of subsequent lienholders had intervened to prevent the same railroad from carrying out the contract made in behalf of the bondholders of one of the railroads.

We know of no principle upon which these contracts may be fixed as a lien upon the Wheeling, or as a charge against its income in the hands of its receiver, or as against the subsequent general mortgage. The receiver repudiated the contracts, as was his right and duty to do if he thought, in the administration of his trust, it would be undesirable or unprofitable to adopt them. United States Trust Co. v.

Wabash Western Ry. Co., 150 U. S. 287, 299, 14 Sup. Ct. 86, 37 L. Ed. 1085; Dushane v. Beall, 161 U. S. 513, 16 Sup. Ct. 637, 40 L.

Ed. 791; Central Trust Co. v. Land Co. (C. C.) 79 Fed. 19.

The Terminal and its bondholders having no lien on the Wheeling or charge against its revenues, it is obvious that they cannot be heard to dispute the validity of the general mortgage and the notes securing the same or the pledge of the bonds, or any question between the noteholders and bondholders and the Wheeling. It is immaterial, therefore, on this appeal, whether or not the bonds were pledged at an illegal discount, or whether or not the notes or any of them were past due when taken up. And, of course, no question of laches on the part of the Wheeling or its stockholders can arise.

[2] But the Terminal and its bondholders claim in the alternative an equity arising, as we understand their position, in this way: The Wabash and Gould and his associates caused it to be represented, through the statements to the Stock Exchange and circulars of the bankers, and the bonds themselves referring to the terms of the mortgage, that the contracts were specifically enforceable for the security

of the interest on the bonds. This is a claim of estoppel.

They charge, further, that the Wabash, in bringing about the foreclosure of the general mortgage incapacitated the Wheeling from carrying out the contracts and caused their breach. This is a tort and sounds in damages. No claim is made for damages on this account, or for false representations, but they say all of these circumstances together constitute an equity entitling the Terminal's bondholders, as against the holders of the notes and the general mortgage bonds securing the same and their respective trustees, all having notice, to a lien or charge upon the Wheeling's property prior to the bond and notes. If we disregard the fact that no bondholder has been shown to have bought his bonds upon knowledge of the statement made to the stock exchange or in any of the circulars, and in reliance on the same, and assume that the bonds were so bought, it would not seem that these bondholders had a right to infer that the agreements were more than what they were said to be. It cannot be said that traffic and trackage contracts as described in the statement and circulars were such as in their nature to become charges upon the property or income of the Wheeling as against all subsequent purchasers, mortgagees and lienholders. The strongest inference a purchaser of the bonds would be entitled to draw from what he saw in the statement, or the circulars, or both, was that, so far as legally it could be done, the three roads were tied together during the life of the bonds by traffic arrangements of advantage to the bondholders. Assuming the contracts to have been valid in all respects, we do not mean to say that, if the Wheeling continuing in full life had broken them, the Terminal and its bondholders could not have required their specific performance. But it is quite sure that no prospective bondholder could reasonably infer or had the right to infer or would infer that the Wheeling and the Wabash would survive all possible catastrophies for the 50 years of the contracts' life, and would, during all that time, be able to carry them out. Nor could they reasonably infer that in the event of such catastrophe to the Wheeling, its receiver would not repudiate the contracts if he thought the interests of his trust required him to do so. Nor did the bondholders have reason to believe that a pledge of a majority of the stock of the Wheeling by the Terminal would prevent the Wheeling as a separate, distinct corporation, exercising its full powers (they at least had no knowledge to the contrary, if the fact were otherwise), from authorizing a loan and executing a mortgage to secure it for the purpose of bettering the Wheeling and keeping it going. Besides, the Terminal bonds were issued before the general mortgage was made, and, whatever the relation of the Wabash to it and the notes was, no estoppel could be raised by what the Wabash did after the bondholders

bought their bonds.

Nor do equities arise in favor of the Terminal's bondholders because the Wabash brought about the \$8,000,000 loan and caused the execution of the general mortgage and its foreclosure. The expenditure of the money it raised for the Wheeling on its guaranty of the notes, not only made the Wheeling a vastly better property, but it undoubtedly kept the Wheeling alive. Had not the interest on that road's underlying mortgage been paid, a foreclosure was imminent. The large floating debt was a threat to the Wheeling's existence, and yet much of that was contracted for the benefit of the Terminal and its bondholders. The enormous expenditure for equipment by which the Terminal was relieved from the contract it could not keep, saved the Terminal, and the equipment was used in the interest of the Terminal and its bondholders. The betterments inured largely to their benefit. The Wheeling's proposal to the Wabash for the \$8,000,000 was on the express ground that the money was needed to properly carry out the provisions of the contracts, and to pay the floating debt incurred for like purposes. The expenditure of this large sum of money, by keeping the Wheeling going, kept the contracts in force for three years longer. It is true the receivership was precipitated at the procurement of the Wabash, but the Wheeling could not live under these contracts. It was insolvent, and a receiver for it was inevitable, even if the general mortgage were not in existence.

We see no basis for the operation of any equity in favor of these bondholders by which the rights of the note and general mortgage bondholders may be transferred to them. The District Court was

right, under the issues, in denying these bondholders relief.

The prior lien obligations and the bonds of the Wheeling's Coal Company involved in Carpenter's suit were the debt of the Coal Company, secured by mortgage on its land and property. The bondholders took the bonds on that understanding. They knew the Coal Company was but an adjunct and agency of the Wheeling, yet they did not look to the Wheeling for the payment of those obligations to the holders thereof, and for the payment of the bonds to themselves, because of that relation, but expressly contracted with it for contributions to be paid by it to be applied, together with royalties paid by Hanna & Co.'s Mining Company, to the payment, first, of the prior lien obligations, and, second, to the bonds on allotment under the plan upon which the Coal Company was reorganized. It was undoubtedly expected that,

during the operation of the plan for its 10 years of life, the prior lien obligations would be paid off and something paid on the bonds, and then, by some new arrangement, the mortgage debt of the Coal Company, being by that much reduced, could be taken care of out of the

mines of the Coal Company.

In the first Carpenter et al. suit the bondholders claimed an express contract by the Wheeling to pay all of the prior lien obligations, because of its contribution agreement; but this court held on Carpenter et al.'s first appeal (218 Fed. 273, 134 C. C. A. 69) that the contribution agreement covered coal only actually transported, less the railroad's fuel coal, and, upon that limitation, the plan would be a fraud upon the bondholders, because the amount of coal it transported was within its own control, thereby giving it the power to destroy, as it did destroy, the plan under which the Coal Company had been reorganized. It was therefore decided that underlying the plan there was necessarily an implied agreement to furnish sufficient cars to transport at least the minimum the Mining Company had agreed to mine, and that the loss or damage recoverable was to be ascertained by figuring royalties on the amount actually mined in 1902 and 1903, and on 700,-000 tons annually for the succeeding eight years, plus the agreed contributions on the balance each year after deducting the amount of fuel coal bought that year for its own consumption by the Railroad Company from the Mining Company. As it turned out, that sum, on a rough figuring, was a small per cent. less than the face of the prior lien obligations; and the court below was directed to ascertain what the exact amount would be. But if the resultant had been more than the face of the prior lien obligations and interest, there would have been something to apply on these very bonds.

These bondholders claim that because the Coal Company was but an adjunct or agency of the Wheeling, the bonds are the obligations of the Wheeling itself, upon the established principle that a court of equity will disregard corporate forms when they have been used to do injustice. That principle is not applicable here, because absolute good faith, so far as the use of corporate forms and the relation of the Railroad Company to the Coal Company and to the bondholders are concerned, dominated the dealings between the bondholders and the Wheeling, and their entire transactions were on the basis of the Coal Company's separate and independent corporate existence. There is no ground upon which to base a finding that these bonds are, either at law or in equity, a debt of the railroad. Not being a debt of the Wheeling, it does not appear how they can be fixed as a lien on its property or charge upon the revenues or income in the hands of its

receiver.

It does not appear that the amount of damages, as found on the first appeal, has been fixed, and the bondholders ask on this appeal a finding that the amount recoverable is a claim against the revenues derived by the receiver in the operation of the road by him, because it is of such character as to give it preference over the general mortgage bonds, and that, if it is not of such character, the Wabash and Gould brought about the failure of the plan by causing the execution

and operation of the traffic and trackage contracts, and the creation of the \$8,000,000 debt and the execution of the mortgage to secure it, with their results, and, therefore, they and the holders of the notes and bonds should, in the interests of these bondholders, yield their rights thereunder.

Assuming that the amount of damages may still be fixed, and that such a contract is enforceable against the Wheeling in full life, it was in any event the Wheeling's personal obligation only, and when the receiver took possession in the foreclosure proceedings, and operated the road for the benefit of the bondholders, and did not adopt it as will appear, the rights of the bondholders were limited to the recovery of damages only.

But it is claimed that this court, on the first appeal, in effect held that the receiver must continue to pay contributions to the trustee of the bondholders under its express agreement. This is based on language found in the opinion (218 Fed. 273, 287, 134 C. C. A. 69, 83):

"Since the contribution was to continue until the prior lien obligations were paid, there can be no inequity in denying the application of the usual rule authorizing a receiver to elect not to be bound by a contract thought detrimental to his trust. The court below was right in setting aside its order discontinuing those payments."

At the time that was written, the court had not considered a modification made by the court below directing a cancellation of a former order authorizing the receiver to discontinue payments. The order, as modified, read:

"That the order of this court entered on the 14th day of December, 1908, authorizing the receiver of The Wheeling & Lake Erie Railroad Company to refuse to adopt the said contribution contract, be set aside, cancelled and held for naught; but nothing herein contained shall be construed as a direction to the receiver to adopt the said contract that matter being reserved for further consideration, as hereinafter set forth."

The District Court never did finally expressly authorize the receiver to adopt or repudiate the contract, although in the final decree made in that case and in the case in which the other parties claimed liens on the Wheeling, the two having been consolidated, the court found, on the claims of Carpenter et al.:

"Neither the said decree of April 12, 1912, as modified by said decree of September 27, 1912, nor the cause of action upon which said decree was based constitutes a preferred claim against the Wheeling Company and neither said decree nor said cause of action is entitled to any preference or priority in payment out of the property of the Wheeling Company or the receiver of said company over other general creditors of the Wheeling Company, and the said decree as so modified, but only to the extent that the same shall be affirmed on the appeal pending as aforesaid, constitutes only a general claim against the estate of the Wheeling Company, and is hereby allowed as such to be paid pro rata with other general creditors of the Wheeling Company."

This is the order from which Carpenter et al. now appeal, and necessarily decides that the receiver should not pay upon the contribution agreement as a continuing contract binding upon the property or on him, and was a direct affirmance of his conduct in refusing, as he did, to pay the contributions, although he had not been expressly author-

ized to adopt or reject the contract itself. We think that, under these circumstances, the receiver cannot be said to have adopted the contract, and what he did under the order of reservation amounted to a repudiation. He had the right to repudiate it, subject to the control of the court, if, in his opinion, it would be undesirable or unprofitable to adopt it.

But, whatever the effect of the language used in the opinion in the case of Carpenter as between these bondholders and the receiver of the Wheeling, it could not affect rights under the general mortgage. Clearly this court, by reserving the question of priority in accordance with the reservation in the court below, did not intend to decide the question, even as against the Wheeling, or its receiver. The damages were the debt of the Wheeling for breach of contract, and partake of no other quality. They were made up by adding the amounts per ton the Mining Company would have paid the Coal Company and the contributions the Railroad Company would have paid the trustee of the bondholders during the life of the contract, if the minimum had been hauled.

Nor can the theory upon which, in equity, claims against a railroad are sometimes allowed in preference to the payment of mortgage bonds, because they are current debts and should be paid out of the current income, prevail for the reason—if there were none other—the consideration with which the bondholders parted for the agreements with the Wheeling did not in the slightest degree contribute to the continued existence of the railroad as a going concern. The many cases on this subject will be searched in vain for any principle upon which such a claim as this is awarded the priority sought. It would be useless to cite them.

The claim of these bondholders for priority arising from the alleged diversion by the Wheeling, or its receiver, of money due the Coal Company to pay taxes, and for repairs, which, under the plan of reorganization, the Mining Company agreed to pay, if otherwise maintainable, cannot be considered, because the record does not disclose any evidence of such diversion. It may be said, applicable to the bondholders, both of the Terminal and of the Coal Company, that they have not, in these actions, asserted any claim for damages against the Wabash and Gould and his associates, in the syndicate for bringing about the situation in which they find themselves, if such action were maintainable. Hence such questions are foreign to this appeal.

General equities claimed to arise as against Gould and the Wabash, growing out of their alleged conduct, including the bringing about, with knowledge, the breach of the traffic and trackage contracts by causing the execution of the general mortgage and the issuing of the notes, and the breach of the Wheeling's contract made for the benefit of the Coal Company's bondholders by causing the execution of the traffic and trackage contracts and the execution of the general mortgage and issuing of the bonds and notes, cannot be considered as against Gould, because, if there were no other reason, he is not a party to the suits. If such equities exist against the Wabash, it has been hereinbefore shown that the traffic and trackage contracts were made for the benefit

of the Terminal and its bondholders, and the \$8,000,000 and interest which the Wabash borrowed from the bankers to take up the notes secured by pledge of the general mortgage bonds, was spent largely for the benefit of the Terminal and its bondholders and kept the Wheeling running in their interests for three years. The Wabash's interest in the pledge of the bonds is comparatively small after the bankers are paid. But its right to receive what there is is at least as strong as any equity these bondholders may have. It is at least a countervailing, if not a paramount, equity.

[3] Nor can Gould be said to be represented by the trustee of the general mortgage, or the trustee of the note agreement. Such trustees represent the bondholders only in matters affecting the enforcement of the security and administration of the trust property under the terms of the trust. Short on Railway Bonds and Mortgages, § 274. So far as any question involved in this case is concerned, the only powers the trustees had are such as were committed to them in the instrument creating the trust. Railway Co. v. Blair, 214 N. Y. 497, 511, 108 N. E. 840; Miller v. R. R. Co., 36 Vt. 452, 486, 487.

We are unable to see how, on the case made here, bondholders, either of the Terminal or of the Coal Company, have any claim on the property of the Wheeling, and, if they have, in what respect it is superior to the rights of holders of the general mortgage bonds.

From all of these considerations, it follows that the decrees of the District Court appealed from by Baker, receiver, and by Carpenter et al., should be, and they are, affirmed at the respective appellants' costs.

On Petition for Rehearing.

Upon consideration of the petition for a rehearing filed by the appellants, we are of opinion that it should be, and it hereby is, denied.

But we think, upon further consideration of the record, that this court was not justified in holding that the Coal Company's bonds were not a debt of the Wheeling. The District Court, in its opinion, expressed the view that the Coal Company's bonds constituted a general claim against the Wheeling, if it should be necessary to assert the bonds as such a claim. But that court, in its decree, spoke as follows:

"The question of the allowance of the claim of the cross-complainants, E. E. Carpenter, Franklin Leonard, Jr., and Joseph T. McCaddon, against the Wheeling Company upon the \$634,500 4 per cent. mortgage bonds as a general claim against the estate of The Wheeling & Lake Eric Railroad Company, to the extent of any balance of said bonds remaining unpaid after the property covered by the mortgage securing the same shall have been exhausted, is hereby reserved."

The question so reserved, whether or not these bonds constitute a general claim against the Wheeling, was not, therefore, before this court on the present appeal of these bondholders, and no finding should have been made upon it. The direct question was not presented, and the finding is not to be considered by the District Court as in prejudice of any conclusion that court may reach upon such reserved question, after all the parties concerned have had the opportunity to be heard, and is without prejudice to the rights of the parties, should that question be presented to this court upon appeal or error, as the case may be.

INTERSTATE BANKING & TRUST CO. v. BROWN et al.

In re LESSER-ELY COTTON CO.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1916.)

Nos. 2717, 2718, 2885, and 2886.

1. BANKBUPTCY =151—REPRESENTATIVE Position of TRUSTEE—STATUTE.

In proceedings relative to the bankruptcy of a firm of cotton factors by virtue of Bankruptcy Act, § 47a (2), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), the trustee represented unsecured creditors with the same force and effect as if they had, on the date of the filing of the petition in bankruptcy, levied executions upon the cotton stored by the firm in a warehouse.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193, 239; Dec. Dig. ⇐ 151.]

2. WAREHOUSEMEN & 2-UNIFORM WAREHOUSING ACT-SUPERSESSION OF COM-MON AND STATUTORY LAW.

Uniform Warehousing Act Tenn. (Acts 1909, c. 336), intended to cover the subject of the respective rights of holders of warehouse receipts and creditors of the depositors, has superseded all existing common or statutory law on the subject.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 2; Dec. Dig. ⊚ 2.]

3. PLEDGES \$\infty\$ 11-Validity Against Execution Levying Creditors-De-Livery.

It is a general rule that a pledge, not followed by delivery, actual or symbolical, is invalid against execution levying creditors of the pledgor.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28–35; Dec. Dig. ⊕=11.]

4. FACTORS \$\infty\$19—Pledges—Uniform Warehousing Act—Strict Construction.

Uniform Warehousing Act Tenn. (Acts 1909, c. 336), giving factors the right effectively to pledge the consignor's interest, which did not formerly belong to them, will be strictly construed.

[Ed. Note.—For other cases, see Factors, Cent. Dig. § 20; Dec. Dig. 🖘 19.]

5. Warehousemen \$\iffsize 2\to Uniform Warehousing Act\to Strict Construction.

Uniform Warehousing Act Tenn. (Acts 1909, c. 336), recognizing the power of the depositor of goods in warehouse to pledge warehouse receipt so as to give a better title than he had and to disregard those rights which under the state's policy would otherwise accrue to the execution creditor, will be strictly construed.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 2; Dec. Dig. ⊕ 2.]

6. WAREHOUSEMEN \$\infty 12-Warehouse Receipt-Statute.

Under Uniform Warehousing Act Tenn. (Acts 1909, c. 336) § 2, prescribing what every warehouse receipt must embody, receipts reading "Received in warehouse for the account of Lesser-Ely Company two hundred bales of cotton. Same to be held subject to the order of the Lesser-Ely Cotton Co. D. W. McLemore & Co., Warehousemen. No. Bales, 200"—was insufficient to come within the protection of the act as failing to describe the cotton for purposes of identification as required by clause F of section 2.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 19-24; Dec. Dig. ⊕=12.]

- 7. Warehousemen ← 12—Uniform Warehousing Act—Negotiable Receipt.

 Uniform Warehousing Act Tenn. (Acts 1909, c. 336) § 5, providing that a receipt stating that the goods will be delivered to the bearer or to the order of any person named in such receipt, is a negotiable receipt, and that no provision shall be inserted in the negotiable receipt that it is nonnegotiable, such provisions if inserted being void, does not convert into a valid statutory negotiable receipt a paper which fails to contain all the requisites of a statutory receipt, but sections 4 and 5 must be read in connection with section 2, cl. (dl, providing that every warehouse receipt must embody the statement whether the goods received will be delivered to the bearer or to a specified person, or to a specified person or his order.

 [Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 19–24; Dec. Dig. € 12.]
- 8. Words and Phrases—"Fungible Goods."

"Fungible goods" are those of which each unit is fully equivalent to each other unit, an equivalency which may be inherent or may result from an agreement which may be expressed or implied from custom.

9. Warehousemen 20—Fungible Goods—Warehouse Receipt—Uniform Warehousing Act.

Under Uniform Warehousing Act Tenn. (Acts 1909, c. 336) § 23, providing that if authorized by agreement or custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade, etc., where cotton warehousemen in the city had long been in the habit of issuing receipts which banks of the city and adjacent cotton country had been in the habit of treating as good for loans of \$50 per bale, all of the bales of cotton in a warehouse of varying values did not become pro tanto fungible goods, so that holders of the warehouse receipts became tenants in common of the entire mass.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 15, 16; Dec. Dig. © 20.]

10. Factors €=52-Pledges-Right of Consignors.

Where the consignors of cotton to a firm of factors did not participate in an arrangement whereby the firm stored the cotton in a warehouse, taking blanket warehouse receipts which it pledged for loans in accordance with a custom of the vicinity, the consignors (having no knowledge of the custom permitting such blanket receipts) were not bound by estoppel by the pledges for the factors' debts accompanied by neither actual nor symbolical delivery, since estoppel cannot bind those not parties to an arrangement, and who never did anything on the faith of which another has acted.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 83, 84; Dec. Dig. ⇐⇒52.]

11. Warehousemen \$\sim 15(3)\$—Pledges-Rights of Creditors of Factors.

General creditors of a firm of cotton factors, not parties to the arrangement and without knowledge thereof, which stored cotton in a warehouse, taking blanket receipts and pledging them to secure loans by banks, were not estopped by the pledge of the receipts.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 37; Dec. Dig. € 15(3).]

12. Execution & 113—Execution Creditor's Superiority of Lien—Tennessee Law.

It is the policy of Tennessee law that an execution creditor gets a lien superior to other prior liens which may be perfectly good as between lienor and lienee, but which have not been preserved against execution creditors in some manner provided by law.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 241-248; Dec. Dig. ⇔⊐113.]

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 235~F.-3

13. WAREHOUSEMEN @== 12-WAREHOUSE RECEIPTS-VALIDITY.

The rule that warehouse receipts are valid and enforceable both at their inception and thereafter, because intended to cover property which could always be identified, cannot extend to a case where no separate receipt covers all the property, but where the result is reached only by the aggregate of many independent receipts.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 19-24; Dec. Dig. =12.]

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Actions by the Interstate Banking & Trust Company and others against J. W. Brown, trustee in bankruptcy of the Lesser-Ely Cotton Company, bankrupt, and others; J. W. Brown against Commercial Trust & Savings Bank and others; Commercial Trust & Savings Bank and others against J. W. Brown; and State Savings Bank of Memphis against J. W. Brown. From a judgment of the District Court confirming conclusions of the referee, the Interstate Banking & Trust Company and others appeal. Vacated and case remanded for the entry of a modified judgment consistent with the opinion.

For some years prior to April, 1913, a business as cotton factors had been carried on, at Memphis, by the Lesser-Ely Company, a partnership, of which Lesser was the active head. On the 25th day of April, Lesser disappeared. It was at once evident that the company was insolvent, and an involuntary petition in bankruptcy was filed on April 26th. This was duly followed by adjudication; and these controversies arise between adverse claimants in the administration of the bankrupt estate.

As the business was regularly carried on, the Lesser-Ely Company received (e. g.,) a consignment of 10 bales of cotton. The consignor might be the grower or the grower's vendee. Each bale bore a tag which, by gin marks and otherwise, identified this bale from all others and enabled it to be traced back to the grower and the ginner. The Lesser-Ely Company paid the freight and similar expenses, perhaps made or had already made advances to the consignor on account of the selling price, and deposited the bales in a certain Memphis warehouse. Eventually, the cotton was sold, and the selling price, less charges and expenses, commissions and advancements, remitted by the Lesser-Ely Company to the consignor. Sometimes the Lesser-Ely Company itself, by sufficient advances or by outright purchase, became the owner of cotton and thereafter sold to others. The warehouseman did not issue to the Lesser-Ely Company warehouse receipts from day to day as the cotton was received and stored, but issued such receipts from time to time as requested by the Lesser-Ely Company, each receipt covering 100 bales, or some convenient number. These receipts did not identify the bales of cotton to which they referred, but each one was in the form shown by the specimen given in the margin.¹ The Lesser-Ely Company used these receipts as collateral in borrowing money from banks and individuals in Memphis and the tributary cotton country, borrowing, usually if not always, \$50 against each bale supposed to be represented by the receipt. When the bankruptcy came, it appeared that there were in the warehouse about 2,000 bales deposited by the Lesser-Ely Company, and that there were outstanding as collateral in the possession of these banks and individual lenders warehouse receipts for about 5,000 bales. This situation resulted from the fraud of Lesser, and the negligence of the warehouseman. All parties exonerate the latter from intentional

^{1 &}quot;Cotton Warehouse of D. W. McLemore & Co., 129 and 163 East Webster Street.

[&]quot;No. 7. Memphis, Tenn., Oct. 8th, 1912.

[&]quot;Received in warehouse for the account of Lesser-Ely Company two hundred bales of cotton. Same to be held subject to the order of Lesser-Ely Cotton Co. D. W. McLemore & Co., Warehousemen." No. Bales, 200.

fraud, but he issued receipts as requested by Lesser without insisting upon the deposit of additional bales or the cancellation of old receipts in equivalent amount, and he trusted Lesser not to ask for receipts which were not against cotton on hand. The bankrupts were also largely indebted to general creditors.

Under the direction of the court, the entire 2,000 bales were sold by the bankruptcy trustee, and the sale proceeds of each bale or lot separately entered. Many intervening petitions were filed by cotton claimants, but it was determined that the cotton should be sold and all existing claims and liens transferred from the cotton to the proceeds. The cotton so sold was divisible into two classes: First, that in which the total of the Lesser-Ely Company's expenses, charges, and advances was less than the selling price. As to this cotton, it was evident—as between the consignor and the Lesser-Ely Company —that title had remained in the consignor, subject to the Lesser-Ely Company's lien or interest for the amount due it. The second class included those bales which had been purchased by the Lesser-Ely Company or as to which its charges and advancements were greater than the sale price. As to these, it was evident that the Lesser-Ely Company's resulting interest, legal or equita-

ble, covered the entire title to and interest in the cotton.

The intervening petitions were by consignors and by receipt holding pledgees. The consignors demanded their respective bales of cotton, subject to such charges and advances as existed. Each holder of a warehouse receipt as collateral security demanded the number of bales called for by his receipt. The bankruptcy trustee answered and claimed title superior to the consignors and the receipt holders. The receipt holders denied the right of the consignors, and the consignors denied the right of the receipt holders; and many subordinate controversies also arose as to special rights or defenses alleged by or against individual claimants. It is sufficient for present purposes to say that the referee held that the claims of the consignors were valid against both trustee and receipt holders; that as to the remainder of the property, after that identified by the consignors was withdrawn, and including the surplus value over the consignor's interest in cotton partly paid for, the receipt holders were tenants in common, among whom the fund should be distributed proportionately; and that the bankruptcy trustee took nothing. These conclusions were confirmed by the district judge, excepting that he disallowed entirely, because usurious, the claim of the largest receipt holder. This receipt holder, the Interstate Banking & Trust Company, brings appeal No. 2717, the bankruptcy trustee brings appeal No. 2718, and other receipt holders bring appeals Nos. 2885 and 2886.

- G. T. Fitzhugh and I. W. Crabtree, both of Memphis, Tenn., for trustee.
- T. E. Cooper and St. John Waddell, both of Memphis, Tenn., for certain petitioners and consignees.

W. H. Fitzhugh, of Memphis, Tenn., for Commercial Trust & Savings Bank and others.

- W. P. Armstrong, of Memphis, Tenn., for W. A. Gage & Co. and others.
 - J. L. McRee, of Memphis, Tenn., for State Sav. Bank.

Luke E. Wright, of Memphis, Tenn., and J. W. Cutrer, of Clarksdale, Miss., for Interstate Banking & Trust Co. Caruthers Ewing, of Memphis, Tenn., for C. D. Smith.

Before KNAPPEN and DENISON, Circuit Judges, and SES-SIONS, District Judge.

DENISON, Circuit Judge (after stating the facts as above). [1] By virtue of the amendment of June, 1910, to section 47a (2) of the Bankruptcy Act, this trustee represents creditors not secured by receipts with the same force and effect as if these unsecured creditors had, on April 26th, levied executions upon the cotton in the warehouse. This property came into the custody of the bankruptcy court, and titles or liens which, under the law of Tennessee, would have prevailed against such levying creditors are superior to the title of the trustee; all others must yield to that title. Bailey v. Baker Co., 239 U. S. 268, 275, 36 Sup. Ct. 50, 60 L. Ed. 275; In re Farmers' Co. (D. C.) 202 Fed. 1005; s. c. (D. C.) 202 Fed. 1008; In re Williamsburg Co. (D. C.) 190 Fed. 871, reversed, but on other grounds, in Holt v. Henley, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767; In re Bazemore (D. C.) 189 Fed. 236; In re Floyd-Scott Co. (D. C.) 224 Fed. 987, 989.

- [2] The rights of the receipt holders, as against the trustee, must depend upon the so-called Uniform Warehousing Act, existing in Tennessee as chapter 336 of 1909. This act, as is obvious by its title 2, was intended to cover the subject of the respective rights of holders of warehouse receipts and creditors of the depositors, and it has superseded all existing common or statutory law on this subject. Commercial Bank v. Canal Bank, 239 U. S. 520, 529, 36 Sup. Ct. 194, 60 L. Ed. 417.
- [3] All parties assume it to be the law of Tennessee, as is the general rule, that a pledge, not followed by delivery, actual or symbolical, is invalid against execution levying creditors of the pledgor. It is even held that the levying officer takes a title to the property. See Herman v. Katz, 101 Tenn. 118, 126, 47 S. W. 86, 41 L. R. A. 700. No actual delivery is here claimed and there is symbolical delivery, if at all, only by virtue of these warehouse receipts, resting upon this statute. If they are such negotiable receipts as the statute contemplates, it follows by the very words of sections 25 and 41 that those who have, in good faith, taken them from a factor as security for present loans, take a title superior to that of consignor or of the fac-
- 2"* * To fix and define rights of creditors of alleged owners of warehouse goods; * * * to define and fix the rights of persons holding warehouse receipts and their assignees and transferees. * * *"
- ³ Whether or not it is accurate to call such delivery symbolical, rather than actual (Union Co. v. Wilson, 198 U. S. 530, 536, 25 Sup. Ct. 766, 49 L. Ed. 1154), the nomenclature of the text is not uncommon, and is intelligible.
- 4 "Section 25. Be it further enacted, that if goods be delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution unless the receipt be first surrendered to the warehouseman or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court."

"Section 41. Be it further enacted, that a person to whom a negotiable receipt has been duly negotiated acquires thereby:

"(a) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value; and

"(b) The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the ware-

houseman had contracted directly with him."

tor's levying creditors. Commercial Bank v. Canal Bank, supra. If they are not such negotiable receipts, the title and rights of the consignor and levying creditor remain untouched thereby. So, we come directly to the controlling question: "Are these the negotiable receipts contemplated by the act, and, particularly, by sections 25 and 41?"

[4, 5] In so far as concerns the present question, this statute is one to be construed strictly rather than with any great liberality. Prior thereto, factors had a right to pledge to the extent of their interest, but no further. The statute gives them the right effectively to pledge the consignor's interest, which did not belong to them, and so far as it thereby permits them to destroy an otherwise existing legal interest, it surely calls for strict construction. As to property owned by the warehouse depositor but subject to secret liens, this statute in some jurisdictions created and in others recognized the power of the depositor to pledge his warehouse receipt so as to give a better title than he had and so as to destroy those rights which under the policy of the state would otherwise accrue to the execution creditor; and this, too, calls for strict construction.

Following its plan of either creating, or recognizing and then regulating, a class of instruments having defined attributes and results, section 2 defines those receipts concerning which the act speaks, and to which, by sections 25 and 41, it gives peculiar force. Sections 2, 4. and 5 are quoted in the margin.⁵

- ⁵ "Section 2. Be it further enacted, that warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms:
 - "(a) The location of the warehouse where the goods are stored.

"(b) The date of issue of the receipt.

"(c) The consecutive number of the receipt.

"(d) A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order.

"(e) The rate of storage charges.

"(f) A description of the goods or of the packages containing them.

- "(g) The signature of the warehouseman, which may be made by his author-
- "(h) If the receipt is issued for goods for which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership. And:
- "(i) A statement of the amount of advances made and of liabilities incurred, for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is at the time of the issue of the receipt unknown to the warehouseman or to his agent who issued it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient. A warehouseman shall be liable to any person injured thereby for all damage caused by the omission from a negotiable receipt of any of the terms herein required.

"Section 4. Be it further enacted, that a receipt in which it is stated that the goods received will be delivered to the depositor or to any other specified

person is a nonnegotiable receipt.

"Section 5. Be it further enacted, that a receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt, is a negotiable receipt.

"No provision shall be inserted in a negotiable receipt that it is nonnegotia-

ble. Such provisions, if inserted, shall be void."

Section 2 requires that the receipt "must embody" eight elements, but one of them (h) is in contingent form, and so is to be excluded from any enumeration of imperative requirements. One (d) allows an alternative form, and one (i) specifies modifications which may sometimes be permitted. The receipts given in the present case omit element (h), but that is unimportant because the contingency which required its inclusion did not exist. They also omit elements (e) and (i); and interesting resulting questions as to their validity and force have been argued. Language cannot be more imperative than that of the first clause of the section, which says "every such receipt must embody" the above-mentioned eight elements; and it is, to say the least, not clear how the last sentence of (i) can operate to make immaterial the omission of any one of the elements which it has been declared must be embodied. This sentence is:

"A warehouseman shall be liable to any person injured thereby for all damages caused by the omission from a negotiable receipt of any of the terms herein required."

If a paper from which one of the terms required by section 2 has been left out is nevertheless a "negotiable receipt," and so gives to the good-faith holder thereof all the rights declared by various parts of the statute, it is not easy to see how such holder could suffer "damages caused by the omission." On the other hand, if the omission of a prescribed element from what otherwise would be a negotiable receipt makes the receipt invalid and so deprives the holder of his otherwise existing rights thereunder, there would be "damages caused by the omission," and this sentence would have applicability and force; yet that theory is not wholly satisfactory. If the effect of this sentence is confined to the clause in which it is found (i), and if the warehouseman's lien is treated as valid in spite of the omission properly to claim it, the sentence could be intelligently applied in all cases.

[6] However, we think it not necessary to decide what the effect may be of failing to state the rate of charges or the advances claimed. A more noticeable, and perhaps a more substantial, defect exists as to element (f). This specification—that the receipt must contain a description of the goods—probably adds nothing to existing requirements as to any document which was to accomplish symbolical delivery. Its purpose, unquestionably, is to provide for identification. We do not need to consider how complete the description must be on the face of the paper, or how far parol evidence may be resorted to in aid of identification; somehow, and perhaps with such aid, the receipt must have, or be given, efficient reference to the property which is to be symbolically delivered. That these receipts do not satisfy this criterion is too plain for controversy. Indeed, in real intent, these The office of such were never considered as warehouse receipts. receipts is to evidence the delivery and deposit of certain articles; they are the depositor's vouchers; these receipts had no such function; they were only intended to be certificates or undertakings by the ware-

[•] As is thought by the Supreme Court of Illinois, in Manufacturers Co. v. Monarch Co., 266 Ill. 584, 107 N. E. 885.

houseman that the depositor should thereafter keep up and maintain his deposit to a fixed minimum. No amount of parol evidence would be sufficient to show to what particular bales of cotton one of these receipts for 100 bales was intended to refer, since, in fact, it never was intended to refer to any particular bales; neither with nor without parol aid can such a receipt create identity, or point out identity which never existed. This is so clear that it would dispose of the case, as against the receipt holders, save for one thing yet to be discussed.

[7] Before coming to that, we notice sections 5 and 6. We cannot think that section 5 has the effect to convert into a valid statutory negotiable receipt a paper which is not a statutory receipt at all. Sections 4 and 5 must be read in connection with clause (d) of section 2. These later sections apply to receipts issued under and sufficiently complying with section 2, and classify them according to the alternative found in (d). The final result is the same as if the fourth element, which "every such receipt must embody," was specified:

"(d). A statement whether the goods received will be delivered to the bearer or to a specified person or to a specified person or his order; if to a specified person, the receipt is nonnegotiable; if to bearer or to a specified person or order, it is negotiable."

If it could be assumed that the definition of a negotiable receipt found in section 5 was intended to be exclusive and complete in itself, it would follow that even the signature of the warehouseman required by section 2 (g) would be quite unnecessary; and, of course, this cannot be.

[8, 9] The special situation just mentioned thus arises: Some of the cotton warehouses in Memphis, including this one, had long been in the habit of issuing receipts in this form, and some, at least, of the Memphis banks and of the banks in the adjacent cotton country had been in the habit of treating such receipts as good for loans of \$50 per bale; and it is said there was a custom whereby each bale of cotton was, for this particular purpose, the equivalent of any other bale, and hence that warehouse receipts with this general and indefinite description are as valid as are similar receipts for so many bushels of grain in an elevator. In reaching this conclusion, reliance is placed upon section 23 of the act, also quoted in the margin. The argument is made that by virtue of this section as applied to this custom and to the particular facts of this case, all the bales of cotton in the warehouse became pro tanto fungible goods, and so the receipt holders became tenants in common of the entire mass.

We do not find that this section has been construed by other decisions in a way here helpful, and we must, without such aid, determine its force as applied to the present case. It seems a proper sum-

^{7 &}quot;Section 23. Be it further enacted, that if authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common, and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole."

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mary of text-book definitions, as modified by this section, to say that fungible goods are those of which each unit is fully equivalent to each other unit; that this equivalency may be inherent or may result from agreement; and that such agreement may be express or may be implied from custom. Further, it seems obvious that goods may be of one of three classes: Inherently fungible, or capable of acquiring that quality by agreement, or quite incapable thereof. Bushels of wheat of the same grade are necessarily the equivalent of each other; barrels of flour may or may not have that mutual relationship-presumptively, they do not (Jones on Collateral Securities, §§ 317, 318) —though the interested parties may intelligibly consent that flour shall be so considered; but that there should be any express agreement or any contract-raising custom whereby a bolt of cloth and a case of boots and shoes should be treated as equivalent to each other is beyond comprehension. We take it, the statute, section 23, must mean only that the right of the warehouseman to mix articles so as to lose their identity and his right to deliver on a receipt, not the thing which he received but other equivalents, are to be confined to the first two classes of articles above mentioned, viz., those inherently equivalent to each other, and those which may be so, and which, therefore, can rightfully be thought of as subject to an agreement or a custom to that effect, but that these rights do not extend to articles where mutual equivalency is inherently impossible. To use the foregoing illustration we cannot comprehend an agreement or custom which would authorize a warehouseman to deliver boots and shoes in satisfaction of his receipt for cloth.

Bales of cotton certainly do not belong to the first group; their mutual equivalency is not clear and certain. A lot of bales coming from one source might belong to the second group; their equivalency would be so possible, if not probable, that an agreement or custom therefor might well exist. The evidence, however, puts beyond controversy that cotton bales in a large mass, such as would accumulate in any general warehouse, and such as did accumulate in this warehouse, are as inherently incapable of acquiring this mutual equivalency as would be the cloth and the boots and shoes. The cotton in such bales is of all varieties, qualities, and grades, and the bales themselves are of various sizes. The actual selling value of the bales involved in this controversy varied from a minimum limit of about \$20 to a maximum limit of about \$90, and the variation was arbitrary by units, or by small lots. The figures brought here do not show results for each bale, but only as to the lot belonging to each consignor, by which can be stated the average price 2 bales or 5 bales or 10 bales. These figures cover about 1,000 bales out of the 2,000 involved. There is no reason to think that there was any more uniformity among the other thousand.8 It necessarily results that this section, 23, has no bearing on the case. Even if it had, its only effect is to authorize an intermingling which never did in fact take place. No one claims that

⁸ As said of the 40 bales of corks, in Llado v. Morgan, 23 U. C. C. P. 517, 525, "it seems impossible to apply any custom we have ever heard of to a case like this."

the identity of any single bale was ever lost, from the beginning to the end.

It is only illustrative of the difficulty which the receipt holders here have, in standing upon section 23 and the supposed custom, to query what would happen if the holder came to the warehouse and demanded the bales of cotton called for by his receipt. Who could say what bales he should have? If he had loaned \$50 per bale, must he take those bales that were worth \$20 or could he take the \$90 bales and leave the poorer ones for later comers? If the warehouseman were indifferent, an execution creditor or a consignor would not be. No

theory of fungibility can answer these questions.

[10] The real strength of the receipt holders' claims lies, not in any such theory nor in reliance on section 23 of the act, but in an application of the theory of estoppel. The depositing factor owned varying interests in the bales of cotton in the warehouse. This interest without aid from the statute it could transfer by way of security to those who would lend money thereon. Almost any kind of a transfer would be good, as between the parties, at least when it came to the equitable distribution of a fund. Here steps in the custom, by which this type of receipt evidenced some kind of an undivided interest in the factor's title. With the aid of this custom, it is to be seen that the factors agreed that their cotton should be subject to these receipts in any proper way which the courts might be able to work out as between the parties, and that the money lenders acted on the faith of such understanding; that the warehousemen issued these receipts knowing that they were to be thus used; and that the lenders of the money accepted these receipts knowing or being bound to know that other similar ones were being issued to and accepted by other lenders. Here is a perfect estoppel as against each of the three participating parties; and while there would be many difficulties, some of which are illustrated in this case, in determining and enforcing the respective rights of all the parties, it may be assumed that a court of equity, if not a court of law, could find a way to do so, and that no one of the three could be heard to complain; but we are not now considering the complaints of parties; we have to deal with the complaints of strangers. Estoppel cannot bind those who were not parties to the arrangement and who never did anything on the faith of which another has acted. The consignors did not participate in this arrangement directly or indirectly. They had no knowledge of the custom permitting such blanket receipts. Let it be assumed that they were bound to know that they might lose their title to their consigned cotton by the issue to the factor and the pledge by him of a statutory warehouse receipt for that specific cotton; this does not imply that they subjected their cotton to any further risk of which they were ignorant or that they can be bound by a pledge for the factor's debt accompanied by neither actual nor symbolical delivery. We are satisfied that the court below rightly held the consignors' title superior to any lien, legal or equitable, in favor of the receipt holders.

[11, 12] We cannot distinguish the case of the general creditors, represented by the trustee as if with executions levied, from the case

of the consignors. The general creditors are not estopped; they are not parties to any such arrangement; they had no knowledge of any such custom (so far as the record shows). It is, as we have seen, the policy of the Tennessee law that an execution creditor gets a lien superior to other prior liens which may be perfectly good as between lienor and lienee, but which have not been preserved against execution creditors in some manner provided by law. We therefore are bound to conclude that the trustee in bankruptcy, for the benefit of all creditors, took a title superior to any claim by a receipt holder, even though the holder might have been able to enforce his claim as against the factor or those in its shoes; and that the trustee, as far as may be required by the claims of the creditors he may finally represent, must take what is left of the fund after the consignors are satisfied; but to the consignors' title the trustee must yield, for it is the prior title, and no rule of law displaces it for the benefit of execution creditors.

The receipt holders have other difficulties to meet—the universality of the custom set up is not clear; much of the cotton which came to the trustee was not in existence when some of the receipts were given; at the date of some receipts, there was no cotton in the warehouse not already appropriated, etc. These become immaterial.

[13] If no one were here interested except the estopped parties, we might, perhaps, give controlling effect to the fact that the outstanding receipts called for a total number of bales greater than the entire number in the warehouse. Even as against consignors or execution creditors, a receipt might be valid which, in terms, covered all the cotton in the warehouse or in a certain compartment. It might, for the purpose of this discussion, even be conceded that a receipt would be unimpeachable which covered all the cotton which from time to time might be in a certain location, and which, therefore, contemplated continual substitution. No one of these concessions reaches this case. The receipts in the supposed instances might be valid and enforceable both at their inception and always thereafter, because they would be intended to cover property which could always be identified. Such a rule cannot extend to a case where no separate receipt covers all the property, but where this result is reached only by the aggregate of many independent receipts. It cannot be that the validity or enforceability of such important instruments as warehouse receipts should be almost a matter of chance, and that they should be good today, bad to-morrow, and good the next day, at the whim of the depositor. If receipts which are inoperative because they describe nothing became enforceable when their sum total becomes greater than all the property involved, they will, of course, lose that enforceability when their total falls below the amount of property on hand. It would follow that, if there were 1,000 bales in the warehouse and receipts outstanding for 990 bales, which receipts were invalid because not identifying anything, the depositing factor could, intentionally or inadvertently, make them all valid by selling 15 bales out of stock or by obtaining and negotiating another receipt for 15 bales; and the next day he could make them all invalid again by depositing a few

more bales in the warehouse or by paying and taking up one of the outstanding receipts. We can see no reason for thinking that the superior title of the consignor can appear and disappear in this fortuitous way; nor can we see any vital distinction on this issue between the rights of the consignors and the rights of the bankruptcy trustee under the amendment of 1910. As is said by counsel for one of the receipt holders, speaking of the execution of receipts for 5,000 against a holding of 2,000:

"That is a matter to be considered in a distribution of the fund between the holders of warehouse receipts, but has no relevancy whatever to the legal rights of the parties."

Few of the decisions cited by counsel are pertinent enough to need comment. In Manufacturers Co. v. Monarch Co., supra., the point decided was that the paper given by the warehouseman did not fail to be a statutory negotiable receipt merely because it omitted the rate of charges. Union Trust Co. v. Trumbull, 137 Ill. 146, 27 N. E. 24, involved the necessity of identification, but it was held that the party who was a common-law assignee stood in the shoes of his assignor, the depositor, and so that the controversy had the same aspect as if between the depositor and the receipt holders. It is admitted (137 Ill. 178, 27 N. E. 24) that further identification would be necessary for many purposes, and the result reached is based upon the mutual estoppel of all parties. No rights of any person not estopped are involved. Stewart v. Phœnix Co., 9 Lea (77 Tenn.) 104, applies the rule of estoppel against the warehouseman, and touches no other rights. Bank v. Haselton, 15 Lea (83 Tenn.) 216, holds that the property involved there was really fungible. The blanket description in the receipt was therefore sufficient, and the receipt became immune to attack on this ground. The opinion, with seeming purpose, omits bales of cotton from its list of the class of property which was under discussion (pages 244, 245). In Bank v. Bryant, 49 La. Ann. 467, 473, 22 South. 89, 93, we find pertinent comment, meriting quotation. There was in use, in New Orleans, a form of cotton warehouse receipt generally similar to that used in Memphis, and a controversy arose between the holder of such a receipt and the administrator of the depositing cotton factor. The latter claimed under an equally vague warehouse receipt, but of later date. It was held that the administrator had no higher rights than the depositing factor and could not dispute the truthfulness of the earlier receipt which he had pledged to his creditor. In the course of the opinion, and after describing the New Orleans custom, the court says:

"The practice which we have alluded to is not only a very loose but a very dangerous one to all parties relying upon it. Under its operation as claimed, a factor having stored in a press several lots of cotton, part of which he could legally sell or pledge and part of which he could not legally pledge for his own debt, can leave a part of it unreceipted for and cause to be executed to himself special receipts for a limited number of bales, leaving their identity (so far as the receipts themselves are concerned) undetermined. He can then pledge these special receipts to a bank for a loan of money, but before the particular cotton to be covered by the receipts is fixed in favor of the bank or pledgee, he can sell the cotton which he was authorized to sell or pledge to a third person, and through the instrumentality of an order directed to

the press, ordering them to deliver that specific cotton to parties named, he can withdraw it from the possession of the proprietors of the warehouse, and from the possible operation of the warehouse receipts, and drive the holders of the receipts into an unsuccessful litigation with the owners of the cotton still on hand. Civ. Code, arts. 1921, 1922. The lenders, in the end, will find themselves, unless, under exceptional circumstances, the holders of worthless pieces of paper. Even if matters in some given case did not go to the full extent here supposed, the lenders, under the operation of this loose practice might be driven in execution of their collaterals, upon a worthless grade of cotton; whereas, had they taken the simple precaution of causing the marks of specific cotton to be inserted in the receipts, they would have been amply protected. So long as business men elect to deal in this way, in order by affording commercial facilities to their customers, to retain their business, they must not be surprised that they should occasionally be called upon to suffer loss."

In a generally similar situation at Little Rock, the warehouseman was held to a double liability, and the Supreme Court of Arkansas said (Citizens' Bank v. Arkansas Co., 80 Ark. 601, 613, 96 S. W. 997, 1002 (117 Am. St. Rep. 102):

"In fact, this custom that the compress company relies on seems to have been based on the theory that all men were honest, * * * but this loose method of doing business was calculated to attract the attention of dishonest commercial adventurers. That years passed before any harm was felt speaks well for the honesty of those dealing with cotton in this market. But the unscrupulous man arrived at last, and then a day dawned full of danger to these unsuspecting dealers."

The one decision which seems indistinguishable from the instant case (save that the receipt called for less than the whole number of bales in existence—and we have pointed out the insufficiency of this distinction) is that of the Supreme Court of Louisiana in Gragard's Succession v. Bank, 106 La. 298, 30 South. 885. Similar receipts were asserted by the holder against the general title of the administrator of the depositing factor. So far as concerns the binding effect upon the administrator of the estoppel which existed against the factor himself, the case necessarily overrules Bank v. Bryant, though without mentioning that then still recent case. It is to be noted that two of the justices participating in Bank v. Bryant, dissent in the later case. What the court says regarding the position of the administrator applies with even greater force to the position of the bankruptcy trustee since 1910 (106 La. 300, 30 South. 886).

"To deny to this administrator, therefore, a standing to contest the validity of a pledge would be to deny the same right to the creditors; and to deny the right to the creditors would be the exact equivalent of asserting one of the two things, either that under the Louisiana law invalid pledges are as effectual as valid pledges, or that under Louisiana law invalid pledges are made valid by the death of the pledgor" [bankruptcy of depositor].

The court then distinctly determines the invalidity of the receipts in this language:

"On such a receipt the warehouseman could not possibly make any delivery. Abundant testimony to that effect is found in the record. Between the different bales of the cotton there might be great variance, nearly or fully as one to four; that is, one bale may contain nearly twice as much cotton as another and the cotton be of a quality twice as valuable. And in the case of this particular cotton, there was a further and, if possible, a more serious dis-

parity between the different bales; some of it the decedent had not a legal or even a moral right to pledge, whereas some he had a perfect right to pledge. This circumstance added infinitely to the already fatal uncertainty of the receipt, for until proof to the contrary should be administered the presumption would have to obtain that the decedent intended to pledge, and the defendant bank intended to receive in pledge, only those bales which the decedent had the right to pledge, and the identification of these bales in the absence of any designation of them was utterly impracticable.

"We must hold that, owing to the indeterminateness of the property intended to be pledged, there was no delivery, and in consequence no pledge. A warehouse receipt in the form prescribed by Act 72 of 1876 may stand for the goods themselves, in such way that its delivery will operate a delivery of the goods; but in order that this should be, the receipt must represent specific goods, or, at any rate, must represent a specific part of a common, or unlform, mass; and, as just shown, a lot of cotton bales cannot be treated as a common or uniform mass, especially when, to the physical disparity of the component bales, there is added a moral and legal disparity."

The purported taking possession of the cotton by one receipt holder on the day before the bankruptcy was, obviously, ineffective, when the rights given by the receipts themselves are treated as we find they must be. If such taking possession were given effect, it would accomplish a preference, and we have no doubt this receipt holder was chargeable with knowledge that the result of sustaining the change of possession (if there was any) as creating a definite lien would be to bring about the forbidden inequality.

Although it is quite unnecessary, for the purposes of these appeals, to decide whether the loans from the Interstate Banking & Trust Company were usurious, and, if so, what the effect would be, yet we have seriously considered whether we ought to express our opinion thereon, based upon the present record. If this company has filed proof of its claim in bankruptcy, or if the intervening petition shown by the present record shall be thought amendable so as to become a formal proof, or if the decree herein is thought to be a "liquidation" (questions concerning which we intimate no opinion), the same question may come back to this court hereafter; but upon the controlling question of fact, further evidence may be developed and the distinct issue which would be presented under such a proof of claim has been argued on the present appeal only incidentally. Upon the whole, we think it best not now to undertake any decision.

It results that the decree below must be vacated, and the case remanded for the entry of a modified decree consistent with this opinion. The trustee should recover the costs of his appeal (No. 2718). Each of the appellants in the other three appeals has already paid the bulk of the costs involved therein, and since apportioning among all the parties entitled the small remaining costs which might be awarded against these appellants would be difficult, the order will be that no costs will be recovered in any one of these appeals (Nos. 2717, 2885, and 2886). Claims of counsel for compensation from the fund coming to the trustee should be disposed of by the bankruptcy court.

[•] Loveland on Bankruptcy (4th Ed.) §§ 332, 333.

LEVY v. HOFFMAN.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1916.)

No. 2800.

1. MINES AND MINERALS 53-CONTRACTS-OPTION CONTRACTS,

Defendant entered into an agreement to sell to plaintiff at any time within 10 days certain described mining property at a fixed price. The agreement recited that defendant did not own all the capital stock of the corporation owning the property, and that, in the event he was unable to acquire it, plaintiff should accept such stock as defendant might have, making a proportional reduction in the price, and recited that, if plaintiff should procure a satisfactory purchaser for the property, then and in that event defendant authorized his representative to extend the agreement for 60 days, so as to enable plaintiff to consummate the sale, defendant's representative to exercise his best judgment in determining whether a bona fide purchaser had been procured. Held, that the contract, which was of a unitary character, was an option contract, and plaintiff cannot recover on the theory that it not only gave him an option to purchase the property, but also constituted him a sales broker, whose commission would be everything above the price fixed, and whose duty was done when he brought together defendant, his principal, and the purchaser.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 147, 148; Dec. Dig. ⊗=53.]

2. Customs and Usages \$\infty 17-Application-Validity of Custom.

As the contract itself provided, in case the option was exercised, for an extension of 60 days to enable plaintiff to effect the sale, a general custom in the sale of mining properties to allow that period of time for examination of title and the property cannot be relied on to extend the time beyond the extension authorized by the contract, for, time being the essence of the contract and the contract providing for one extension, the custom has no application.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 34; Dec. Dig. ♦ 17; Evidence, Cent. Dig. §§ 1945-1947.]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; John E. Sater, Judge.

Action by Charles E. Levy against Herman H. Hoffman. Judgment for defendant, and plaintiff brings error. Affirmed.

Hoffman owned the stock control of the Democrata Cananea-Sonora Copper Company, and desired to sell out. Levy thought that the personal relations of himself and some associates with Mr. Greene of the Greene Consolidated Company were such that he could get Greene to buy the Democrata. Thereupon, and on October 10th, Levy and Hoffman made the written agreement copied in the margin. On October 20th, and pursuant to paragraph third,

¹This agreement made this 10th day of October, 1905, by and between H. H. Hoffman and Charles E. Levy, witnesseth:

First. Said Hoffman agrees at any time within ten days from the date hereof, subject to the conditions hereinafter mentioned, to sell to said Levy all the property at the present time owned by the La Democrata mine in the district of Arispa, Cananea, Sonora, Mexico, free from debt of any kind, for and in consideration of \$900,000.00 to be paid Hoffman by said Charles E. Levy, either in cash or in Greene Consolidated Copper Company stock at the market price on the day of acceptance of this option, at said Levy's option; said price of the Greene Consolidated Copper Company stock, however, not to exceed \$26.00 per share. Said Hoffman represents that he does not at the present time own all the capital stock of the Democrata Cananea-Sonora CopStallo gave Levy a 60-day extension. On November 17th, and referring to the statements of the mining company prospectus which Hoffman had furnished to Levy, Greene wrote Levy, saying: "If these statements are verified upon examination, I will take the property, subject to 60 days for examination from date, at the price of \$1,100,000 U. S. gold coin, said amount to be paid in cash upon delivery to me at my office, 24 Broad street, New York, of the title deeds to the property, upon my verification and examination above stated, which examination is to take place within 60 days from date. It is understood that this property is to be free from any and all incumbrances of any sort, description or nature."

Greene's financial responsibility to make good this offer is not questioned, but Hoffman refused to hold this option open for the 60 days, as requested by Greene, and the sale was never closed. Levy brought this action in the court below against Hoffman, claiming that he had procured Greene as a purchaser, and that, by Hoffman's refusal to go on with the same, Levy had been damaged \$200,000. In his complaint, he alleged that there was in the sale of mining property a universal trade custom by which, after a purchaser had been procured, he was allowed a reasonable time to examine the property to see if it justified the representations made, and to examine the title to see if it was good, and that, for such a property as this, 60 days was a reasonable time. Defendant answered, setting up various defenses, which it is not important to consider in detail. Upon the trial, a verdict for defendant was instructed, and Levy brings this writ of error.

S. M. Johnson, of Cincinnati, Ohio, for plaintiff in error. Judson Harmon, of Cincinnati, Ohio, for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and COCH-RAN, District Judge.

per Company which owns the La Democrata mine, and does not hereby intend to obligate himself to transfer all said property unless he can first acquire all said stock. Said Hoffman further represents that the authorized capital stock of said mining company is \$3,000,000 divided into 300,000 shares of \$10.00 each, and that he owns and controls, of said amount, more than a majority of the shares, and that there will be at least 67,000 shares in the treasury of said company in case the sale herein contemplated is consummated.

Second. In case said Hoffman should not be able to procure all the stock outstanding in said mining company, then and in that event, he agrees to deliver to said Levy, within the time specified, more than a majority of the shares of the capital stock of said company at a price to be fixed by such proportion of said \$900,000 as the shares of stock delivered by said Hoffman bear to the entire then outstanding capital stock (that is to say, to all stock outstanding excepting the stock in the treasury of said mining company, which for the purposes of this paper is considered canceled). Said Hoffman shall have the privilege, however, of delivering as much stock as he may be able to acquire in addition to the stock by him agreed to be delivered at a price to be determined by the same method as with reference to the stock by him agreed to be delivered.

Third. In case said Levy shall procure a satisfactory purchaser for the property mentioned in either paragraph first or second hereof, then and in that event said Hoffman hereby authorizes Edmund K. Stallo, as his representative, to extend this agreement for sixty days, so as to enable said Levy to consummate the sale. Said Stallo is to exercise his best judgment in determining whether or not a bona fide purchaser has been so procured.

Fourth. All expenses of said sale are to be borne by said Levy, who agrees to hold said Hoffman free from all liability on account of such expenses. Fifth. Said Levy has paid to said Hoffman the sum of \$1.00 as considera-

tion for the above agreement, the receipt whereof is hereby acknowledged.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

H. H. Hoffman, [L. S.]

Charles E. Levy [L. S.]

PER CURIAM. [1] We may assume, without deciding, that clause third of the contract, by its reference to procuring a purchaser, meant procuring some one who was likely to buy; that Greene was interested to this extent within the 10 days; that Stallo acted in good faith in deciding that a purchaser had been procured under this paragraph; and that, therefore, the 60-day extension granted by Stallo, and running to December 19th, was valid. We cannot, however, treat the contract, as plaintiff would have us do, as divisible into two—one an option contract for the sale to Levy at a stated price whereby Levy would make no profit unless and until he sold, and the other an agency contract, whereby Levy became a mere broker who earned, as a commission, everything above the stated price received from the purchaser he found, and whose duty was done when he brought to-gether his principal and his purchaser. We think it very clear, whether or not we resort to the aid of surrounding circumstances and the later conduct of the parties, that the agreement, taken all together, was of a unitary character and was an option contract contemplating that Levy or his assignee should buy the property, and that he should have, as his profit, what he could make upon a sale of the option or a resale

of the property.

[2] The existence of the custom pleaded may be granted, but it does not help the plaintiff. The authorities relied upon to show the force of such a custom all say—what is obvious—that the custom operates to give additional time under an option contract or a sales contract only in cases where the contract does not itself make specific provision on the same subject; but in this contract, there is such specific provision. It says, in effect, that if within 10 days Levy procures a satisfactory purchaser—himself or another—then he may have 60 days more in which "to consummate the sale." No reason is suggested why this phrase "to consummate the sale" does not cover and include everything which may be necessary to convert the prospective purchaser, who is contingently willing to buy, into the satisfied purchaser who does buy. Examination of title, examination of property, financial arrangements, corporate meetings—all these things necessarily precede the consummation of the sale. Any other construction of this contract implies that, after the prospective purchaser has been interested, during the 10 days, and then after, during the 60 days, everything has been completed and the sale has been "consummated," the purchaser shall still have a reasonable time to decide whether property and title are as represented. Its words do not permit such an interpretation. When the 60-day provision of the contract has been thus construed, it is the end of the case. Time was of the essence of the contract, as of every option contract, and Levy does not claim that he procured a purchaser who, within the 60-day contract period, consummated the sale or was ready to consummate the sale. Greene's offer was conditional on a further extension of time, to January 17th, in which to make up his mind. He never offered to take up the subject of purchase, except upon that condition; and to that extension of time, Hoffman never assented and Stallo had no power to consent.

We observe further that Hoffman's option offer was in an alternative form, reserving the right to elect whether he would sell property or capital stock, and Greene's contingent acceptance covered only one alternative. Even if it may be said that Hoffman waived this objection to the Greene proposition, he did not waive the time limit. There are other obstacles in the way of recovery, but it is not necessary to consider how serious they may be. We have carefully reviewed the elaborate discussion of the case by counsel for plaintiff in error, but we find nothing to make us doubt the correctness of the conclusion we have stated.

The judgment is affirmed.

VIRGINIAN RY. CO. v. LINKOUS.

(Circuit Court of Appeals, Fourth Circuit. July 8, 1916.)

No. 1379.

In Error to the District Court of the United States for the Western District of Virginia, at Roanoke; Henry Clay McDowell, Judge.

On rehearing. Former opinion (230 Fed. 88, 144 C. C. A. 386), re-

versing judgment below, adhered to.

H. T. Hall, of Roanoke, Va., and G. A. Wingfield, of Norfolk, Va.,

for plaintiff in error.

W. L. Welborn and S. H. Hoge, both of Roanoke, Va. (Welborn & Jamison and Hoge, Williams & Darnall, all of Roanoke, Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The above-entitled cause was decided at the November term, 1915, of this court, the court holding that the defendant in error, under the circumstances, was not entitled to recover. A petition for rehearing was presented December 25, 1915, and the case was reargued at this term.

Having fully discussed the question as to whether the injury of the defendant in error was due in whole or in part to the negligence of a fellow servant, in the opinion heretofore announced, we do not now deem it necessary to enter into a further discussion of that phase of the case. After a careful consideration of the contention of counsel for defendant in error, as well as the authorities cited, we think that the decision of this court in the first instance was correct.

Therefore we adhere to our former opinion, reversing the lower court.

WOODS, Circuit Judge (dissenting). In this action, brought under the federal Employers' Liability Statute (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]), the plaintiff recovered judgment on account of the death of her husband, J. M. Linkous, an engineer on one of the defendant company's trains. The negligence of the engineer was admitted, and the sole question is whether the Dis-

trict Court should have directed a verdict for the defendant on the ground that there was no proof of negligence of the other servants of the defendant contributing as a proximate cause to the death of the decedent.

There is practically no dispute as to the facts. When extra train No. 468, on which Linkous was engineer, reached the station Alta Vista, copies of a written telegraph order to meet and pass another freight train, No. 33, at the station Keever, were given to the conductor and the engineer. The order was in plain language, not easily misunderstood, and the surviving brakeman testified that he and the conductor spoke to each other of the order to pass No. 33 at Keever. The presumption is that the conductor and the engineer, in accordance with the rules of the company, showed or made known the order to the brakeman and fireman. Looney v. Metropolitan Railroad Co., 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564.

After receiving the order, the conductor and one brakeman got on the engine with the engineer and fireman, leaving one brakeman in the shanty car at the rear end of the train. The order to stop at Keever was disregarded; there was a head-on collision with No. 33 about 2,500 feet beyond the east end of the switch where No. 468 should have been stopped; and the four men on the engine were instantly killed. Copies of the order were found on the bodies of the

conductor and engineer.

A number of rules of the Railroad Company were introduced, but these seem to be chiefly relied on by the plaintiff:

"Instructions to Conductors and Enginemen:

"Rule 105. Both conductors and enginemen are responsible for the safety of their trains, and, under conditions not provided for by the rules, must take every precaution for their protection."

"Instructions to Conductors:

"Rule 451. Enforce the rules applicable to all other employes on the train,

reporting any insubordination, misconduct, or neglect of duty.

"Rule 457. When assigned to a train, take entire charge of it and of all persons employed thereon, until it is finally set off from the main track at the terminal station."

"Instructions to Enginemen:

"Rule 701. Obey orders of the conductor as to starting, stopping, switching cars, speed and general management of train, unless such orders endanger the safety of the train or would require the violation of the rules or cause injury to company property."

The following bulletin was issued by the superintendent:

"All Concerned:

"At all stations where a train is required by the rules or train order to meet or wait for an opposing train, the engineman will give one short sound of the whistle immediately after whistling for the station.

"In event of failure on the part of the engineman to give the prescribed signal, trainmen will take whatever steps are necessary to prevent the train

from passing the station."

From this statement it is evident that the four men on the engine knew of the order to stop at the east end of the switch at Keever, and that it was the duty of all of them to be on the lookout for the stopping place. They knew in abundant time to stop the train and avoid the collision that the stop ordered had not been made. They knew before reaching Keever of the failure to slow down in proper time, and that the train was going by. All of them well knew, as reasonable men, of the almost certain death which would result from disregard of the order. There is no living witness of what took place on the engine or of the reason for going by, but it is impossible to believe that the train would not have been stopped had any one of the four men remembered the order. None but a mad engineer would have gone on had he been reminded of the order, and none but a mad conductor, brakeman, or fireman would have allowed him to go on had the order been remembered. Memory and attention fail much more readily and frequently than the instinct of self-preservation in the presence of imminent peril. I cannot think it is going into the field of conjecture to say that the most reasonable, if not the only, explanation of the accident is that the four men, engaging each other in conversation, or having their attention otherwise diverted, forgot the order, or were inadvertent to it. It is unbelievable that they would not have united in the common purpose to stop the train had any one of them thought of the order. It seems perfectly evident, then, that had any one of them been advertent to his duty, the accident would not have happened. Looked at in this way, the case is precisely one which the statute was designed to meet, in that the death of the engineer resulted in part from the negligence of the other employés of the defendant in being inadvertent to their duty.

The case is peculiarly strong, and different from any which has been cited, and any which we have been able to find, in that the conductor, the representative of the master in charge of the train, was on the engine, standing by the side of the engineer, and that a touch or word from him would undoubtedly have stopped the train in obedience to the order given to him. I cannot resist the conclusion that to hold that the duty of the engineer was primary, and that of the other trainmen only secondary, while they were standing side by side, all under the same duty to stop the train, and when any one of them could and would have stopped it but for the forgetfulness of duty in which all participated, is to hold the engineer alone responsible for the breach

of duty and failure of memory of all.

Review of the numerous cases on the subject would not be enlightening. The principles upon which the cases rest are well established. The difference is in their application. The following cases state the principle involved, but an examination of them will show that in its facts this case is different from all of them: Seaboard Air Line Railway v. James T. Horton, 239 U. S. 595, 36 Sup. Ct. 180, 60 L. Ed. 458; Illinois Central R. R. Co. v. Fulton M. Skaggs, 240 U. S. 66, 36 Sup. Ct. 249, 60 L. Ed. 528; Great Northern Railway Co. v. Wiles, Administrator, 240 U. S. 444, 36 Sup. Ct. 406, 60 L. Ed. 732; Pennsylvania Railroad Co. v. Goughnour, 208 Fed. 961, 126 C. C. A. 39; Smith v. Atlantic Coast Line R. R. Co., 210 Fed. 761, 127 C. C. A. 311; New York C. & St. L. R. R. Co. v. Niebel, 214 Fed. 952, 131 C. C.

A. 248; Norfolk Co. v. Earnest, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172; Grand Trunk Co. v. Lindsey, 233 U. S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168; Central R. R. Co. of New Jersey v. Young, 200 Fed. 359, 118 C. C. A. 465; Tidwell v. Central of Georgia Railway Co., 140 Ga. 250, 78

S. E. 898; Kendrick v. Chicago R. R. Co., 188 Ill. App. 172.

The case of Spokane Railroad Co. v. Campbell, 241 U. S. 497, 36 Sup. Ct. 683, 60 L. Ed. 1125, decided June 12, 1916, is analogous, and upholds the right of the plaintiff to recover in this action. The plaintiff, Campbell, was an engineer injured by collision with another train. The jury found a special verdict: (1) That the plaintiff ran his train, which was a special, out of the terminus, Cour d'Alene, in violation of an order which required him to await the arrival of regular train No. 20; (2) that the air brakes on Campbell's train immediately before the collision were insufficient to enable him to control the speed of the train; (3) that Campbell's leaving Cour d'Alene in violation of his orders was the proximate cause of the accident. The court, nevertheless, sustained a verdict against the railroad company, using this language:

"It is said that, conceding the power-brake provision applies to electric trains, the duty imposed was not owed to Campbell under the special circumstances established by the jury's findings. The argument is that the purpose of the brake requirements is to place control of the train in the hands of the engineer, so that the safety of passengers and employes may be conserved, not that the engineer should be able to escape injury from peril to which he had wrongfully exposed himself, and that Campbell cannot bring himself within the class intended to be protected by pointing out that the situation created by his disobedience of orders was one that Congress contemplated as possible and the consequences of which it desired to guard against. This gives altogether too narrow a meaning to the Safety Appliance Act, and is inconsistent with the provisions of the Employers' Liability Act, as we shall see."

The conclusion of the court was that the defect in the brake and the engineer's violation of the order were concurring proximate causes of the accident, and the engineer was therefore entitled to recover. In this case the forgetfulness of the conductor was an act of negligence, concurring with that of the engineer, without which the accident would not have happened.

For these reasons I think that the judgment of the District Court

should be affirmed.

AUSTRALIA TRANSIT CO. v. LEHIGH VALLEY TRANSP. CO. et al. FEDERAL INS. CO. et al. v. AUSTRALIA TRANSIT CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1916.) Nos. 2768, 2769.

1. Collision \$\iffsigmathrightarrow{\iffsigm

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 78; Dec. Dig. ©=61.]

2. COLLISION \$\iiii 61\$—STEAM VESSELS MEETING—CONTRIBUTORY FAULT.

The meeting vessel and her tow also held chargeable with contributory fault for not taking stops to avoid the collision, when after the exchange

fault for not taking steps to avoid the collision, when, after the exchange of passing signals, the disabled vessel, then nearly half a mile distant, began to sheer, and sounded two alarm signals.

Appeal from the District Court of the United States for the East-

ern District of Michigan; Arthur J. Tuttle, Judge.

Suit in admiralty for collision by the Lehigh Valley Transportation Company, owner of the steamer Bethlehem, against the steamer Australia and the barge Polynesia, the Australia Transit Company, claimant, with cross-libel, and intervening libels of the Federal Insurance Company and others. From the decree, the Australia Transit Company and the Insurance Companies appeal. Modified.

In Case No. 2768:

H. D. Goulder and F. S. Masten, both of Cleveland, Ohio, for appellant.

G. L. Canfield and Sherwin A. Hill, both of Detroit, Mich., for appellees.

In Case No. 2769:

H. A. Kelley, of Cleveland, Ohio, for appellants.

G. L. Canfield and Sherwin A. Hill, both of Detroit, Mich., for appellees.

Before KNAPPEN and DENISON, Circuit Judges, and EVANS, District Judge.

DENISON, Circuit Judge. At about noon of June 13th, in the St. Clair river, the steamer Bethlehem, loaded and down-bound, and the steamer Australia, with the barge Polynesia in tow, up-bound, were in collision. Serious damage was done to both steamers and to the Bethlehem's cargo. The channel at this point was 1,500 feet wide. The Bethlehem was near the American shore, and the up-bound boats

were about mid-stream, and port passing signals had been exchanged, when the Bethlehem sheered across the stream and struck the Australia in the side. While still in that position and before the Bethlehem backed effectively, the barge Polynesia came on and struck the Bethlehem. Obviously, the initial burden of explanation is upon the Bethlehem; and she meets that burden upon the theory of inevitable accident. It is claimed in her behalf that her steam steering gear suddenly refused to work, and that she did everything possible thereafter to avoid the disaster, instantly reversing and continuing to back until after the collision, and blowing alarm signals; and she charges fault upon the Australia and Polynesia in that, with ample warning and opportunity to escape the collision, they did nothing whatever for their own safety, but came heedlessly along, whereby their fault was the sole proximate cause of the collision.

[1] The first thing to decide is whether the Bethlehem was at fault. The real cause of the trouble is very obscure. Only two theories are suggested, and one or the other must be adopted: The first is that the cargo fouled the steering cable in the hold; the other is that a fragment of packing or scale became detached and was carried by the steam current into a valve, preventing it from closing, and leaving it balanced, so that it would not operate in either direction. This seems

to be a known possibility and is called "steam bind."

The first hypothesis has no direct evidence to support it. It is not at all impossible, since sugar, in bags, was piled very nearly to the cable, and if, through some slight shifting, one of the bags had come into position to be jammed into a leader by the cable passing through, it might naturally have produced the precise results that did occur. No such jamming was found when an examination was later made, but occurrences in the meantime might have removed all evidence of it.

If the second hypothesis is the right one, we are not satisfied that it should be considered as unseaworthiness existing when the ship left port; but it does not follow that the occurrence was inevitable accident. The steering engine had worked perfectly, during the entire voyage from Duluth, until about half an hour before this accident. At that time, it had "stuck," and on two occasions the wheelsman had been compelled to make an effort to get it past the sticking point. This had been reported to the captain, and, after the accident, was recounted by the wheelsman to the mate. If the refusal to work at the time of the collision was caused by this steam bind coming from the presence of such a fragment in the steam current, the trouble shortly before was presumptively from the same cause. The ship was chargeable with notice that this was the trouble, or, at least, that it might be the trouble; and the boat might have been stopped, or an emergency steering gear might have been put into use, while the engine was examined, to make certain that the fragment had been blown on through, so that it would give no more trouble. This was not done. and the ship took the risk that the troublesome fragment or another one like it might still be in the engine and might again find lodgment in the valve and give trouble.

In addition to both these theories of fault, it is to be observed that there was an interval of at least three minutes (the Bethlehem claims about twice as much) after it was known that the steering engine was disabled and before the collision. It would seem that the boat might well have been provided with an alternative or emergency steering gear, which could have been put into use within much less time; but this has not been argued as a ground of fault, and we do not depend upon it.

Considering the whole situation, we think the Bethlehem has failed to establish the existence of inevitable accident by that high degree of proof and with that measure of certainty which the law rightly demands to exculpate a vessel which has directly caused a collision. The Lackawanna (C. C. A. 2) 210 Fed. 262, 127 C. C. A. 80; The Merchant Prince, L. R. 1892 Probate Div. 179; Bradley v. Sullivan (C. C. A. 6) 209 Fed. 833, 835, 126 C. C. A. 557; Hawgood v. Meaford (C. C. A. 6, May 10, 1916) 232 Fed. 564, — C. C. A. —.

We have no difficulty in distinguishing this case from The Olympia (C. C. A. 6) 61 Fed. 120, 9 C. C. A. 393. There no theory of explanation was or could be suggested, excepting that the rudder cable had broken. Not only was there no evidence that any defect had been observed, but it was proved that regular inspection had demonstrated that there was no visible trouble. It necessarily followed that the defect must have been of that latent character which could not have been discovered, and hence that the resulting accident was to be classed as inevitable. In the present case, if the trouble was caused by fouling the cable—and there is no compelling reason for discarding that theory—the ship was clearly at fault in the stowing of the cargo or in caring for it during the voyage; and if the trouble was in the steering engine, the ship had notice within the previous hour that something was wrong with the engine, but paid no attention. If there was a duty to be provided with alternative steering gear which could be used quickly, the case is even clearer. So it is apparent that there are clear distinctions between the facts of this case and those of the Olympia.

We infer from the briefs that it is not necessary to decide whether the Bethlehem's fault should be definitely attributed to one or another of these causes, or whether any one constitutes unseaworthiness rather than negligence; if counsel think otherwise, we will consider

an application to that effect.

[2] We are clear that the up-bound boats were also in fault, but we are not able to regard that fault as so extreme as to constitute the sole proximate cause of the collision (assuming that the rule of sole proximate cause, or last clear chance, applies in admiralty as at common law). The extent of this fault depends primarily upon the distance between the boats when the Australia, with proper attention, should have realized that the Bethlehem was out of control. Some confusion as to this distance is caused by an uncertainty as to the place intended by the witnesses when they speak of Recor's Point. The river is here making a bend, and the apex of the bend—the point

—where boats would naturally change their course, and where the official chart indicates a change in course, is at a spot marked as Rankin's Dock. About 2,000 feet down stream—on the side of the point—is Recor's Dock, and here is situated a station on the electric railroad running along the bank, which station is named Recor's Point. The evidence of the witnesses, when they speak of Recor's Point, not only indicates quite strongly that they meant the point of land or the apex of the bend which mariners would naturally have in mind, but in the only instance where the question was raised it was made clear by both counsel and witness distinctly saying that "Recor's Point" meant "Rankin's Dock." The distance between the boats must, therefore, be made some 2,000 feet less than if it were supposed the witnesses referred to the little station on the railroad.

We conclude that the boats were about one mile apart, when they exchanged port to port meeting signals. There was a 2-mile current and the Bethlehem was making 14 miles and the Australia 7 miles each past the land. They were, therefore, due to meet in about 3 minutes. The Bethlehem was close to the American shore on her starboard, and though the Australia claims to have been in midstream, we are satisfied she was well toward the American shore, keeping towards the shorter line, on the inside of the curve, as she had a perfect right to do. As soon as the Bethlehem's rudder failed to respond, she blew an alarm, and shortly afterwards a second alarm. It was not until after this second alarm that she began noticeably to sheer towards the center of the stream. It is conceded that a boat which takes a sudden sheer usually quickly recovers and straightens up. About this time, the Australia, either swinging to starboard under the agreement or making out from the American shore because of continuing her straight course past the bend, was approximately in the middle of the channel. Her captain, if he had noticed the sheer of the Bethlehem as soon as it should have been clearly apparent to him, could not be bound on the very instant to appreciate that it would continue and bring the Bethlehem away out to the middle of the river. The alarm signal, even when repeated, did not mean that the boat could not be steered. It might mean that the power was gone or any one of several other things. The only sure meaning to the Australia of the first alarm was, "Look Out! something is wrong."

A detailed discussion of testimony is not worth while, but making all allowances for loss of speed of the Bethlehem, due to backing and changing of course, we cannot escape the conclusions that at the time when the captain of the Australia, if he had been observing with care, should be held to know that the Bethlehem was out of control and likely to cross over into his course, and so bound to shape his conduct accordingly, the vessels were rather less than half a mile apart, and that not more than about two minutes intervened between that time and the collision.

Cases are cited to the effect that, when two boats are approaching and one blows an alarm, it is the duty of the other to stop; but these are cases of unincumbered boats meeting in open water. There can

be no such hard and fast duty upon the master of a steamer incumbered with a tow and going against a current in a curving channel. If the Australia had been enabled, by backing and with the aid of the current, to stop sharp, the Polynesia would perhaps have run into her; or if the tow line had been cast off, the Polynesia would quickly drift ashore; or, if the Polynesia had avoided this danger by anchoring, she might have been exactly in the path of the approaching, rudderless boat. Neither, if the captain of the Australia had known exactly what was the matter, could he have been certain how to make his boat safe. The Bethlehem might come across at any angle. it turns out, if the Australia had been only one length further down stream, there would have been no collision; but this was pure chance. As it turns out, also, the very safest thing for the Australia to do would have been to get over to the American shore as sharply as possible; but this would have been crossing the regular course of the other boat, and, if it had resulted in collision, the Australia would have been surely condemned.

Looking at the situation as far as possible as it then should have appeared to a careful navigator of the Australia, we think due care required that, as soon as the Bethlehem's second alarm was blown, the Australia should have checked as much as could be done without getting into trouble with the tow, and should have given notice to the barge to be ready for any emergency, and then, as soon as the course of the coming sheer could be judged (see The Ohio [C. C. A. 6] 91 Fed. 547, 558, 33 C. C. A. 667), should have gone over as sharply and as rapidly as possible toward the Canadian shore, and directed the tow accordingly. These two movements not only would have avoided the collision which did take place, but they would have been the things most likely to avoid whatever shape the developing danger might take. These considerations convince us that the Australia was at fault, but not in such degree as to make it proper to exonerate the Bethlehem from the damages.

We have assumed that if the navigators of the Australia had been vigilant, but had made the mistake of continuing on their course as long as they did and in checking as little as they did, this contributing fault, and this only, should be imputed. It cannot make the case of the Australia any worse that her officers were not in fact vigilant, and very likely did not appreciate the danger nearly as soon as they should have done so. If arbitrarily applying to the boat the true and proper standard of vigilance does not make her solely responsible for the collision, it cannot be material, on that issue, whether she in fact fell short of that standard much or little.

Rule 26 of the White Law (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 645, 649 [Comp. St. 1913, § 7936]) pertains to a case where a meeting agreement is in doubt. It puts no burden on the Australia beyond the one we have applied.

The Polynesia was also in fault for the second collision. The tow line was 700 feet long, and even after the collision between the two other boats had become unavoidable, there was, seemingly, ample time for the Polynesia to cast off the tow line, and either to anchor or to swing to one side or the other of the two boats ahead. At any rate, the negligence of the Polynesia's captain in not promptly trying to do anything will not justify speculation as to whether he might have been hit if he had attempted to pass on either side, or might have failed if he had tried to anchor. Neither as to the Australia nor the Polynesia is a situation presented where a navigator was reasonably vigilant in apprehending danger and in trying to avoid it, and where he merely chose in an emergency what turned out to be the wrong expedient.

The damages should be divided, with due regard to the more or less separable faults involved. We think the conclusions we have stated will enable the court below to enter the proper decree. If not, and if any further question ought to be decided by us on this record, counsel may call it to our attention within the time allowed for a rehearing application. The Australia and Polynesia will recover against the Bethlehem the costs of their appeal; the cargo will recover against all the boats its costs of its appeal.

THE SATILLA.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 270.

 MASTER AND SERVANT ⇐=316(1)—MASTER'S LIABILITY FOR NELIGENCE—In-DEPENDENT CONTRACTORS.

A stevedoring company, which contracted generally to load and discharge the vessels of a steamship company at New York, the steamship company giving orders when and where to load or discharge a vessel, but not as to the manner of doing the work, was an independent contractor, for whose negligence the shipowner was not responsible.

|Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1242; Dec. Dig. ♦==316(1).]

2. Master and Servant ⇐=321—Master's Liability for Negligence—Independent Contractor.

Where such contract required the vessels to furnish winches, but required the stevedore to keep them in repair and to furnish the winchmen, the responsibility for the use of a winch which had, to the knowledge of both parties, been defective for several years, was that of the stevedore.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1262; Dec. Dig. ♦ 321.]

3. MASTER AND SERVANT \$\infty 301(4)\$—LIABILITY FOR NEGLIGENCE—SERVANT OF INDEPENDENT CONTRACTOR.

A winchman furnished by the stevedore under such contract, and who worked entirely under its orders, was a servant of the stevedore, which was alone responsible for his negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1213, 1214; Dec. Dig. &=301(4).]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the New York Central & Hudson River Railroad Company against the steamship Satilla, the Texas City Steamship Company, claimant, with the Chiarello Bros. Company, impleaded. Decree for libelant against the Chiarello Bros. Company, and that company appeals. Affirmed.

For opinion below, see 221 Fed. 949.

McFarland, Taylor & Costello, of New York City (Willard U. Taylor and Alfred H. Strickland, both of New York City, of counsel), for appellant.

Barry, Wainwright, Thacher & Symmers, of New York City (James K. Symmers and Earle Farwell, both of New York City, of counsel),

for libelant-appellee.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Chauncey I. Clark, both of New York City, of counsel), for claimant-appellee.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

ROGERS, Circuit Judge. This libel was filed by the libelant, as the owner of the lighter Samson and as the bailee of the cargo laden thereon and on behalf of the crew thereof, against the steamship Satilla, her engines, boilers, etc., and against all persons lawfully intervening therein, to recover damages for injuries which the Samson suffered on November 27, 1912, while at Pier 44, North River, New York City.

At the time this injury was done the Samson had been hauled alongside hatch No. 1 of the Satilla, to which she was made fast. The Satilla was being loaded with steel rails laden on the lighter Samson. The rails were handled by employes of Chiarello Bros. Company, stevedores. The rails were being hoisted on board the Satilla by means of winches and tackle owned by the Satilla and furnished by the owner to the stevedores and operated by the latter's employés at the time of the accident. The rails were taken from the pile on the Samson's deck and a chain sling was placed around them, three at a time, and hoisted from the Samson's deck until they were above the level of the steamship's rail, when they were swung on board by the Satilla's derrick and tackle and lowered into the steamship's hold. During the progress of the work three rails were negligently dropped from the sling when it was the height of the steamship's deck. They fell end-on to the deck of the lighter, piercing the deck and bottom of the Samson, and caused her to sink.

The rails, while being loaded into the steamship, were first fastened by an iron sling or chain around a draft of three rails in the usual way, which was as follows: By passing the sling chain twice around the rails, and crossing the hook end of the chain over the first turn of the chain, and engaging the hook with the suspended part of the chain, thereby causing the hook end of the chain to grip the first turn around the three rails to be hoisted. The sling or chain was placed around the rails about ten feet from one end thereof, so that when they were hoisted they stood or swung perpendicularly or somewhat

diagonally.

The Texas Steamship Company, as the owner of the Satilla, filed its petition under the fifty-ninth rule in admiralty (29 Sup. Ct. xlvi) against the Chiarello Bros. Company. The petition states that the damages resulting from the fall of the rails were not due to any negligence on the part of the Satilla or those in charge of her, but were due to the negligence of Chiarello Bros. Company who were in charge of the unloading. The Chiarello Bros. Company allege that the accident was wholly caused by the defective winch of the Satilla, which they were directed and ordered to use by the Satilla, although it was out of order and out of repair to the knowledge of the Satilla before the accident.

[1] There is no doubt upon the testimony but that the Chiarello Bros. Company was an independent contractor. There was no relationship of master and servant between it and the Satilla. The Chiarello Company controlled the men engaged in loading and unloading the rails. The president of the Chiarello Company testified as follows:

"Q. Did you get orders from McMahon? A. I got orders from McMahon. Q. What orders did he give you? A. He gave me orders when he wants the cargo, how quick he wants the ship discharged or loaded, when the ship has got to go; if he wants us to work nights or days, and where he wants the cargo, he says. Q. In other words, he tells you when to work and where to work? A. He tells us when to work and where to work. Q. And how to work? A. No; not how to work; he says, 'This ship has got to be discharged night and day,' and we work night and day, Sundays or Sunday nights; and if he isn't in a hurry he says, 'We are in no hurry, and you needn't go to work day and night.'"

The McMahon referred to was the superintendent of the owner of the Satilla. Moreover the express contract entered into between the contractors and the company owning the Satilla provided as follows:

"The contractors at their own cost and expense shall:

"First. Supply all the necessary tools and gear to perform such services, with the exception of ships, winches, booms, falls and guys, hand trucks, and planks or skids, all of which are the property of the company and are loaned to the contractors, with the distinct understanding that same will be kept in proper repair and condition, and when damaged to the extent of being of no further use will be replaced by the contractors.

"Fifth. Guarantee the company against any liability or claims arising by reason of accident or injury to the persons or employes of the contractors while such persons or employes are performing the services herein described either on board steamers or on lighters or wharves, particularly any injuries resulting from negligent or careless use of ship's gear.

"Likewise be responsible for any damage to the ship's hull, machinery, tackle, or gear, or to any other property, such as docks, lighters, or other floating equipment, that may be designated, owned, or used by the company, or their shippers or consignees, who may from time to time receive or deliver cargo.

"In accepting this agreement the contractors severally and jointly pledge themselves to strictly comply with its conditions, also to use every possible effort to protect the company's property and interests, as well as that of its shippers and consignees, to employ competent laborers and foremen, and to keep a constant watch on their men to prevent rough handling, breakage, pll-ferage, or any other damage to cargo."

[2] The winch which the stevedore used was not in perfect condition. The Satilla, which furnished it, was aware of that fact prior

to the accident. The stevedore also knew before the accident of its defective condition. Whether the winch was defective when it originally came into the possession of the stevedore does not appear with certainty, as the stevedore had been using it for a number of years and under its contract was bound to keep it in repair. However that may be, the stevedore cannot be excused because the Satilla furnished a defective winch and insisted on its being used. If the winch was unsafe when it was furnished, the stevedore was under no obligation to accept it, and should have declined to use it. And if safe when received, and it subsequently got out of repair, the stevedore was bound to repair it. The defect was that the winch would not at all times release, because of the inefficiency of the spring to move the drum back laterally on the shaft. When it failed to release, the person operating it would knock it loose by striking it with his hand or with a bar of wood or iron. The president of the Chiarello Company testified that the assistant engineer of the Satilla had said to him, when he complained about the winch, "The winch is all right," and "The only thing is that the drum don't release the winch, and then the thing is to bang it with a fishel; all they have to do is to knock them on the side of the drum, and they come back themselves; there is not much trouble about it."

Sometimes it was necessary to strike it five or six times before it would release, and sometimes one strike would release it; but when it was thus released the drum came back suddenly with a jerk. This trouble with the winch was not recent. The employé whose duty it was to give the signals to the winchman testified that "there was always something the matter with this winch." He was asked if the winch was used the day after the accident, and he said it was. He was then asked how it worked, and he replied:

"It always worked in the same manner; they were striking it, and it would then go back, and then they would stop again the work [to fix it]."

For several years it had always worked in the same way. The winchman was asked how long he had used this winch, and he said for six or seven years. He was asked then:

"Q. During those six or seven years did you have any trouble with the drum? A. There always was trouble. Q. What was that trouble? A. It was always the same thing, that the drum would not release."

He afterwards said that he had known the winch was out of order for three or four years. He further testified:

"Q. Will you tell the court how you operated this winch? A. When I received the order from the foreman, I would put on the steam and work the lever. Q. You worked the lever to do what? A. In order to start the working of the drum, and then as soon as the sling of rails was ready I would let her go, and would put my foot on the stop. Q. On this occasion, when the sling of rails fell, did the drum come back or release itself? A. No. Q. What effect did that have on the sling of rails when the drum did not come back? A. I was myself the cause of what happened; as soon as I saw that the drum did not come back, then I myself struck it with my own hand, and then this caused the chain to jerk. Q. What did you strike it with your hand for? A. In order to release the drum."

[3] The winchman was employed by the Chiarello Company and was its servant, and not the servant of the Satilla. In The Slingsby, 120 Fed. 748, 57 C. C. A. 52 (1903), this court held that a winchman was not the employé of the stevedore who had contracted to discharge and load the vessel. In that case the winchman was under the direction of the stevedore. But the contract there provided that the stevedore should furnish all labor and appliances, except winches and winchmen; and the captain of the vessel detailed a seaman to run the winch. As the stevedore had no power to discharge the winchman, and no power to require him to perform any other duty, or to substitute any person in his place, we held that he did not become their servant while in the service, but remained the servant of the ship, which was liable for his negligence.

In The Elton, 142 Fed. 367, 73 C. C. A. 467 (1906), the winch and the winchman were both furnished to the stevedores by the ship, and the Court of Appeals in the Third Circuit held the winchman was not the servant of the ship. It noticed the decision of this court in the Slingsby Case and said:

"We regret that we are not able to agree with the conclusions of law and fact reached by that eminent court. In a case like the present, we think the true test of fellow servant is whether both are, at the precise time of the accident, working in a common employment, under the same general control and direction. We think reason and the weight of authority supports this view."

The question came before this court again in Standard Oil Co. v. Anderson, 152 Fed. 166, 81 C. C. A. 399 (1907). In this case the injury resulted because a winchman reversed the winch before signal to do so was given him. The stevedore hired the longshoremen, but the ship furnished the winchman. The stevedore did not hire and could not discharge the winchman. The case was on all fours with the Slingsby Case, and was decided in the same way—that the winchman was not the servant of the stevedore. This court, speaking through Judge Lacombe, said:

"Our attention has been called to The Elton, 142 Fed. 367 [73 C. C. A. 467], in which the Circuit Court of Appeals in the Third Circuit reached a different conclusion upon a similar state of facts. We regret that we are not able to agree with the conclusions of law reached by that eminent court, but we see no reason to change the opinion heretofore expressed in The Slingsby, which was reached after careful examination of the authorities cited in The Elton."

The case was carried to the Supreme Court of the United States, and the authorities were considered at length, and the decision of this court was affirmed.

But the facts in the case at bar do not bring it within the rule this court laid down in the Slingsby and Standard Oil Co. Cases. The winchman was not furnished to the stevedore by the Satilla. He was by his own testimony employed by the Chiarello Company. That company had employed him for about eight or nine years. A witness was asked:

"Q. Who handled the winches when they were loading this cargo, the stevedores or men from the ship? A. The stevedores handle the winches. Q.

Have any men from the ship anything at all to do with the loading of the cargo? A. No, sir."

Another witness, second officer on the Satilla, was asked:

"Q. Who worked the winch? Do you know? A. Some of the longshoremen; I don't know who it was; probably the stevedore there (indicating) will tell you what man it was, I couldn't tell you. Q. Are you able to say on this occasion it was not a member of the crew of the Satilla? A. No, sir; it was none of our crew."

The chief engineer on the Satilla was asked:

"Q. Did you or your men have anything to do with the loading of the cargo? A. No, sir; don't have anything to do with the loading of the cargo. Q. Did you ever have anything to do with the running of the winch while the cargo was being loaded? A. No, sir."

There can be no question but that this winchman, selected by the stevedore company, employed by it, and subject to its orders, and who could have been discharged by it, was its servant, and, as it had exclusive control over him, it was answerable as his master for his conduct. The person in whose business another is engaged at the time, and who has the right to control and direct his conduct, is such person's master. The master is the one who has the control and direction of the servant, and whose will the servant represents, not merely in the ultimate result, but in the details of the work. 26 Cyc. 965. And the relation of master and servant does not exist between an employer (in this case the Satilla) and the servants of an independent contractor (the Chiarello Company), unless the former assumes control over the servant of the latter, and there is not the slightest evidence of that in this case.

Notwithstanding the testimony that for years there was trouble with this winch, because the drum stalled and was released by striking it, and that this caused a jerk unless the foot lever was used to prevent it, the evidence shows that no such accident as the falling of the rails from a sling had happened prior to this one. The winchman was asked whether he expected to have any trouble with the rails slipping out, and he answered that he did not anticipate it. The witness Terrance testified that he had never heard of any rail slipping until this occasion. Pelegrino testified that no such thing had ever occurred in his experience. Benfonti, a winchman who used this winch, stated that he had never known any cargo to slip, except in this particular case. Montanino had handled 20,000 or 30,000 tons of rails, and had never seen any slip out of a sling. The president of the Chiarello Company testified that he had never before had an accident in handling rails, and that he had no reason to expect that any accident like this would happen. He also stated:

"There was nothing very dangerous with the winch; the only thing was that it did not release it, and they had to go with a bar to knock it, or knock it with a fishel."

In view of the above testimony, and the further testimony that the sling of rails was properly made up in the usual customary and careful manner, there must have been negligence of some sort beyond and outside of the use of this winch. The conclusion to which we have

arrived is that the accident was caused by the failure, in this instance, of the winchman to use his foot lever when the drum of the winch was released by the winchman's blow. The expert, Campbell, a manufacturer of winches of 28 years' experience, called by the stevedore, testified that if the winchman "puts his foot on the brake it will stop the load and hold it there." The president of the Stevedoring Company, who had had many years experience in the business and was familiar with winches, testified that the drum could not move either way when you put the foot brake on. As we understand the evidence, the accident was primarily due to the failure of the winchman to have his foot on the brake.

As the injury was caused by the failure of the winchman to use the foot lever brake, a part of the mechanism provided for the purpose of holding as well as lowering the load, and by which the jerk could have been kept from being serious, the stevedore must be held responsible for the negligence of its servant.

The decree is affirmed.

MUNSON S. S. LINE v. GLASGOW NAV. CO., Limited. (Circuit Court of Appeals, Second Circuit. May 15, 1916.)

No. 4.

1. Admiralty 33-Premature Commencement of Suit-Effect.

It is not the practice in admiralty to dismiss a libel because prematurely filed, if the right has accrued afterward, and before the matter is presented for final determination. The fact that the suit was prematurely brought will affect only the matter of costs.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 313-315; Dec. Dig. ⇐= '3.]

2. Admiralty \$\infty 117-Procedure on Appeal-Trial De Novo.

Under rules 7-10 in admiralty of the Circuit Court of Appeals for the Second Circuit (150 Fed. lvii, lviii, 79 C. C. A. lvii, lviii), a libelant on appeal may properly be allowed to make new allegations in a supplemental libel and take new proofs in the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 748-757; Dec. Dig. &=117.]

3. Shipping \$\infty\$ \$5\infty\$ Injury to Stevedore\(-\text{Recovery Against Charterer}\) \(-\text{Suit Against Owner to Recover Over.} \)

A charterer held not debarred of the right to maintain a suit against the owner to recover over after payment of a judgment recovered against it for injury to a stevedore, because of the insufficiency of the notice given to the owner to defend the action, where the result of such action could have no effect to determine liability as between charterer and owner.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 339; Dec. Dig. \$35.]

4. Shipping \$\infty 45, 47-Charters-Duty to Load and Discharge.

In the absence of a contract or binding custom to the contrary, it is the duty of the owner to load and discharge his ship, and this duty applies to chartered ships, whether on time or voyage charters, provided the ship is not demised.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 177-183; Dec. Dig. € 45, 47.]

5. Shipping \$\infty\$ 85—Injury to Stevedore—Liability as Between Owner and Charterer,

A time charter of a steamer in government form, which was not a demise of the vessel, required the owner to provide and pay for all provisions, wages, and consular shipping and discharging fees of officers and crew, and the charterer to pay all other charges. It further provided: "All steam winches to be at charterer's disposal during loading and discharging and steamer to provide men to work same." Held that, while such provisions required the charterer to pay the expense of loading and discharging, except for the winches and winchmen, they did not make such loading and discharging the duty of the charterer, but left such legal duty upon the owner, and that as between them the owner was responsible for an injury to a stevedore resulting from the negligence of a winchman while discharging.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 339; Dec. Dig.

€==85.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Munson Steamship Line against the Glasgow Navigation Company, Limited. From a decree dismissing the libel, libelant appeals. Reversed.

Haight, Sandford & Smith, of New York City (J. W. Griffin, of

New York City, of counsel), for appellant.

Kirlin, Woolsey & Hickox, of New York City (Charles R. Hickox and Cletus Keating, both of New York City, of counsel), for appellee.

Before COXE and WARD, Circuit Judges, and AUGUSTUS N. HAND, District Judge.

WARD, Circuit Judge. The libelant was charterer of the British steamer Denaby under a time charter. While the cargo was being discharged April 19, 1907, by the consignee, the American Sugar Refining Company, the stevedores undertook to lift one of the cross-beams of No. 2 hatch, weighing about a ton and a half, into place, which fell and injured one of them, named Michael Callahan. He brought suit against the Munson Line, the charterers, and the American Sugar Refining Company, the consignee of the cargo, in the Supreme Court of the state of New York for Kings county, and on April 25, 1911, the court dismissed the complaint as to the American Sugar Refining Company and submitted the case to the jury as to the Munson Line, against which they rendered a verdict for \$11,586.09. This was affirmed December 18, 1911, by the Appellate Division (Callahan v. Munson S. S. Line, 147 App. Div. 934, 132 N. Y. Supp. 1123), and October 24, 1913, by the Court of Appeals (209 N. Y. 546, 103 N. E. 1122).

November 20, 1911, the libelant filed this libel against the owner of the steamer to recover anything it might ultimately have to pay on account of the judgment rendered against it in the state court, from which it was appealing. May 19, 1913, upon the respondent's exceptions, the libel was dismissed on the ground that the suit was premature. November 10 the libelant appealed, and January 12, 1914, within 15 days after filing the apostles, applied under our rules in admiralty 7 to 10 (150 Fed. Ivii, Iviii, 79 C. C. A. Ivii, Iviii) for leave to make

 $[\]leftarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 235 F.—5

new allegations, file a new pleading, and take new proofs in this court, which was granted.

Thereupon a supplemental libel was filed, setting up the payment by the Munson Line of Callahan's judgment. The respondent answered, alleging that the accident occurred because of the negligence of a winchman, who had been found by the state court to have been the servant of the charterer, libelant, which finding was binding on it and could not be contradicted in this court.

[1] The shipowner's first contention is that the District Judge properly dismissed the libel as premature. The admiralty is not technical in such matters; it aims to do substantial justice. In the course of common-law trials, at least in the state courts in this district, the statute of limitations would frequently run before the defendant had been compelled by the court of last resort to pay such a judgment. It would have been so in this case. The accident occurred April 19, 1907, and the libelant was not at the last ditch until October 24, 1913, more than six years thereafter. Its obligation to pay was first fixed April 25, 1911, and it filed the libel in this case November 20, 1911. It has been held that a sailor may recover his wages under a libel filed before he had completed his service and before there had been any demand or refusal. The L. B. Snow (D. C.) 15 Fed. 282. So, a libel having been filed for freight and demurrage, a supplemental libel was filed, setting up the same claim, together with a claim for demurrage thereafter incurred. Judge Benedict said:

"No injustice can result to the claimant from this course. The practice pursued, if not strictly regular, has in this case wronged no one, but, on the contrary, tended to save trouble and expense." 841 Tons of Ore (D. C.) 25 Fed. 864.

So, a libel having been filed to recover the price of setting up a boiler in a tug before payment was due, Green, J., said:

"But I think it is clear from the evidence that neither the claimants, nor Townsend & Co., nor any one on behalf of either of them, have ever tendered to the libelants, in fulfillment of their part of the contract, the note their contract called for, and that the right to libel has since the 19th day of December, 1891, been vested in the libelants. Had it been filed not until then, it would have been properly filed, as far as time is concerned. But the premature filing of a libel, if the right to libel accrues afterwards, and before the determination of the issue, affects the question of costs only. It is not necessary, nor is it the practice in admiralty, to dismiss such libel, if when the matter is presented to the court for final determination, it appears that the right to libel exists." The Pioneer (D. C.) 53 Fed. 279.

And in The Laselle (D. C.) 193 Fed. 539, a suit in rem was sustained to recover for lightering, refloating, and reloading a stranded vessel, although the reloading had not been completed. The circumstance that a suit is prematurely brought will only affect the question of costs.

[2] The shipowner next objects that we improperly allowed a supplemental libel with new allegations to be filed and new proofs to be taken in this court. It is the settled practice in this circuit to treat an appeal in admiralty as a trial de novo. Munson Line v. Miramar S. S. Co., 167 Fed. 960, 93 C. C. A. 360. And under our rules in admiralty 7 to 10, inclusive, the libelant was properly allowed to make

new allegations in a supplemental libel and take new proofs in this court.

[3] It is next objected that the notice to the respondent to come in and take part in the trial in the state court was too short and was accompanied by an illegal condition. The notice was given March 23, 1911, by cable to the respondent in Glasgow and on the same day to counsel in this city for the West of England Club in which the steamer was entered. The cause was tried March 28 and 29. No objection was made to this notice as being too short, and as the question to be litigated was not the liability of the owner, but the liability of the charterer, preparation of the owner's case was not necessary. We think this objection without merit. The notice required that the owner should admit liability as between itself and the charterer. It was not obliged to do this, and taking part in the trial would not have constituted such an admission. The charterer could not qualify its rights in this way. The purpose and effect of such a notice was to make the finding of the jury conclusive upon the owner in the following respects:

(1) As to the plaintiff's right to recover against the defendant.

(2) As to the amount of the plaintiff's recovery.

But the liability of the owner over to the charterer, if any, would have to be settled in a subsequent suit to be brought by it against the

owner, such as the present.

- [4] Now follows a most material inquiry, viz.: Who in point of law was doing the unloading, and therefore for whom was the negligent winchman acting? We have no doubt that, in the absence of a contract or of a custom binding upon the parties to the contrary, it is as much the duty of the shipowner to load and discharge the cargo as it is to carry it between the loading and discharging ports. In early days the crew did the loading and discharging, but in modern times it is done, at least in large ports, by master stevedores, who are independent contractors. All regular liners are so loaded and discharged. This duty of the owners applies to chartered ships, whether on time charters or voyage charters, provided the ship is not demised. Of course, when the charter is a demise, the charterer is to be treated pro hac vice exactly as if the owner.
- [5] Now by the law of this circuit the charter known as the government form is not a demise. Clyde Commercial S. S. Co. v. West India S. S. Co., 169 Fed. 275, 94 C. C. A. 551; Luckenbach v. Insular Line, 186 Fed. 327, 108 C. C. A. 405. The charter party under consideration is such form. No custom is alleged, making it the duty of the charterer under a charter which is not a demise to load and unload the cargo. Therefore we have to inquire whether it was the charterer's duty to do so under the charter in this case. The material articles are:
- "1. That the owner shall provide and pay for all the provisions, wages and consular shipping and discharging fees of the captain, officers, engineers, firemen and crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine room and other necessary stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service.

"2. That the charterers shall provide and pay for all the coals, port charges, pilotages, agencies, commissions, consular charges (except those pertaining to

the captain, officers or crew), and all other charges whatsoever, except those before stated.

"24. Steamer to work night and day if required by charterers, and all steam winches to be at charterers' disposal during loading and discharging, and steamer to provide men to work same both day and night as required, charterers agreeing to pay extra expense if any incurred by reason of night work, at the current local rate."

It is quite plain from the foregoing provisions that the charterer is to pay the expense of the loading and unloading except for the winches and winchmen, who are to be provided by the owner, though any extra payment for night work is to be defrayed by the charterer. This obligation to pay for the unloading does not make the unloading the duty of the charterer, but leaves the legal duty of loading and discharging upon the owner, just as the duty of navigation remained upon the owner, although it was being performed by a supercargo appointed and paid by the charterer. The Volund, 181 Fed. 643, 104 C. C. A. 373.

This duty is often varied by special provisions, such as that the ship shall employ the charterer's stevedore, or a stevedore to be approved by the charterer, or that the charterer or shipper or consignee shall load or unload. In the case of The Elton, 142 Fed. 367, 73 C. C. A. 467, which we infer was a voyage charter, it was provided that the consignee should unload, the ship furnishing winches and winchmen, and the master stevedore's contract was with him. Slingsby, 120 Fed. 748, 57 C. C. A. 52, which we understand to have been a voyage charter, the vessel did the unloading under a contract with the master stevedore, the ship to furnish winches and winchmen. In The Centurion (D. C.) 57 Fed. 412, the time charterer had charge of the loading. Cargo being damaged by bad stowage, Brown, I., held the time charterer primarily and the ship secondarily liable to the cargo owners. In Bull v. N. Y. & Porto Rico S. S. Co., 167 Fed. 792, 93 C. C. A. 182, the time charterers had the duty of unloading and had also agreed that there should be no claim against the owners for loss of cargo, for which reason they had to bear the cargo damage.

Cases of personal injury to a stevedore resulting from negligence of a winchman supplied by the ship, in which the question was whether the stevedore and the winchmen were fellow servants, discussed in the briefs, do not throw much light on the question here involved. The view of this court in The Slingsby that they were not fellow servants was affirmed in Standard Oil Co. v. Anderson, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480; but the liability of the shipowner and charterer inter sese for such an injury was not raised. In that case and in Johnson v. N. A. S. N. Co., 132 N. Y. 576, 30 N. E. 505, the owners were unloading their own vessels. It may be conceded that the jury found that Callahan was injured as the result of the negligence of the winchman, and that the court held that the winchman was the servant of the charterer, and not of the stevedore, and therefore, not being fellow servants, the defendant was liable. This would be true if the steve-dore was doing the charterer's work, but not if he was doing the ship's.

We hold that he was doing the ship's work.

The unloading was actually being done by the American Sugar Refining Company, consignees of the cargo. What their contract with the charterer was we do not know. The charter party is the document which regulates the relation of the shipowner and the charterer, while the bill of lading regulates those of the charterer and cargo owners; but no bill of lading is in evidence. Between those parties the charterer may have been the carrier, under the duty of unloading, and may have let the consignee do it, agreeing to furnish winches and winchmen. If so, then between them and their stevedores the winchman would be the servant of the charterer, performing its duty of unloading. Notwithstanding this, he would be, as between the shipowner and the charterer, the servant of the shipowner and performing the duty of the shipowner, if we have rightly construed the charter party. There would then be no inconsistency between the judgment of the state court, holding the winchman to be the servant of the charterer, and the right which it seeks to enforce against the shipowner in this

But, assuming that the state court, as matter of law, erroneously found the charterer liable for the negligence of the winchman, that should not prevent the charterer from claiming indemnity from the shipowner, if, as we have found, the discharging of the cargo was the shipowner's duty, and this accident was caused by the negligence of the winchman as the shipowner's servant.

The decree is reversed.

WOLF ▼. DISTRICT COURT IN AND FOR NORTHERN DISTRICT OF CALIFORNIA, SECOND DIVISION, et al. *

(Circuit Court of Appeals, Ninth Circuit. July 17, 1916.)

No. 2823.

COURTS 493(3)—FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION.

A federal court will not entertain an action to recover real estate while an appeal is pending from a judgment of a state court, to which plaintiff was a party, determining the title to the same property.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1349-1352; Dec. Dig. \$\infty 493(3).]

Petition by Maria Julia Wolf for a writ of mandamus directed to the District Court of the United States for the Northern District of California, Second Division, and William C. Van Fleet, Judge of said court. Writ denied

We are asked to issue writ of mandamus directed to the respondents to vacate an order made by the District Court on October 11, 1915, staying proceedings in a suit pending in the District Court and striking the cause from the calendar, and to direct the District Court of the United States to set such cause for trial and to proceed with the trial thereof at its early convenience.

The petition sets up that petitioner filed an amended complaint in an action at law in the District Court of the United States wherein petitioner was plaintiff and Edward Funkenstein defendant; that on January 7, 1915, the defendant answered the amended complaint; that on March 27, 1915, defend-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Rehearing denied September 5, 1916.

ant Edward Funkenstein moved the United States District Court to stay proceedings; that this motion was heard, and that, to support it, the plaintiff introduced a copy of the judgment roll in the action of Wolf et al. v. Gall et al., No. 50811 in the superior court of the state of California, and that it appeared by the judgment roll that plaintiffs in that action, before trial, alleged that plaintiffs were, at the time of the commencement of the action, in possession of the real property described in the complaint, and that such allegation was deemed denied by the defendants; that defendant Edward Funkenstein made no objection to the judgment roll so offered; that thereafter, on October 11, 1915, Judge Van Fleet granted the motion to stay proceedings, and struck the cause from the calendar of the United States District Court; that defendant Edward Funkenstein died in San Francisco in November, 1915, and that Rebecca Funkenstein Gall was appointed special administratrix of his estate and was substituted as defendant in the place of Edward Funkenstein, deceased.

In the amended complaint filed in the United States District Court, the plaintiff, Maria Julia Wolf, alleging citizenship in Guatemala, prayed judgment to be let into the possession of certain described property with the defendants, Sarah and Edward Funkenstein and Charles F. and Rebecca F. Gall. The complaint alleged, among allegations of heirship, that plaintiff, by death of one Tobe Funkenstein, became the owner and seised in fee simple of an undivided tenth interest in the real estate, and succeeded to the possession of the real estate, together with Arturo Wolf and the other defendants, as tenants in common, but that about June 30, 1913, the defendants

wrongfully ousted her and Arturo Wolf from possession.

The defendant Edward Funkenstein answered, denying that ownership and possession of the real estate ever were in Tobe Funkenstein, denying that Arturo Wolf was a brother of plaintiff and that plaintiff and Arturo were the children of Tobe Funkenstein, denying ownership or seisin in fee simple, or ownership of any interest in the described real estate, and denying ouster, all as alleged. Defendant also pleaded that in December, 1907, Tobe Funkenstein was the owner of the property and made a deed of gift of the same to defendants Charles F. and Rebecca Gall and Edward and Sarah Funkenstein. The deed is set forth. Defendant pleaded also that defendants Charles Funkenstein Gall, Rebecca Funkenstein Gall, and Sarah Funkenstein have been owners and in possession ever since the deed. Defendant pleaded the statute of limitations, and alleged that the superior court of the state of California assumed jurisdiction over the real property described, and every part thereof, and the right to determine title thereto, and to the subjectmatter of the action as between the parties to the suit in this manner: That on August 7, 1913, he, together with Arturo Wolf, brought action in the superior court in San Francisco, No. 50811, against Edward and Sarah Funkenstein and Rebecca and Charles Gall; that in this action plaintiffs claimed to be heirs at law of Tobe Funkenstein, and claimed certain ownerships in the real property described as heirs at law of Tobe Funkenstein, deceased, and they prayed that their title should be quieted and that they should have possession; that thereafter defendants in that action denied ownership of plaintiffs therein and right of possession; that trial was had and judgment ordered that Maria and Arturo had no right or title or right of possession to the property; that this judgment has not been vacated; and that the superior court of the state also decided that Charles Funkenstein Gall and Sarah Funkenstein and Rebecca Funkenstein Gall and Edward Funkenstein were owners in fee simple and entitled to the possession of the property, and that Arturo and Maria should be enjoined from making claim to the real property. For further defense it was set up that in the superior court of the state there was pending a proceeding in the estate of Tobe Funkenstein, deceased, wherein Arturo Wolf applied for letters of administration of the estate of Tobe Funkenstein, and that the petition for probate had not been determined as against a petition by the public administrator for letters of the estate of the said Tobe Funkenstein; that the special administrator had commenced an action in the superior court for the possession of the real property, and that that action was undetermined. Estoppel was relied on as a defense, and judgment prayed that plaintiff should be enjoined and that

the action be continued or abated until the final determination of the actions commenced in the superior court of the state.

Accompanying the motion made by the defendant Edward Funkenstein to stay proceedings in the federal court, Edward Funkenstein filed an affidavit setting up, in effect, that the superior court of the state of California had assumed jurisdiction over the real property described in the amended complaint in the cause and of the right to determine title thereto and of the subject matter of the action. Affiant set forth the proceedings to which we have just made reference, the entry of judgment by the superior court, the pendency of the proceeding in the probate matters and the institution of the suits by the special administrator.

A. W. Myers, counsel for the plaintiff, filed an affidavit in the District Court in opposition to the affidavit of Edward Funkenstein, to which we have just referred. Affiant therein denies that the plaintiff in the action in the state court. No. 50811, sued for the possession of the real estate, but that she alleged she was the owner in fee simple of a certain portion (one-tenth), and entitled to the possession and in the possession of a certain portion (one-tenth). and that upon the facts alleged by plaintiff in that action she could not maintain an action in ejectment, but could only maintain her action in equity to quiet her title. Affiant then says that in the action 50811 Edward Funkenstein did not assert title to the property in himself as heir at law, but claimed title under an alleged deed of gift and asserted title by prescription, and that in the trial had in the superior court of the state sitting without a jury, on May 1, 1914, the court rendered a decision, not upon the merits, but "a technical and erroneous decision, as to the law which determined the plaintiff's rights in said action, as appears from the said oral decision of said court." Affiant then quotes the opinion of Judge Sturtevant, of the superior court, in the case of Wolf et al. v. Gall et al., No. 50811. The opinion is somewhat elaborate, and enters into what the learned judge was pleased to term "every angle" necessary for its determination. The court considered the rights of illegitimate and legitimate children, and traces sections of the statutes of the state of California as codified in sections of the Civil Code. Findings and judgment were ordered for the defendant, and judgment thereafter duly entered.

Petitioner sets up that there was no finding or decision with reference to the title by prescription either in the plaintiff or defendant, and no determination of the issue by the court in that action; that thereafter the plaintiff Maria Julia Wolf appealed to the Supreme Court of the state, and the appeal is now pending and undetermined; that Maria Julia Wolf filed a motion for a new trial in case No. 50811, and that that motion is still pending in the superior court. Maria Wolf then alleges that she believes the judgment of the superior court of the state was erroneous, and not a legal determination of her rights, and she is not satisfied to have her rights determined by the courts of the state of California, and therefore brings this action in the federal courts to determine the legality of the so-called deed under which the defendant claims title to the real estate. The petitioner further alleges that the superior court, in 50811, has rendered a judgment which on its face decides that the deed of gift was executed and delivered by Tobe Funkenstein to the defendants, but that the court never considered evidence offered upon the trial of the action before it by which it was established that it never was the intention of Tobe Funkenstein to make or deliver a conveyance to defendants, and the affiant says that the judgment is nothing more than one of nonsuit, and that there is no judgment in 50811 binding upon affiant, because the judgment has been appealed from and is now undetermined. Affiant further alleges that a special administrator has been ordered to proceed with actions necessary to recover possession of the property belonging to the estate of Tobe Funkenstein, and that he has commenced two actions, but that the superior court has made an order vacating the appointment of a special administrator, and that all the actions and proceedings had by or on behalf of Edward Funkenstein are for the purpose of preventing a decision of the plaintiff's rights on the merits.

Leon Samuels, objecting to the granting of a mandate by this court, has filed an affidavit herein. He sets forth that action No. 50811 brought in the

superior court in California was to quiet title to the same property described in the petition herein and was based upon the ground that Maria and Arturo Wolf were entitled to succeed to the real property as heirs at law of Tobe Funkenstein. He sets up the judgment of the superior court adjudging that neither of them had title or right of possession to the property; that Edward Funkenstein and Charles and Rebecca Gall and Sarah Funkenstein were the owners and in possession and entitled to the possession, and that injunction was issued against Arturo and Maria Wolf from claiming the real estate; that this judgment has not been modified or set aside; that after this judgment was rendered Arturo brought suit in the superior court of the state, alleging that the deed under which Edward, Charles, and Rebecca and Sarah had taken title was made under duress, fraud, and mistake. This action was No. 71003 in the superior court. Affiant sets up that the superior court determined that by the commencement of action 71003 Arturo and his attorneys were guilty of contempt, in that the injunctive provision in judgment in 50811 had been violated; that by proceedings had in the contempt matter the District Court of Appeal, First Appellate District, of the state of California, adjudged Arturo and his attorneys guilty of contempt; that before the commencement of action 71003 Arturo, in the superior court of the state sitting as a court of probate, sought to have himself appointed administrator of the estate of Tobe Funkenstein upon the ground that he and Maria Wolf were heirs at law, but that the superior court determined that Arturo was not an heir at law of Tobe Funkenstein, deceased; that action No. 50811 is now pending on appeal in the Supreme Court of the state of California; that it is not true, as alleged in the petition for writ of mandate, that the judgment roll in 50811 showed that at the time it was made or certified the plaintiffs in that action had before trial amended their complaint by alleging that at the time of the commencement of said action they were in possession of the real property described, and that in the decision of the superior court of the state, and in the judgment, it is nowhere found that plaintiffs were at the time in possession of the real estate.

George Lezinsky, one of the attorneys for Maria Wolf, the petitioner, filed a reply affidavit, setting up that he believed that by virtue of the appeal taken from the judgment of the superior court the judgment rendered would be reversed; that the amendment to the complaint in action 50811 was made by order of the court in open court before the trial of the action, but by inadvertence the order of the court was not entered, and a nunc pro tunc order was thereafter made; that administration of the estate of Tobe Funkenstein has not been had, because of the opposition of Edward and Sarah Funkenstein and Charles and Rebecca Gall. Affiant then sets up that there was not a fair and full determination by the superior court of the state of the question of the validity of the alleged deed under which the defendants claimed title to the real estate, and affiant believes that the instrument of conveyance is spurious and void and that these facts can be established upon a trial.

Denson, Cooley & Denson, of San Francisco, Cal. (Theodore A. Bell and George Lezinsky, both of San Francisco, Cal., of counsel), for petitioner.

Edgar D. Peixotto, J. R. Pringle, and Leon Samuels, all of San Francisco, Cal., for defendants Rebecca F. Gall and others.

Before MORROW and HUNT, Circuit Judges, and DOOLING, District Judge.

HUNT, Circuit Judge (after stating the facts as above). Stated in brief way, our conclusion is that the judgment of the superior court of the state in case 50811 found the issues of title and possession and right of possession to the real property described in the complaint in the defendants' favor, and this court will presume that

such judgment was supported by evidence, and, the superior court of the state being one of general jurisdiction, that it made findings of fact responsive to the material issues presented and tried before The record shows that the parties went to trial in the state court upon pleadings wherein, by affirmative allegations in the answer, the answering defendants prayed for affirmative relief. By the issues the trial in the state court was had, not alone upon the question of plaintiffs' title as against defendants', but also upon the question of the defendants' title as against the plaintiffs' title. Moreover, we gather that the question of the right of the defendants to have their title tried out as against the plaintiffs' title has been argued in certain contempt proceedings had before the superior court of the state and the higher state tribunal, where decisions have been rendered upholding the contentions of the defendants and sustaining the view that the defendants had properly prevailed in the superior court. Under all the conditions shown, this court ought not to issue mandamus to require the District Court of the United States to proceed to try a matter over which the state tribunals have jurisdiction with full power.

Such, we think, is the general rule laid down by the federal courts, and is very clearly stated in Westfeldt v. North Carolina Mining Co., 166 Fed. 706, 92 C. C. A. 378. There ejectment was brought in the state court. Defendants answered, and pleaded ownership in fee. During the pendency of this action, and after the judgment which had been rendered in favor of the plaintiff had been reversed, one of the defendants brought suit in the federal court, and the federal court enjoined the plaintiff from proceeding with his action in the state court. But on appeal to the Circuit Court of Appeals for the Fourth Circuit this order of injunction was reversed, the court speaking through Chief Justice Fuller presiding. The court put its decision upon the broad ground that, in matters of concurrent jurisdiction, the court to which jurisdiction first attaches holds the case to the exclusion of the other until the final determination of the matters in dispute, and stated that this rule is not limited in its application to cases where property has actually been seized under judicial process before the institution of a second suit, but applies to actions dealing actually or potentially with specific property, and does not rest simply on comity, but on necessity. In this matter now under consideration, as in the North Carolina case, there is a specific property in the controvery, the title of which and the possession to which are involved.

It appears that the Supreme Court of the state of California has not yet acted upon an appeal in case No. 50811 taken from the judgment of the lower state tribunals, and inasmuch as that court will apparently be called upon to decide the issues tried in the action to quiet title, it is clear to us that the federal court ought, at least at this time, to decline to proceed with the case before it. By proceeding in the federal court a judgment might be rendered which would be in conflict with the one rendered by the state court, and create that confusion deprecated by the Supreme Court, where attempts have been made to transfer matters standing for judgment in the one court to the other.

McClellan v. Carland, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762, the principal case cited by petitioner, is easily distinguished, in that McClellan, in that case, went directly into the federal court, and did not wait until a judgment had been rendered in the state court against him. We believe it not in conflict with the doctrine stated in Westfeldt v. North Carolina Mining Company, to which we have referred. The petition is denied.

TRIUMPH ELECTRIC CO. v. THULLEN.

(Circuit Court of Appeals, Third Circuit. July 10, 1916. Rehearing Denied August 17, 1916.)

No. 2088.

SPECIFIC PERFORMANCE & 71-RIGHT TO REMEDY-CONSTRUCTION OF CONTRACT

A contract by which defendant, an electrical engineer, was employed by complainant, a manufacturer of electrical appliances, and bound himself to assign to complainant any patentable inventions made by him during his employment, but expressly excepting any "not applicable to the line manufactured by this company," held not to so clearly apply to a patent for a system of motor control, which included as one of its elements a mechanical structure, not within complainant's line of manufacture, as to entitle complainant to enforce specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 204; Dec. Dig. \$\sim 71.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit in equity by the Triumph Electric Company against Louis H. Thullen. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 228 Fed. 762. See, also, 227 Fed. 837, — C. C. A. —.

Clifton V. Edwards and Lawrence K. Sager, both of New York City, for appellant.

Richard Eyre, of New York City, for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The plaintiff asserts a right to an invention of the defendant for which Letters Patent No. 1,070,638 were granted, and prays that the defendant be decreed to assign the patent. The case involves a question of the plaintiff's right to the equitable remedy of specific performance. The District Court dismissed the bill, and the plaintiff took this appeal. The facts of the case are fully stated in the opinion of the trial court. 228 Fed. 762. We shall confine our statement to those matters which have principally influenced our decision on review.

The plaintiff was engaged in the manufacture and sale of electrical apparatus, and the defendant was employed as its chief electrical engineer, under a contract, the pertinent parts of which are the following:

"It is mutually understood and agreed that you (the defendant) will devote your entire time and attention to the interests of this company, that, while in its employ, in the event of any design being capable of being made the subject-matter of a patent application, such application and patent shall be assigned to the company, they paying the necessary attorney and patent office fees.

"It is understood that this does not apply to any patentable design you may

discover not applicable to the line manufactured by this company."

The plaintiff terminated the contract by discharging the defendant, and there followed the litigation appearing in 227 Fed. 837, — C. C. A. —.

The electrical apparatus manufactured by the plaintiff during the period of the defendant's employment included dynamos or motors, starters and controllers, which were affixed to and used upon various types of machinery manufactured by other concerns, such as laundry, washing, dough mixing and elevator machinery. It was the defendant's task, as electrical engineer, to design such electrical apparatus and conform it to the requirements of the machines. In the course of its business the plaintiff was asked by a manufacturer of friction saws to supply a motor for a saw of its make. The motor which was made to fill this order was designed by the defendant with especial regard to ruggedness and strength to meet the exacting demands of a machine of that type. In the course of designing this motor the tests upon the saw developed peculiar difficulties due to irregularity of the load, with respect to which the defendant conceived a novel idea.

The friction saw was used for cutting steel of various degrees of hardness and of different sizes and shapes. The saw was revolved by a motor and the steel was brought against the saw on a movable carriage controlled by the operator. The different qualities of the metal and the changing dimensions of the structure to be cut threw an irregular load upon the saw and produced unsatisfactory results. The plaintiff met its customers' requirements by supplying a motor for the saw and later a motor for the carriage, specially designed with respect to power to do the work of that particular machine. The defendant afterward developed his idea. His conception was not a saw mechanism operated by one or more motors attached to it, but was a unitary mechanism consisting of two operative parts, one the saw and the other motors. It contemplated two motors. A large one was employed to drive the saw and a small one to drive the work toward the saw or the saw toward the work, the two motors being so connected, and the smaller motor being so constructed that its speed would vary inversely as the load of the larger motor increased or decreased, thereby keeping the load approximately constant. This involved the construction of a saw proper and a system of motor control. For this invention the defendant applied for and received the patent in suit, entitled "Control System for Electric Motors." The question is whether the invention of the patent is "applicable to the line manufactured" by the plaintiff. If it is, the plaintiff is entitled to an assignment of the patent under a decree for specific performance, unless, indeed, that remedy is denied it for lack of mutuality in the contract. Marble Co. v. Ripley, 77 U. S. (10 Wall.) 339, 19 L. Ed. 955; Triumph Electric Co. v. Thullen (D. C.) 228 Fed. 762, 765. If it is not applicable to the plaintiff's line of manufacture, then the invention comes within the exception of the contract and belongs to the defendant.

The patent contains eighteen claims. All refer intimately or remotely to the same conception and are drafted with the customary regard to broad and narrow constructions. As the one purpose of this action is to compel the defendant to specifically perform his contract by assigning the patent, we are not concerned with the validity of the patent or the scope of its claims. Nor is the question of the shop rights of the plaintiff to manufacture the patented device involved. We are required only to ascertain the precise character of the patented invention and then determine whether that invention comes within the scope or the line of the plaintiff's manufacture.

The invention disclosed by each claim comprises a combination of elements with varying particularity. Four claims relate specifically to a "saw" electrically controlled. In these claims a saw is a distinct element of the combination. In five claims a "carriage" is substituted for a saw, and these claims are thus broadened to any mechanism employing generally a motor driven carriage. In three claims the limitation of a carriage is broadened by describing this element as a "device", and by the remaining claims a further attempt is made to broaden or generalize this element (which appears in each of the eighteen claims in some shape or other) by the word "resistance" and by the expression "means for varying the load" on the motor, etc.

The invention of the patent is illustrated by an electrically operated and electrically controlled friction saw. The elements of this device,

as they appear in certain of the claims, are,

(1) A saw;

(2) Means for rotating the same (large motor);

(3) A carriage to bring the saw and material to be sawed into cooperative relation.

(4) An electric motor for driving the carriage (small motor);

(5) Means for maintaining the pressure between the saw and the material at a substantially constant value (connection between the motors and between the motors and the saw mechanism).

This is a combination structure based upon combination claims. It consists primarily of two things, a saw mechanism and a controller These two mechanisms are joined in their construction mechanism. and are inseparably related in their operation. The saw without the controller is inoperative in the sense intended by the patent. controller without the saw performs no function as it has no mechanism to control. Neither mechanism is separately operated and neither alone is within the claims we are now considering. The two form the device of the invention, and when together, they operate in such a related and compensating way that the presence of one is necessary to the operation of the other, and the co-operation of the two is essential to the result desired. Now, the manufacture of saws, either singly or in connection with controllers, was admittedly never within the line of the plaintiff's business, and the plaintiff, by its contract, is only entitled to an assignment of an invention that is in the

line of its manufacture. It is therefore clearly not entitled to that part of the defendant's invention which consists of a saw. If in any aspect it is entitled to the other part, that part is not assignable because it is not separable. Therefore, under the claims we are considering we believe the plaintiff is not entitled to an assignment at all.

This reasoning is equally applicable to those claims in which the element of a carriage or the element of a device is substituted for that of a saw, for it nowhere appears in the testimony that the plaintiff was engaged during the life of the contract in the manufacture of a composite unitary structure embodying a carriage or device operated

by a system of motor control.

The remaining claims of the patent refer less specifically to the element which in the others consists of a saw, a carriage or a device, and disclose in the broadest possible way a system of motor control in connection with an element which is termed "resistance" or "means for varying the load" on the motor. If these claims can be construed to disclose a system of motor control separate from and in no way connected with other mechanism upon which the control is intended to be exerted, then we approach a ground between the contending parties over which the conflict has been vigorously waged. The basis of the plaintiff's claim is that it manufactured "electric controllers" and that such controllers, within a proper definition, embrace any system of motor control. The defendant admits that the plaintiff manufactured an electric controller, but maintains that in electricity there is a distinction between an electric controller implement and a system of electrical control. This matter is debatable, and, as usual, is greatly confused by the opposing opinions of those learned in the science.

At this point the issue becomes one entirely of fact. Without reciting the facts, or repeating the opinions of experts, it is sufficient to say, that, after a very careful study of the testimony, we are inclined to believe there is substance in the distinction made by the defendant between a system of motor control and an electrical controller. At all events, there is doubt that at the time the contract was in force the plaintiff was engaged in the manufacture or installation of controller systems, and it is evident that the plaintiff has not proved with that certainty which is required to invoke the equitable remedy of specific performance, that the invention of the defendant is in the line of its manufacture. We are therefore of opinion that in dismissing the bill upon this ground, the District Court committed no error.

The decree below is affirmed.

THE SOUTHERN.

THE NO. 8.

(Circuit Court of Appeals, Fourth Circuit. July 6, 1916.)

No. 1427.

Collision \$\infty\$=95(5)—Steam Vessels Crossing—Change of Course by Privileged Vessel.

A collision in Baltimore harbor between a scow in tow and a launch on crossing courses, such as to give the launch the right of way under the starboard hand rule, held due solely to the fault of the launch, on evidence warranting a finding that she kept going to starboard of her original course, that the place of collision was several hundred feet from such course, that if she had kept such course she would have passed safely astern of the tow, and that after leaving their plers the tug and tow were so near the course of the launch as to make it unsafe to attempt to observe the starboard hand rule.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. \$\infty\$ 255(5).]

Appeal from the District Court of the United States for the Dis-

trict of Maryland, at Baltimore; John C. Rose, Judge.

Petition in admiralty by the Chesapeake Steamship Company of Baltimore City, as owner of the steam tug Southern and scow No. 8, for limitation of liability. From a decree holding petitioner not liable for collision, Max A. Cohen, Joseph P. Harris, and the State of Maryland, to the use of Frances Cohen, widow of Phineas Cohen, damage claimants, appeal. Affirmed.

For opinion below, see 224 Fed. 210.

Isaac L. Straus and Joshua Horner, Jr., both of Baltimore, Md. (Robert Phillips, of Baltimore, Md., on the brief), for appellants.

Arthur D. Foster, of Baltimore, Md. (John Henry Skeen, of Balti-

more, Md., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and JOHNSON, District Judge.

JOHNSON, District Judge. The state of Maryland, to the use of Frances Cohen, widow of Phineas Cohen, began suit in the superior court of Baltimore city against the Chesapeake Steamship Company, claiming damages in the sum of \$50,000 for the death of one Phineas Cohen. At the same time suit was begun in the superior court of Baltimore city by Max A. Cohen against the same defendant for personal injuries in the sum of \$20,000. Also suit was begun in the superior court of Baltimore city by Joseph Harris against the Chesapeake Steamship Company for the sum of \$20,000 for alleged personal injuries. All these suits were for injuries alleged to have been caused by defendant's negligence in navigating a tug and scow.

The Chesapeake Steamship Company filed its petition in the District Court of the United States for the District of Maryland, setting forth the facts relating to the collision out of which the aforesaid suits arose, and asking that it be exonerated, or, failing in that, its liability

be limited to the value of its tug and scow, as provided in sections 4282 to 4289 of the Revised Statutes of the United States (Comp. St. 1913, §§ 8020, 8027). The District Court appointed a board of appraisers, and the property of the defendant involved in the collision was valued at \$4,700. This return of the appraisers was approved by the court. The aforementioned suits were all transferred to the United States District Court of Maryland as a court of admiralty. The several causes were tried together and resulted in favor of the steamship company. Whereupon it was ordered that the Chesapeake Steamship Company was entitled to exemption from all liability, and all parties, their agents, servants, proctors, and attorneys, were enjoined from the institution of any and all suits against the said Chesapeake Steamship Company, or its tug Southern, or its scow No. 8. From

this decree the appellants seek relief.

The facts are that on January 15, 1915, there was a collision in Baltimore harbor between scow No. 8, then in tow of the tug Southern, and the launch Leader. The Leader was capsized and damaged. One of its passengers was drowned, and the other two were thrown into the water, and claim that they were seriously injured. The tug belonged to the Chesapeake Steamship Company. This company was sued in the courts of the state of Maryland for damages aggregating the sum of \$90,000 on account of the collision referred to. The Chesapeake Steamship Company, affirming that its tug was in no wise to blame, asked the court either to exonerate it or to limit its liability to the value of the tug and scow. The real question in the case is whether or not the tug was in fault. The launch was bound from Pier 6 on the Canton side of the harbor to Curtis Bay; the tug and scow from Pier 2 on the Canton side to Pier 31-32 on the Locust Point These courses were very nearly at right angles. The launch was to the starboard of the tug and its tow, and to the extent to which rule 7 applies they were the burdened vessels, and the launch was the privileged one. The master of the launch claims that he blew a oneblast signal on a mouth whistle, which meant that he elected to cross the bows of the tug and scow; he claims that they kept silently moving across his path until the risk of collision became imminent, and then and then only he changed his course to starboard in the attempt to escape. He claims that the bow end of the scow struck the port side of the stem of the launch. The captain of the tug claims that the launch when he first noticed it was on a course which would have carried it safely under his stern, that he blew a two-blast signal, to which there was no response, but that the launch changed its course to starboard. He then blew the danger signal, and ordered his engines full speed astern. The launch, however, continued to go more and more to starboard, and although he brought the tug and scow almost, if not quite, to a standstill, the launch struck the scow on the starboard side, near

Each party claims that the other did not keep a proper lookout, did not respond to signals, and violated inland pilot rule No. 1. The tug says that the navigator of the launch was incompetent and blameworthy in trying to cross the bows of the tug and scow. The launch

alleges that the tug violated rules 2, 7, and 9. The course of the tug was west by north and was never altered. The boats must have come together somewhere on a direct line between Pier 2 and Pier 32. One witness testifies that collision occurred when the tug was about 1,000 feet from the outer end of the pier. The District Judge says that all the circumstances tend to show that the estimate of 1,000 feet from Pier 2 is not far out of the way. If this collision occurred 800 or 900 feet from the end of Pier 2, the question arises: How did the launch get to that point? The extreme northern corner of Pier 6 is distant only 600 feet from the southern side of Pier 2. Pier 6 extends to the pier head line. Pier 2 is not so long, and stops about 165 feet short of that line. The most direct route of the launch to its destination would have been just outside of the pier head line. If it had taken this course, it would have crossed the course of the tug somewhere from 175 to 200 feet from the end of Pier 2 and would have passed safely under the stern of the tug and scow. The master of the launch says that he was steering for the lower end of Ft. Mc-Henry, so as to get out beyond the channel. At the point of the fort the harbor mouth is so narrow that no straight course from Pier 6 to pass it can be laid which will cross the path of the tug further than 375 feet from the pier head line, or 540 feet from the harbor end of the pier. It follows, therefore, that if the collision took place 800 to 1,000 feet from the pier, the launch must have gone from 260 to 460 feet to the starboard of any course it had occasion to be on. The captain of the tug insists that the launch did go to the starboard, and kept going more and more in that direction, and that, had it not done so, there would have been no trouble of any kind. The master of the launch, shortly after the accident, testified before the steamboat inspectors. He then said he went as much as 150 feet to starboard, and if the collision took place not less than 750 or 800 feet from Pier 2, his statement of his deflection at that time was rather under than over the estimate.

Why did he thus unnecessarily run into danger? He claims to have blown a one-blast on a mouth whistle, which was not heard by any other person except those on the launch. The District Judge believes that the navigator of the launch was giving his attention to his engine when he ought to have been at the wheel and on the lookout. There is not any doubt about the fault of the navigator of the launch. His very great carelessness stands out clearly. If he was relying on the starboard hand rule, it was his duty to keep his course and speed until further to do so involved inevitable disaster, unless he had otherwise agreed with the burdened vessel, which he says he had not. It is clear that, if he had held his course, there would have been no collision; the launch would have passed a considerable distance under the stern of the tug and scow. Of course, the launch could stop within a few feet. The very great carelessness of the launch would not exonerate the tug and scow from liability, unless they were wholly free from any negligence that produced or might have produced the collision. If the tug is chargeable with any negligence, it is on account of her failure to observe the starboard hand rule. The launch. however small, is a steam vessel within the meaning of the law. It was under rule 7 the privileged vessel. The rules of navigation are made to prevent collisions. Navigators must direct their vessels in accordance with these rules, unless the circumstances are such that to do so would invite disaster. Then the navigators must exercise

their common sense and prudence.

The District Judge found that the tug and scow could not have turned so as to pass under the stern of the launch without exposing the launch to very great peril, from which even a prudent navigator might not have been able to escape. The tug had no room to go under the stern of the launch. The captain of the tug, being a man of 45 years' experience, exercised his common sense and his knowledge as a mariner so as to prevent collision, and but for the extreme carelessness of the navigator of the launch there would have been no collision. The District Judge believes that any attempt on the part of the tug to stop or reverse would have made collision almost certain if the launch continued its course. It seems that, as soon as the captain of the tug saw that the launch had changed its course and kept changing it, he stopped and reversed, or tried to do so. The District Judge, from all the evidence, reached the conclusion that the tug and scow were entirely without fault and that the launch was wholly responsible for the collision.

The only question in this case that there could be any doubt about is as to whether or not the captain of the tug, under all of the circumstances fairly interpreted, recognized and followed the starboard hand rule. After a careful reading of the testimony, this court is satisfied that the findings of the District Court are abundantly sustained by the evidence, and for that reason the decree below is affirmed.

THE THEMISTOCLES.

(Circuit Court of Appeals, Second Circuit. June 6, 1916.)
No. 276.

1. MASTER AND SERVANT \$\iiinstructure 217(1), 219(1), 226(1)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMED RISKS.

A servant assumes all the ordinary and usual risks and perils of the employment, as well as all others of which he knows, or by the exercise of reasonable care might know; but he does not assume such risks as are created by the master's negligence, nor such as are latent, nor such as are discovered only at the time of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574, 610, 624, 659, 660; Dec. Dig. \$\infty 217(1), 219(1), 226(1).]

2. Shipping \$\infty\$ 84(3)—Master's Liability for Injury to Servant—Unsafe Place to Work.

Libelant, with others, was employed by direction of the master to clean a steamship, which had been loading cargo, working under orders of the chief steward. It was dark when they commenced, but they could obtain only two lamps, which were hung near a partly uncovered hatchway. During the night libelant was sent to straighten the hose being used to wash the deck, which lay across the hatchway and had become

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 235 F.—6

kinked. Some flour had been spilled on and around the hatchway, which, with the dirt and water from the leaking hose, had formed a paste, and when libelant stooped to take hold of the hose his feet slipped, and he fell through the hatchway and was injured. He had no previous knowledge of such condition of the deck, and could not see it well because of the dim light. Held, that the risk was one which he did not assume, and that he was not chargeable with negligence; that a finding that the ship was negligent in requiring him to work in a dangerous place without sufficient light was supported by the evidence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 350; Dec. Dig.

84(3); Master and Servant, Cent. Dig. § 492.]

Ward, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty by Sidoro Vaccarino against the steamship Themistocles; Nicholas D. Goulandris, claimant. Decree for libelant, and claimant appeals. Affirmed.

For opinion below, see 225 Fed. 671.

This cause comes here on appeal from a decree of the District Court of the United States for the Eastern District of New York, awarding the libelant the sum of \$4,800 damages, together with costs.

Cohen Bros., of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for libelant. Kirlin, Woolsey & Hickox, of New York City (John M. Woolsey and Mark W. Maclay, Jr., both of New York City, of counsel), for claimant.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This is an action to recover for personal injuries sustained by the libelant on November 15, 1913, on the steamship Themistocles, while lying at Pier 30, South Brooklyn, New York. The libelant, Vaccarino, was working on the vessel which had discharged her cargo and was being prepared to receive outward passengers and cargo. While so engaged he received the injuries for which he seeks to recover damages against the ship. His claim is that the injury was due to the negligence of the agents of the vessel in failing to provide him a safe place in which to work.

It appears that a great deal of cargo had been loaded in the number 4 hatch, where the accident happened. Dirt and refuse had accumulated there, which had to be removed before the space could be considered ready for the carriage of passengers. The captain told the regular stevedores of the steamer that he wanted the shelter deck cleaned, and they recommended Vincent Marra, a longshoreman. During the day on which this conversation occurred Marra had been working for the stevedores, and was told by them that when the day's work was done the captain wanted to see him. In the conversation which followed the captain of the Themistocles told Marra that he wanted him to get six men and clean the ship. Marra testified, referring to the six men, that the captain said to him: "These men work for the ship, for the company." And Vaccarino testified that Marra, when he engaged him, said that he was employing him "for the people that

owned the steamer," "I asked him," said Vaccarino, "who I was go-

ing to work for," and he said, "The company."

Thereupon Marra engaged the six men, including the libelant, to wash the ship. The work of washing the ship began at 7 o'clock in the evening and at that time it was dark. The men were furnished with two lamps. Marra asked for six lamps, so that each man might have the use of a lamp; but this was refused by the ship's steward. He said that, when he complained to Paskales, the steward, who gave him the lamps, the latter said he did not have any more, and that two were sufficient. The lamps were hung on each side of the hatch. According to the testimony "you could see some, but it was quite dark." Marra was asked, "Could you see the kink?" meaning the kink in the hose. His reply was, "No, that you couldn't see."

During the time the men were at work in cleaning the ship the chief steward of the vessel was present supervising the work. He was "the boss" of it, Marra testified. He gave Marra "his orders." "This man came to me continually, and told me to wash her and clean her, and do this, and do that," and he was there all night. The libelant, as we have seen, was one of the men employed that night under the instruction given by the captain, and so was at his work under the supervision of the chief steward of the Themistocles when the injury occurred. The captain told Marra to take his orders from Paskales, the chief steward. The captain of the ship, when asked whether Marra was working for him, answered, "Yes; the head of the workmen."

The court below held that the libelant was the employé of the ship, and not of an independent contractor, and we see no error in that conclusion. That being so, if the injury was due to negligence, and the libelant was not himself guilty of contributory negligence, the whole liability would rest upon the ship, as Marra was not an independent contractor. If the libelant was guilty of contributory negligence, that would not of necessity be a bar to his recovery, as courts of admiralty are not bound by the common and civil law rules governing cases of contributory negligence. In a case of contributory negligence, admiralty will apportion the damages if, in the exercise of a sound discretion, to do so seems to accord with the principles of equity and justice. We are not, however, in this case called on to consider any apportionment of the damages between the libelant and the ship. For we do not find in the facts disclosed by the record any reason for holding that the libelant has been guilty of contributory negligence. Much less is there any reason for holding, as the appellant's proctor urges, that the sole proximate cause of the accident was the libelant's own negligence. We have failed to discover any such negligence on his part.

The record discloses that a hose was used in cleaning the deck. It was fastened to a valve on the port side, the machinist turning on the water, which was supplied by the ship, when the engineer was notified. The rubber hose was in bad condition. It was covered with canvas, was full of holes, and leaked so that the men in cleaning the deck had to wear rubber coats. As the water did not come through

the hose when turned on, Marra thought that there was a kink in it, and he directed the libelant to go to the hatch cover and straighten out the kink. The hose lay between libelant and the open part of the hatch. He went upon the tarpaulin and stooped to pick up the hose; but before he touched it his feet slipped from under him and he fell into that part of the hatchway which was open. The third of the hatch was open; the rest being covered and having over it a black tarpaulin, which was doubled back. On top of the tarpaulin bags of flour had been left heaped five or six feet high. The space between the edge of the open hatch and the bags of flour was about three feet in width. The tarpaulin was slippery with grease. Marra described it as dirty from the figs that had been there. As some of the flour had sifted out of the bags and over the tarpaulin and the deck, the water from the leaking hose wet it and made it a slippery paste. The libelant had no knowledge of the slippery and unsafe condition this state of things occasioned. The captain of the vessel admitted that he knew the deck was slippery and "a dangerous place." The libelant was not familiar with its condition. After one side of the deck was washed, the witness Marra testified that it was necessary to pass the hose across the top of the hatch. That was the only way it could be done in order to wash the other side of the deck as the pipes from which the water came were only on one side of the ship, and the bunks around the hatch interfered. When it was attempted to pass the hose over, Marra testified, the hose "stuck," and he called Vaccarino to "take out that kink." "Go and clear that hose there before it breaks."

There is some evidence to the effect that when Vaccarino went to straighten out the kink he ran out on the hatch cover, gave the hose a kick with his foot to clear the kink, and in so doing lost his balance and fell over the edge and down into the hatch. An affidavit to that effect, made by Marra about two months after the accident, was introduced upon the trial. But Marra in his testimony in open court denied that he had ever said that Vaccarino had attempted to kick the hose. There was no other testimony than Marra's, denied by him at the trial, that Vaccarino kicked it. The hose at the time was lying about a foot and a half from the edge of the hatch. Vaccarino testified that as he was about to lean down and put his hand over to where the kink was he slipped and went to the bottom. He declared that he "had not even had a chance to touch the hose." And he swore, "I never used my foot at all." Asked if he could see in walking over the hose he replied: "There were only two lamps, and I couldn't see very good over there." Another witness, who was working at the time by the side of Vaccarino, one Grasso, testified that when the libelant reached the hose "he leaned over to catch the hose and get the kink out; but he didn't catch it when he slipped down and went over inside." Marra's testimony at the trial was that Vaccarino leaned over the hose and attempted to straighten it with his hands, and slipped and went over into the hatch. The court below, who saw and heard the witnesses, evidently did not believe Vaccarino kicked at the hose. And this court is not convinced that he was guilty of that act of negligence.

[1, 2] It is fundamental that a servant, on accepting an employment, assumes all the ordinary and usual risks and perils incident to the employment, as well as all risks which he knows, or in the exercise of reasonable care may know, exist. But the exception is as fundamental, and as well settled as the rule, that the servant does not assume such risks as are created by the master's negligence, nor such as are latent, nor such as are discovered only at the time of the injury. In this case the libelant knew nothing of the exceptional conditions under which he was working until he commenced the work in the dark. Marra had been at work on the vessel during the entire week, the accident happening on Saturday night. He was asked, "Vaccarino had been on the ship many times that week, hadn't he?" To which he replied, "No, sir." "Didn't you hire him to work the night before the accident?" To which he answered, "No, sir." Again he was asked, "Had you seen him on board the Themistocles any of the few days before the accident?" and he replied, "No, sir." What Vaccarino knew of the conditions about hatch No. 4 was what he learned when he began his work in the dark, aided by the insufficient light of the two lamps. The testimony shows the place was unsafe and that the lamps were inadequate. Under these circumstances we are unwilling to hold that this libelant assumed the unusual risks arising out of the conditions as they existed and of which he had no knowledge until the accident happened.

The libelee is charged with negligence: First, in failing to provide sufficient light, the work being done between decks in the dark; second, in directing the libelant to step upon a closed portion of the hatch which was covered by a slippery tarpaulin made so by grease, flour, and water leaking from a defective hose and making a kind of paste. If the action had been one at common law, the court would not have been justified in taking it from the jury, but should have submitted to the jury whether the defendant was guilty of negligence in the respects noted. The cause being in admiralty and the District Judge having considered these questions, this court should not reverse the decision rendered unless clearly convinced that it is wrong. This court is not so convinced.

The award of \$4,800 cannot be regarded as excessive. On the contrary, it appears to us to be exceedingly conservative. The injuries this man sustained were severe. He suffered a compound comminuted fracture of the right femur and other injuries, including a fracture of the left clavicle. As a result of the accident his right leg was shortened four inches in the femur, his knee was stiff and ankylosed, and it will be necessary for him to use crutches permanently. He still suffers pain, even when lying down. He was confined to the hospital for six months. His temperature, while in the hospital, was at times as high as 104. Ice caps were kept on his head and morphine was administered to him several times a day. After he left the hospital, his surgeon testified that he found it absolutely necessary to treat him daily for four months; and more than a year after the accident and at the time of the trial the surgeon was seeing him once a week. He

was then 33 years of age. Prior to the accident he had been in perfect health. The accident has rendered him incapable of pursuing his former means of livelihood, or any similar gainful occupation.

Decree affirmed.

WARD, Circuit Judge (dissenting). The serious results of this accident are likely to mislead the judgment. Assuming that the libelant was a servant of the shipowners because, although employed and paid by Marra, the officers of the ship were in control of the operation (Atlantic Transport Co. v. Coneys, 82 Fed. 177, 28 C. C. A. 388), what is the negligence of the owners? The libelant was a sailor, familiar with ships and all dangers connected with them. If he had been hurt by the hatch cover breaking or falling out of place, or if he did not know that part of the hatches were off, and there was not light enough to see it, the shipowners would be responsible. But he was employed to wash out the dirt from a dirty 'tweendecks. Water alone, and more so if mixed with dirt, is likely to make the deck slippery. These were dangers involved in the duty he was performing. The only plausible explanation given of the accident is that the water and dirt and flour on the tarpaulin made it slippery. It seems to me a pure accident and risk of the employment. I discover no negligence on the part of the shipowners. Common-law cases are not applicable, because the findings of the jury upon the facts are binding on the appellate court.

MOODY v. KELL.

(Circuit Court of Appeals, Eighth Circuit. July 31, 1916.)

No. 4610.

CONTRACTS \$\infty 142\top Legality of Consideration\top Location of Town Site.

A contract by which an officer of a railroad company undertakes to secure the location of the line of road and of a station from considerations of personal profit, and not for the interests of stockholders and the public to be served, is void as against public policy; but when the location of the road and of a station had previously been definitely fixed, a contract by an officer to secure the completion of the road and the platting of a town site at the station within a specified time, in consideration of a payment to be made to himself by the owner of adjoining property, is not necessarily invalid, and may be enforced against the other party, provided he had knowledge of the fact of such previous location, and that it did not constitute any part of the consideration for his promise.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1826; Dec. Dig. € 142.]

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action at law by Frank Kell against R. A. Moody. Judgment for plaintiff, and defendant brings error. Affirmed.

John W. Willis, of St. Paul, Minn. (H. E. Hoover, of Canadian, Tex., and Charles Swindall, of Woodward, Okl., on the brief), for plaintiff in error.

W. B. Merrill, of Oklahoma City, Okl., and Orville Bullington, of

Wichita Falls, Tex., for defendant in error.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

ADAMS, Circuit Judge. Kell, the defendant in error, brought this suit in the District Court of the United States for the Western District of Oklahoma to recover from Moody, the plaintiff in error, the sum of \$12,525 alleged to be due to him on a certain contract, dated September 12, 1911, of the following tenor:

"Whereas, on the 29th day of August, 1911, I became the possessor by assignment of contract for deed with Harriett Nesbitt and R. T. Nesbitt for the southwest quarter of section twenty-two (22) in township twenty-six (26) north of range twenty-five (25) W. I. M., in Harper county, Oklahoma, which contract for deed obligates me to pay unto the said parties the sum of four thousand (\$4,000.00) dollars in consideration of a good and sufficient warranty deed conveying the above described land unto me; and

deed conveying the above described land unto me; and "Whereas, on the 12th day of September, 1911, I became the possessor of a contract for deed with E. E. Coulter and Nella Coulter for the northwest quarter (N. W. ¼) of section twenty-seven (27), township twenty-six (26) north, of range twenty-five (25) W. I. M., in Harper county, Oklahoma, which contract for deed obligates me to pay unto the said parties the sum of eight thousand three hundred and fifty (\$8,350,00) dollars in consideration of a good and sufficient warranty deed conveying the above described land unto me; and

"Whereas, on the 6th day of September, 1911, I entered into a contract for a good and sufficient warranty deed with John Mollman, owner of the southeast quarter of section twenty-one (21) and the northeast quarter of section twenty-eight (28), all of township twenty-six (26), range twenty-five (25) W. I. M., in Harper county, Oklahoma, obligating myself to pay for said tract the sum of twenty-five thousand (\$25,000.00) dollars in payments as specified in said contract for deed with said John Mollman.

"The total sum of the several contracts which I have obligated myself to pay equals the sum of thirty-seven thousand three hundred and fifty

(\$37,350.00) dollars.

"Be it known that on this the 12th day of September, 1911, I have assigned unto Frank Kell, of Wichita Falls, 'Texas, the several contracts hereinbefore mentioned, reserving the crops, he assuming the payment of the balance due on said contracts, which equal the sum of \$35,700.00, I having heretofore paid on said several contracts the sum of \$1,650.00, leaving as aforesaid the sum of \$35,700.00 as a balance due, which sum as aforesaid the said Frank Kell assumes and obligates himself to pay, and in consideration of his assuming the payment of the balance due on said contracts as aforesaid, and for the further consideration that said described tracts of land or part thereof are to be used by the said Frank Kell, his successors and assigns, for the location of a town site, the location of a railroad, railroad depot, station, and side tracks, which railroad depot, station, and side tracks are to be constructed on and across said lands, or a part thereof, on or before eleven months from the date hereof, and the said town site to be platted on said tracts, or a part thereof, within six months from the date hereof, and as a further consideration of the enhancement in value of certain lands owned by me adjoining said town site in the immediate vicinity thereof, that will be materially enhanced in value by reason of said town site being located on the lands hereinbefore described, I agree to reimburse the said Frank Kell in the sum of \$12,525.00, payable as follows, to wit: \$6,000.00 due from me and payable unto him on October 15, 1911, \$3,000.00 due from me and payable unto him on November 15, 1911, \$3,535.00 due from me and payable unto him on December 15, 1911, which said sums, if not paid when due, to draw 10 per cent. from maturity

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"It is expressly understood that before the 15th day of October, 1911, the date that I agree to pay Frank Kell the sum of \$6,000.00 as aforesaid, he, the said Frank Kell, is to deposit with me in my hands a good and sufficient personal bond, signed by himself and J. A. Kemp, guaranteeing unto me that the aforesaid town site, railroad, railroad station, and side tracks will be located on and across the said described tracts as aforesaid within the time hereinbefore specified, and in the event that he, the said Frank Kell, his successors and assigns, fail to so locate said town site, railroad, railroad station, and side tracks upon said described land, as aforesaid, then and in that event he is to reimburse me by refunding unto me the money that I have paid out as a part and parcel of the \$12,525.00, and also \$1,650.00 here-tofore paid by me, with interest at 10 per cent. thereon from the date of payment to the date of reimbursement, August 12, 1912.

"In witness whereof I have hereunto set my hand, this the 12th day of September, 1911. [Signed] R. A. Moody."

Plaintiff alleged in his petition that he duly performed all the terms and conditions of the contract obligatory upon him, paid the contract obligations of Moody assumed by him, and within 11 months thereafter caused the railroad to be built, and the station, with side tracks, to be located on part of the lands described in the contract, and caused to be located thereon a town site adjacent to other lands then owned by the defendant, according to the conditions imposed upon him by the contract, but that the defendant has failed and refused to pay to him the sum of \$12,525, according to his promise in that behalf made in the contract.

The defendant, for his answer, admitted the execution of the contract, but alleged that Kell at the time it was made was vice president and general manager of the Wichita Falls & Northwestern Railway Company, which was then engaged in the construction of a line of railroad from Elk City, Okl., in a northwesterly direction, extending through Harper county, in which the land involved in this suit was situated: that he was also interested in a construction company engaged in constructing the railway, and in a town site company organized for the purpose of locating townsites along the railway; that plaintiff represented to him, the defendant, that the course and route of the railroad through Harper county had not been definitely decided; that plaintiff was able to control its definite location, and also that of the station, side tracks and town sites thereon; that if defendant would enter into the contract hereinbefore set out, and pay to him the sum of \$12,525, he would locate the route of the railroad and a station with side tracks on and across the lands involved in this case, and would also cause a town site to be laid out on the lands; that by reason of the foregoing facts the contract was against public policy and void.

Plaintiff's reply was substantially this: That the course and route of the railroad through Harper county had been definitely and finally fixed and determined, and the station and depot grounds had been definitely located on a portion of the land in question prior to September 12, 1911, the date of the contract, and that defendant, Moody, knew these facts at and prior to the date of the contract in question; that in view of these facts the only consideration for the contract on

plaintiff's part was the assumption by him of the balance of the purchase money for the land due from Moody and also the completion of the construction of the railroad, side tracks, station, and depot grounds, so definitely located, within 11 months after the date of the contract, and also the platting of a town site on the land in question within six months after the date of the contract; that there was nothing in these things (which were the real considerations for the contract) contrary to public policy, or of such character as to render the contract void.

To the petition, and again to the reply, the defendant filed a demurrer, and upon the pleadings as a whole moved for judgment in his favor. These demurrers and this motion were overruled by the court, and due exceptions saved to the rulings, and afterwards the cause came on for trial before a jury. The evidence conclusively shows that Kell, the plaintiff, was a director and vice president of the Wichita Falls & Northwestern Railway Company, and was also interested in the construction and town site companies, as pleaded by defendant. It tended to show that the railroad had been routed and definitely located across the lands in question, that the station, side tracks and depot grounds had been definitely located on the same land before September 12, 1911, the date of the contract, and that the defendant knew these facts at the time he entered into the contract.

In view of these facts, and especially of the fact that Kell was an officer of the railroad company, the trial court held, and so charged the jury, that the contract on its face was against public policy and void, on the ground that a railroad company had a public duty to discharge in the matter of locating the route and station house of its railroad, and that its officers could not, by contract or otherwise, jeopard the rights of the public by contracting for a personal advantage in so doing. But the court also, in view of the testimony tending to show that the railroad and its station, side tracks and depot grounds had been definitely and finally located on the lands in question prior to the making of the contract, and that Moody had knowledge of these facts at that time, also charged the jury, in effect, that if they should find such to have been the facts the routing of the railroad on the lands in question, and the location of the station, depot grounds, and side tracks did not form any part of the real consideration moving Moody to sign the contract, and that the assumption by Kell of the balance due by Moody to his grantors, and his efforts in securing the location of the town site, afforded sufficient consideration for the promise of Moody.

To this charge no exception was taken by the defendant, but he had demurred to plaintiff's petition, moved for judgment on the pleadings, moved to strike out parts of the reply setting up the facts of the location of the road and defendant's knowledge of it prior to the time the contract was entered into, and at the close of the case he moved for judgment on the pleadings and the undisputed evidence in the case, on the ground that the contract sued on was void because against public policy. In many other ways the sufficiency of the proof of prior location of the railroad and defendant's knowledge of it was chal-

lenged as any antidote for the illegality of the contract apparent on its face; so that, notwithstanding the fact that no exception was taken to the charge, the question is fairly raised whether the location of the road across the land described in the contract prior to the making of that contract and defendant's knowledge of it at the time the contract was made, extracted the virus of illegality from the contract and left it enforceable against the defendant.

This is the important question for our consideration. The law is well settled that officers of a railroad corporation hold a position of trust and confidence in favor of their stockholders, with a duty to serve them faithfully and promote their interests with a singleness of purpose to that end. Railroad corporations are also quasi public corpo-They derive their existence, franchises, powers, and privileges from the public, and their officers hold their positions as quasi public officers, with the duty and obligation resting upon them to construct and locate their roads so as best to accommodate the public and thereby promote the welfare of their stockholders. As a necessary corollary to these principles, contracts for the location and construction of a railroad must be made by officers of a railroad company with an eye single to the best interests of the stockholders and of the public as well. Any contract made by such officers, either for the location of the road or its operation, whereby such officer is or may be induced to disregard these fiduciary obligations is in violation of his trust, and clearly unlawful. A fortiori, any contract made by such officer for the location or operation of his road, by the terms and provisions of which he is to secure a personal reward or advantage for doing it in a given way, is unlawful. It is in the nature of a bribe. Its inevitable tendency is to destroy the disinterested attitude which alone permits him to properly discharge his fiduciary duties. Such a contract, on the ground of public policy, as well as on the implied obligation arising from his contract of employment, is void. Woodstock Iron Co. v. Richmond & Danville Extension Co., 129 U. S. 643, 661, 9 Sup. Ct. 402, 32 L. Ed. 819, and cases cited; Cook v. Sherman (C. C.) 20 Fed. 167; Enid Right of Way & Townsite Co. v. Lile, 15 Okl. 317, 82 Pac. 810.

This proposition is not seriously disputed by plaintiff's counsel. Their contention is that the contract in question, when properly interpreted in the light of the facts existing at the time it was made, imposed no obligation upon the plaintiff to violate his duty or do any unlawful act. Their contention in this regard is that the railroad had already been definitely and finally located, and the station house and depot grounds had been finally located upon the land described in the contract, prior to the execution of the contract, and that these facts were known to the defendant when he made it; that as a result their location could not and did not afford any consideration for the defendant's promise. Much ground for this contention is found in the language of the contract itself. The stress of the agreement does not seem to be the future location of the railroad, depot, and depot grounds upon the lands in question, but rather for their construction within the specified time. The language of the contract is this:

"* * That said described tracts of land or a part thereof are to be used by the said Frank Kell, his successors and assigns, for the location of a town site, the location of a railroad, railroad depot, station, and side tracks, which railroad, depot, station, and side tracks are to be constructed on and across said lands or a part thereof on or before 11 months from the date hereof, and the said town site to be platted on said tracts or a part thereof within 6 months from the date hereof. * * *"

This language, taken by itself, reasonably justifies a contention that the parties intended to provide for the construction within the period of 11 months of a railroad, depot, station, and side tracks, which were already located on the land. But, conceding that the phraseology of the contract in this particular is ambiguous, and that it leaves its true meaning in doubt, it becomes our duty, according to familiar rules of construction, to so interpret it as to give effect and force to all its provisions, if possible, and in doing so we may also, according to well-settled rules governing the construction of contracts of doubtful import, take into consideration facts existing at the time in the light in which the parties acted.

Applying these rules of construction, we think the parties intended nothing, by the clause of the contract in question, but to obligate Kell, the plaintiff, to complete the construction of the road and its station and depot grounds, already definitely located across and upon the land in question, within the period of 11 months from the date of the contract. Time was obviously made the chief feature and essence of the contract. It would have been quite absurd for the parties to deliberately make a contract requiring Kell to route a railroad and locate station house and depot grounds on a given piece of land, when these things had already been done, and when Moody knew it at the time he signed the contract. We think it quite clear, in view of the language of the contract itself and of the facts existing at the time it was made, that the learned trial judge correctly let the jury find the facts just referred to as the conclusive and controlling questions of fact in the case.

Criticism of the rulings upon the demurrers, motions to strike, and other attacks upon the pleadings, in view of the ambiguous character of the contract, as already pointed out, are without merit. Moreover, all the questions raised thereby were saved to the defendant in his request at the close of the case for a peremptory instruction to the jury to find a verdict on the pleadings and proof in his favor.

Counsel for defendant contend that, if the routing of the road over and locating the station and depot grounds upon the land in question be held to constitute no consideration for the contract, then there was no consideration for it at all, and that it was unenforceable. This is not correct. Ample consideration for defendant's promise is found in Kell's assumption of the payment of the balance due on the purchase price of the land, in the location of the town sites, as to which no illegality is imputed, and in his undertaking to do the work within the time specified.

The judgment is affirmed.

THE ANGLO-PATAGONIAN.

(Circuit Court of Appeals, Fourth Circuit. July 5, 1916.)

No. 1431.

1. Admiralty \$\infty 20-Jurisdiction-Tort by Vessel in Dry Dock.

A dry dock in which a seagoing vessel is placed for repairs is a part of the navigable waters, and a suit against the vessel for negligence causing injuries to workmen engaged on the repairs is within the admiralty jurisdiction.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 216, 225, 231; Dec. Dig. € 20.]

2. Admiralty \$\iff 21-Jurisdiction-Suit for Wrongful Death-Place of Death,

That one of the injured workmen, while unconscious, was taken to a hospital on land, where he died, does not affect the jurisdiction of the admiralty court over a suit for his death, which is fixed by the place of the injury.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 218–220; Dec. Dig. €==21.]

8. Admiralty \$=21-Jurisdiction-Action for Wrongful Death.

A right of action for wrongful death, given by Code Va. 1904, § 2902, which provides that a ship or vessel, which would have been liable if death had not ensued, shall be liable to an action for damages or to a libel in rem, may be enforced by a suit in rem in a court of admiralty, where the injury occurred at a place within the maritime jurisdiction.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 218-220; Dec. Dig. €==21.]

4. Shipping \$\infty 84(3)\to Liability of Vessel for Torts\to Injury to Workmen Making Repairs.

While the hull of a ship was being repaired in dry dock, the anchor cable, which was held only by the brake, slipped, and the anchor dropped and crushed part of the staging, causing injuries to some of the workmen thereon. There were two other devices on the ship, the use of either of which would have made the anchor secure. *Held*, that the facts justified a finding that the ship was negligent, and decree holding it liable for the injuries.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 350; Dec. Dig. \$350; Dec. Dig. \$350; Dec. Dig.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Libels by William Ledwitch, by Peter Johnson, by Edward Pressy, by Enoch Spratley, and by R. D. Smith, administrator of William Byrd, deceased, against the steamship Anglo-Patagonian; Stanley Lord, master and claimant. These causes were consolidated and heard together. Decree for libelants, and claimant appeals. Affirmed.

For opinion below, see 228 Fed. 1014.

H. H. Little, of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for appellant.

Allan D. Jones, of Newport News, Va. (E. S. Robinson, J. T. Newsome, T. J. Christian, and J. Winston Read, all of Newport News, Va., and William A. Graff, of Norfolk, Va., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and JOHNSON, District Judge.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

KNAPP, Circuit Judge. The accident under review happened while the steamship Anglo-Patagonian was in dry dock at Newport News, Va. The vessel had been injured in a collision, which made it necessary to cut away and replace a number of plates in and around the bow and to straighten the stem. In order to have this work done the vessel entered the dry dock, where, after the water had been withdrawn, it rested upon keel and bilge blocks. The rigging gang of the dry dock company, which contracted to make the repairs, erected staging around the bow, on both the starboard and the port sides. This staging was supported by two uprights immediately in front of the bow, resting upon the bottom of the dock, connected by cross-beams, and lashed to the forecastle. Upon these cross-beams at various heights rested the forward ends of planks, the rear ends of which were supported by rope slings swung from convenient places on the deck and rail. The

workmen making the repairs stood upon these planks. The vessel went into dry dock on the 2d of June, 1915, which was Wednesday. Work commenced immediately, and continued day and night until about noon of Saturday, three days later, when from some cause the starboard cable slipped, and the anchor, suspended above the workmen, dropped slowly to the bottom of the dock, crushing a part of the staging and hurling the men to the bottom, causing the death of one, seriously injuring three, and inflicting minor injuries on another. It appears that the anchor had been hanging on the brake, which constituted its only support. This brake was an iron band extending almost entirely around the drum of the windlass, and could be loosened or tightened by a threaded spindle connecting the two ends. When tightened, the brake band held the drum on the windlass by compression and friction, which prevented the anchor chain from running out through the hawse pipe. Ordinarily this support was sufcient, according to the testimony of several witnesses; but when it was desired to make the anchor absolutely secure other means were provided. Any one of several methods could be used; the anchor could be lashed to a ring bolt in the deck, or the chain stopper could be set, clamping the chain. Another method in common use is to fasten a link of the chain to the "devil's claw." The Anglo-Patagonian could have adopted either of the first two methods, but was not equipped with a devil's claw. According to the testimony the chain stopper was covered with paint and had not been recently used.

Libels were filed by the injured workmen and by the administrator of the one who was killed. Exceptions to the jurisdiction were over-ruled, and the causes consolidated and heard together. The trial court upheld the right of recovery, found as a fact that the accident was caused by the neglience of the steamship, and fixed the damages, aggregating \$18,600, to which each libelant was deemed entitled.

[1] Two grounds are relied upon to reverse the decree. It is argued in the first place that the accident did not occur upon any "navigable waters of the United States," and therefore an action for damages for the resulting injuries was not within the jurisdiction of admiralty. In other words, since the vessel was not afloat at the time, but rested upon supports in the bottom of the dry dock, the contention is made

that the accident happened on land, and for that reason was not cognizable by an admiralty court. This contention rests upon no sustainable basis and must be rejected. The Robert W. Parsons, 191 U. S. 17, 33, 24 Sup. Ct. 8, 48 L. Ed. 73; The Steamship Jefferson, 215 U. S. 130, 142, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907; Atlantic Transport Company v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157. See also the case of The Raithmoor, 241 U. S. 166, 36 Sup. Ct. 514, 60 L. Ed. 937, decided by the Supreme Court May 1, 1916. The first two cases hold distinctly that a dry dock, such as the one in question, is part of the navigable waters, and constitutes a place or locality which is subject to admiralty jurisdiction. Under the ruling in the Robert W. Parsons Case, it is not open to discussion that the owners of a dry dock have a maritime lien for repairs to a seagoing vessel put in their dock for that purpose. And if the dry dock company in this case could sue in admiralty under its contract for repairs, we perceive no reason why its employes, engaged in making the repairs, may not sue in admiralty for injuries caused by the steamship's negligence. Upon this point the Imbrovek Case seems to us conclusive, since no valid distinction can be made, in the matter here considered, between a workman who is hurt in loading a vessel and one who is hurt in repairing a vessel.

[2] Nor, as regards admiralty jurisdiction, can the cases of the workmen who were injured be distinguished from the case of the workman who was killed. The circumstance that Byrd was taken in an unconscious condition, and therefore without his knowledge or assent, from the dry dock, where he was hurt, to a nearby hospital, where he died shortly afterwards, cannot serve to defeat the jurisdiction which, as we hold, would have attached if his death had occurred at the scene of the accident. On this question we follow with approval the decision of the Fifth Circuit Court of Appeals in The Gye Case, 207

Fed. 247, 124 C. C. A. 517, in which it is said:

"We deem it unnecessary in view of the conclusion reached on the merits to advert to the question of jurisdiction, more than to say that it is well settled by the weight of modern authority that the locus injurize is the test of jurisdiction. The Strabo, 98 Fed. 998 [39 C. C. A. 375]; The Aurora [D. C.] 163 Fed. 634."

[3] In the Code of Virginia (section 2902) it is provided that "the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem"; and this court held in The Glendale, 81 Fed. 633, 26 C. C. A. 500, that the lien created by this local statute was enforceable in a federal court of admiralty. To the same effect, and also holding that injury to a stevedore, employed in discharging cargo, occasioned by a defective appliance furnished by the ship, constitutes a maritime tort, is the recent case of The Chiswick, 231 Fed. 452, — C. C. A. —. In the light of the authorities cited, and others of a similar import, we think it clear that the plea of want of jurisdiction was rightly overruled.

[4] The other ground of appeal is the alleged lack of proof of any

negligence on the part of the steamship. Without reviewing the testimony, which has been carefully examined, we are constrained to hold that enough was shown to warrant the finding of the trial court upon this branch of the case. The master of the vessel was fully aware of the nature of the work to be done by the dry dock company, and this cast upon him the duty of exercising reasonable care for the protection of the company's employés. He must also have been aware that these employes would be exposed to obvious peril if the anchor, under which they had to work, should happen to fall, and he was therefore bound to see that it was securely fastened. The means for preventing such an accident as unhappily occurred were there at hand and could have been readily applied; and it seems to us that ordinary prudence would have dictated the use of the chain stopper, or the lashing of the anchor chain to the ring bolt in the deck, either of which methods would have insured absolute safety. Taking into account the actual situation, which involved extreme danger to the workmen in case the anchor should drop, we think that negligence was fairly inferable from the circumstance that it was held in place only by screw pressure upon the brake, which may not have been made sufficiently tight when the anchor was raised, of which there is at least a suggestion, and which was liable to become loosened by the jarring effect of the repair work, or from other causes—especially so, when ample means were available for so securing the anchor that it could not possibly fall. The mere fact that it did fall may not of itself be sufficient to charge the appellant with responsibility, under the doctrine of res ipsa loquitur; but for the reasons indicated we are of opinion "that by analogy the case well illustrates that rule," as the Supreme Court has just said in Reid v. Fargo, 241 U. S. 544, 36 Sup. Ct. 712, 60 L. Ed. 1156, decided June 12, 1916. In short, it seems clear to us that the question of negligence in this case was a question of fact which the court below has correctly decided.

Affirmed.

HOPKINS et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 6, 1916.)

No. 4606.

1. Indians ⇔15(1)—Lands—Restrictions on Alienation.

The original Creek treaty of March 1, 1901 (31 Stat. 863, c. 676, § 4), provided that allotted lands selected for a minor should not be sold during his minority. The Supplemental Agreement of June 30, 1902 (32 Stat. 503, c. 1323, § 16), which became effective August 8, 1902, provided that allotted lands should not be incumbered or alienated before the expiration of five years, except with the approval of the Secretary of the Interior. Act May 27, 1908, c. 199, § 1, 35 Stat. 312, provided as follows: "From and after sixty days from the date of this act * * * all allotted lands of enrolled full bloods, and enrolled mixed bloods of three quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, * * * or any other incumbrance prior to April 26, 1931, * * * nothing herein shall be con-

strued to impose restrictions removed from land by or under any law prior to the passage of this act." *Held*, that the allotment of a three-quarter blood Creek Indian, who was a minor when the last-named act became effective, was subject to the restrictions therein prescribed after she attained her majority, although such minors who reached their majority before July 27, 1908, were freed from restrictions.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 37; Dec. Dig. \$ 37; Dec. Dig.

2. STATUTES \$\infty\$=228—Construction—Exceptions from General Words.

All that is not clearly embraced in an exception from the general words of a statute remains within the scope of the principal provision.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit in equity by the United States against J. H. Hopkins and H. M. Fender. Decree for the United States, and defendants appeal. Affirmed.

Charles B. Mitchell, of Oswego, Kan. (W. W. Noffsinger and Y. P. Broome, both of Muskogee, Okl., on the brief), for appellants.

Paul Pinson, Sp. Asst. U. S. Atty., of Atoka, Okl. (D. H. Linebaugh, U. S. Atty., and Archibald Bonds, Sp. Asst. U. S. Atty., both of Muskogee, Okl., on the brief), for the United States.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. Lucy McIntosh is a three-quarter blood Creek Indian. At the time of the allotment of the tribal lands she was six years of age. On the 19th day of April, 1911, after she had attained her majority, she executed a mortgage to the defendant, Hopkins, covering a portion of her surplus lands. On the 13th day of May of the same year, she conveyed another portion of her surplus lands by warranty deed, to the defendant, Fender. This suit was brought by the United States against Hopkins and Fender to cancel these instruments as clouds upon the title. The trial court entered a decree in favor of the government, and the defendants appeal.

[1] The question presented is whether the surplus allotment of a three-quarter blood Creek Indian, who was a minor when the act of Congress of May 27, 1908, became effective, was subject to the restrictions against alienation and incumbrance prescribed by that act, after she had reached her majority. The answer to that question is found in the following statutes. The original Creek Treaty (31 Stat. at Large, page 863), provided as follows:

"Allotment for any minor may be selected by his father, mother, or guardian, in the order named, and shall not be sold during his minority."

Section 16 of the Supplemental Creek Agreement, approved June 30, 1902 (32 Stat. at Large, 503), is as follows:

"Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation

nor be alienated by the allottee or his heirs before the expiration of *five* years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. * * *"

This supplemental agreement became effective by proclamation of the President on August 8, 1902, and the restriction which it imposes, therefore, expired by limitation on August 8, 1907.

Section 1 of the Act of May 27, 1908 (35 Stat. at Large, 312), uses

the following language:

"That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows:

* * * all allotted lands of enrolled full-bloods, and enrolled mixed bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April 26, 1931. * * * Nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act."

As we have pointed out above, the five-year restriction of the Supplemental Creek Agreement expired August 8, 1907. Allotments of minors who became of age between that date and the date when the act of May 27, 1908, took effect, namely, July 27, 1908, were freed from restrictions. It was decided by the Supreme Court in United States v. Bartlett, 235 U. S. 72, 35 Sup. Ct. 14, 59 L. Ed. 137, that the last clause of the act of May 27, 1908, above quoted, namely, "Nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act," prevented allotments of three-quarter blood Indian minors who attained their majority during the period between August 8, 1907, and July 27, 1908, from coming under the restrictions of the act of May 27, 1908. It is argued by counsel for appellants that because the allotments of some minors were thus exempted from the restrictions of the act of May 27, 1908, the court, to prevent "confusion," should construe that act as not restricting the alienation of allotments of any minors after they attain their majority. To do that we would have to disregard the plain language of the statute. It extends to all lands "allotted heretofore or hereafter." It embraces "all allotted lands of enrolled mixed bloods of three-quarter or more Indian blood, including minors of such degrees of blood." When language is thus plain, courts cannot disregard it by reason of such mild considerations of inconvenience as are urged in this case. Felsenheld v. United States, 186 U. S. 126, 131, 22 Sup. Ct. 740, 46 L. Ed. 1085. Why Congress did not embrace the allotments of minors who had attained their majority in the few months between the two acts can only be surmised. It may have been on account of doubts as to whether lands which had once become entirely free could be again placed under restriction; or it may have been because Congress feared that the rights of innocent third parties might be clouded by such legislation. Whatever the reason it is now clear by the decision of the Supreme Court to which we have referred. that Congress did not intend to impose the restrictions of the act of May 27, 1908, upon allotments of minors which had thus become free from restriction.

[2] We think it equally clear from the language of that act that Congress did intend to continue under restriction all allotted lands of enrolled mixed bloods of three-quarter or more Indian blood, including minors of such degrees of blood, if those allotments were at the time the act took effect subject to restrictions against alienation. The last clause which we have quoted covers only allotments from which restrictions had been removed. The allotments of Lucy McIntosh were not of that character. The language of the statute contains no exception, except allotments from which restrictions had been removed. It follows, it seems to us, as a necessary conclusion, that the allotments here involved became subject to the restrictions of the act of May 27, 1908. It is "a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made." Brown v. Maryland, 12 Wheat. 419, 438 (6 L. Ed. 678). The exception also proves that what should be withdrawn from the enacting clause was present to the mind of the Legislature. It follows as a necessary presumption that all that is not clearly embraced in the exception, remains within the scope of the principal provision. Sutherland on Statutory Construction, § 328. The analogies of the opinion of the Supreme Court in Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738, point clearly to the interpretation of the act of May 27. 1908, which we have adopted. A similar view has been expressed by the Supreme Court of Oklahoma in Jefferson v. Winkler, 26 Okl. 653, 110 Pac. 755, and Texas Co. v. Henry, 34 Okl. 342, 126 Pac. 224.

The judgment of the trial court is affirmed.

THE VIRGINIAN. .

(Circuit Court of Appeals, Ninth Circuit. May 29, 1916.)

No. 2728.

COLLISION \$== 102-STEAM VESSELS MEETING-MUTUAL FAULT.

A collision occurred in Puget Sound on a clear night between the meeting steamships Virginian and Strathalbyn. When about a mile apart the Strathalbyn gave a signal to pass port to port, and, receiving no answer, repeated it, porting each time. Both signals were heard on the Virginian, but her officers testified they could see no lights. After some time she stopped and reversed, but gave no signal until, shortly before collision, in answer to an alarm signal, she signaled that she was going astern. Held, that the Virginian was clearly in fault for not giving an alarm signal and reversing at once, when she failed to see the Strathalbyn's lights; that the latter was also in fault, it appearing that her side lights were either obscured by deck cargo or were so dim that they could not be seen for any distance.

[Ed. Note.—For other cases, see Collision, Dec. Dig. 20102.]

Appeals from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Rehearing denied October 23, 1916.

Suit in admiralty for collision by the Strathalbyn Steamship Company, Limited, as owner of the steamship Strathalbyn and bailee of a cargo of lumber, against the steamship Virginian, the American-Hawaiian Steamship Company, claimant, with cross-libel. From a decree dividing damages, both parties appeal. Affirmed.

For opinion below, see 217 Fed. 604.

W. H. Bogle, Carroll B. Graves, F. T. Merritt, and Lawrence Bogle, all of

Seattle, Wash., for American-Hawaiian S. S. Co.

Huffer & Hayden and Ballinger, Battle, Hulbert & Shorts, all of Seattle, Wash., and Ira A. Campbell and McCutchen, Olney & Willard, all of San Francisco, Cal. (William Denman and Denman & Arnold, all of San Francisco, Cal., of counsel on rehearing), for Strathalbyn S. S. Co. W. F. Sullivan, of San Francisco, Cal., for Shipowners' Ass'n of the Pa-

cific Coast, amicus curiæ on rehearing.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. On the night of January 12, 1912, on the waters of Puget Sound, the Virginian, a large freight steamer, 492 feet long, 58 feet 3 inches beam, with a carrying capacity of 12,000 tons, came into collision with the Strathalbyn, a tramp steamer 387 feet long, 52 feet beam, with a carrying capacity of 7,200 tons. The facts as found by the court below are substantially as follows:

The Strathalbyn, proceeding northward from Tacoma, discovered immediately ahead and coming southward on her course the lights of two vessels. One was the Virginian, and the other was the Flyer, a passenger vessel on her way from Seattle to Tacoma. The Flyer was making 14 knots an hour, the Virginian 11, and the Strathalbyn 6 or a little more. The Flyer overhauled the Virginian, signaled to her, and passed her about 200 yards to starboard. The Virginian answered the signal, and the Strathalbyn heard both signals. About five minutes later the Strathalbyn blew one whistle to the Flyer, which was answered by the latter, and those vessels passed port to port. The Virginian heard these passing whistles, but the officers who were navigating her testified that they saw no lights of the Strathalbyn, and

saw only the Flyer.

When the Strathalbyn and the Virginian were something less than a mile apart, the former blew one whistle to the Virginian as a signal to pass port to port. The pilot and the third mate of the Virginian, on the bridge, and the lookout, heard the whistle. They realized that it was a whistle intended for the Virginian, but they testified that they were unable to see any light or make out the approaching vessel. There was testimony that the Virginian's pilot then signaled that her engines be stopped, and that the captain, hearing the signal, came on the bridge and was informed of the reason for stopping the engines, and that they then heard a second single blast of the whistle of the Strathalbyn; but they still were unable, so they testified, to see any lights on that vessel. There was further testimony that the engines of the Virginian were reversed, and that about a minute after reversing the officers of the Virginian heard the danger signal, four blasts, from the other vessel. The captain of the Virginian then gave three whistles, to signify that his vessel was going full speed astern. Less than a minute thereafter the vessels came into collision

The officers in charge of the navigation of the Strathalbyn testified that when their vessel gave her first signal to the Virginian the red and green lights of the Virginian were plainly visible; that on giving that signal the helm of the Strathalbyn was ported a point or more; and that after waiting a minute, and hearing no answer from the Virginian, another single blast was blown, and the Strathalbyn's helm again ported and her engine stopped; that at that time the red light of the Virginian began to shut out and her green light to open, indicating that her course was directed across the Strathalbyn's bow; that, the Virginian making no answer, a minute later the Strathalbyn blew a third signal, and a minute and a half later reversed her engines; and they testified that the Virginian still came on, giving no signal until she blew three whistles in answer to the danger signal of the Strathalbyn.

The owners of each vessel filed libels against the other vessel, each claiming that the collision resulted from the negligence of the other. The court below found both vessels at fault; that the Strathalbyn was at fault in that her side lights were hidden to the Virginian as she approached, and that this was a proximate cause of the collision; that the Virginian was clearly at fault in not reversing her engines until less than a minute before the collision, and was in fault in failing to give the danger signal. Both parties to the suit have appealed, each claiming that its own vessel was without fault, that the collision was the result of the negligence of the other vessel, and that the court below erred in finding that both were at fault, and in dividing the damages.

It seems too clear to require discussion that the Virginian was in fault in proceeding on her course, and in not stopping and reversing her engines sooner than she did after hearing the signals of the Strathalbyn, and in not giving a danger signal. As to the contributing fault of the Strathalbyn the evidence is conflicting. No fault can be found with her navigation or her maneuvers; but there is substantial evidence that she was at fault, in that she was not equipped with proper side lights, that the lights were not ordinarily bright, and were not visible at as great a distance as they should have been, and that they were so placed or so obstructed by a deck load of lumber or otherwise that they were not discernible from all points ahead.

There is testimony of witnesses, it is true, who stated that the side lights of the Strathalbyn were distinctly visible, and there is evidence that those lights were seen by passengers on the Flyer while that vessel was passing the Strathalbyn, and that they were seen by others shortly before the collision. But, on the other hand, there is the evidence of the captain of the Flyer that he passed the Strathalbyn without seeing her side lights, and that he saw only her masthead lights, and there was testimony of others in other passing vessels tending to show that the side lights of the Strathalbyn were dim. It was in evidence that on the day of the collision the Strathalbyn's side lights had been changed, that prior thereto she had been using electric lights, and that, her dynamo having broken down, those lights had been removed and oil lamps substituted; and there was some evi-

dence tending to show that at least her masthead lamp burned dimly for want of ventilation.

The one strong, salient fact, which in this conflict of the evidence we think is controlling, is that the officers on board the Virginian who were responsible for her safety, and whose duty it was to navigate her and to respond to the signals of passing vessels, distinctly heard the Strathalbyn's signals, but were unable to discover her lights on a night which was dark and clear and free from fog. We think that the lights of the Strathalbyn must have been at that time either so dim as to be visible but a short distance, or placed in a position where their rays were obstructed or obscured by the cargo of lumber which was carried on deck, or by the stanchions which held the cargo in place.

We have carefully considered the evidence, and we are of the opinion that the decree disposes of the issues in accordance with substantial

justice.

It is ordered that the decree be affirmed, and that the costs of the appeal be divided between the parties hereto.

UNITED STATES v. MINOR et al.

(Circuit Court of Appeals, Fourth Circuit. July 7, 1916.)

No. 1438.

1. Judgment \$\infty 760\top-Limitation of Actions \$\infty 11(1)\top-United States \$\infty 133\top-Laches of Officers.

Act Aug. 1, 1888, c. 729, § 1, 25 Stat. 357 (Comp. St. 1913, § 1606), provides that judgments of District and Circuit Courts shall be liens as if rendered by state courts, but only when authorized to be docketed and docketed under state laws. Laws N. C. 1889, c. 439, allows docketing of federal judgments by clerks of superior courts. Rev. St. § 967 (Comp. St. 1913, § 1608), provides that judgments and decrees in Circuit and District Courts in any state shall cease to be liens on real estate and chattels real in the same manner and at like periods that those of the state courts cease to be liens. Pell's Revisal, N. C. § 574, provides that judgments directing payment of money, when duly docketed, shall be liens on real estate for 10 years, and section 391 fixes the period of limitation of actions on judgments at 10 years. Held, that since, the United States may take the benefit of any state or federal statute, though not bound by its limitations, judgments, though prior to 1888, in favor of the United States against the surety on distillers' bonds became liens on real estate of the surety, and were not barred by the North Carolina limitation, though if in favor of a citizen they would have been barred nor can the right of collection be defeated by laches of officers of the United States.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1315; Dec. Dig. \$\sim 760; Limitation of Actions, Cent. Dig. §§ 35, 36; Dec. Dig. \$\sim 11(1); United States, Cent. Dig. §§ 127, 128; Dec. Dig. \$\sim 133.]

2. Partition = 116(2)—Sales—Effect as Against Creditors.

Where the heirs secured sale on partition, and the deed was made before administration of the estate, the sale was binding only on the heirs, who were the only parties, and, not having been made two years after administration, could not affect rights of the United States to collect former judgments against decedent; Pell's Revisal, N. C. § 70, providing that conveyances by heirs to bona fide purchasers two years after grant-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ing letters of administration shall be valid even as against creditors, but if made before such time, shall be void.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 315; Dec. Dig. \$ 316(2),]

Appeal from the District Court of the United States for the Western District of North Carolina, at Greensboro; James E. Boyd, Judge.

Bill in equity by the United States against J. B. Minor, administrator of C. O. Ward, deceased, and others. From a decree dismissing the bill, complainant appeals. Reversed and remanded.

Thomas S. Beall, Asst. U. S. Atty., of Greensboro, N. C. (W. C. Hammer, U. S. Atty., of Ashboro, N. C., on the brief), for the United States.

G. S. Bradshaw, of Greensboro, N. C., for appellees.

Before KNAPP and WOODS, Circuit Judges, and JOHNSON, District Judge.

WOODS, Circuit Judge. This appeal is from a decree of the District Court dismissing a bill filed in the United States to subject lands of the estate of C. O. Ward, deceased, to the payment of judgments of the Circuit Court of the United States in favor of the United States against Ward as surety on the distiller's bonds of Joseph A. Davis. The judgments, seven in number, aggregated, including costs, \$736.26, subject to payments amounting to \$131.97. They were rendered at different times in 1881, 1884, and 1885, and the main question is whether the action on them to subject the land of the deceased to their payment is barred by the statute of limitations, or the lapse of time.

[1] The statute of North Carolina, Pell's Revisal, § 574, provides that judgments directing the payment of money when duly docketed shall be liens on real estate for the term of ten years. By section 391 the period of limitation of actions on judgments is fixed by the state

law at ten years from the date of rendition.

The federal statute in force at the date of the judgment (Revised Statutes, § 967 [Comp. St. 1913, § 1608]), provides:

"Judgments and decrees rendered in a Circuit or District Court, within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such state cease * * * to be liens by law."

By the federal statute of 1888 it was enacted that:

"Judgments and decrees rendered in a Circuit or District Court of the United States within any state, shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state; provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the state of Louisiana before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States Courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state." Act Aug. 1, 1888, c. 729, § 1, 25 Stat. 357 (Comp. St. 1913, § 1606).

This last statute came into operation as to judgments rendered in the federal courts in the state of North Carolina by virtue of the state statute of 1889, providing for docketing of such judgments by the

clerks of the superior courts of the state.

The judgments now before us became liens under section 967 of the Revised Statutes of the United States, above quoted, which was in force at the date they were recovered. United States v. Scott, 27 Fed. Cas. 999; Cooke v. Avery, 147 U. S. 375, 13 Sup. Ct. 340, 37 L. Ed. 209.

Had the judgments been in favor of a citizen, by the terms of the federal statute, they would have ceased to be liens at the expiration of the ten years fixed as the life of the lien by the state statute, and of course no action could now be maintained to enforce them as liens. But it is established beyond all controversy that the rights of the United States cannot be impaired by the lapse of time provided as a bar by the laws of the states, and that the federal government will be held to be excepted from federal statutes of limitation unless the intention to include it plainly appears. Under the same reasoning that the rights of the nation are not to be impaired by the enforcement of such state statutes, its rights cannot be defeated by the laches of its officers.

"It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they shall be so bound." Ex parte John A. Davenport, 6 Pet. 443, *661, 8 L. Ed. 537; United States v. Jacob Knights et al., 14 Pet. 251, *301, 10 L. Ed. 465; Gibson v. Chouteau, 80 U. S. (13 Wall.) 92, 20 L. Ed. 534; United States v. Thompson, 98 U. S. 486, 25 L. Ed. 194; Fink v. O'Neil, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. Ed. 196; United States v. Nashville, Chattanooga & St. Louis Railway Co., 118 U. S. 120, 6 Sup. Ct. 1006, 30 L. Ed. 81; United States v. Insley, 130 U. S. 263, 9 Sup. Ct. 485, 32 L. Ed. 968; United States v. American Bell Telephone Co., 159 U. S. 548, 16 Sup. Ct. 69, 40 L. Ed. 255; note to Bannock v. Bell, 101 Am. St. Rep. 173.

This principle extends to the proposition that the United States may take the benefit of any state or federal statute though it is not bound by its limitations. Dollar Savings Bank v. United States, 19 Wall. 227, 22 L. Ed. 80; Stanley v. Schwalby, 147 U. S. 508, 13 Sup. Ct. 418, 37 L. Ed. 259.

So in these cases the United States was entitled to assert the lien of its judgments under the federal and state statutes without subjecting itself to the limitation that the lien should expire in ten years.

[2] It remains to consider the effect of section 70 of the Revisal of

North Carolina, which provides:

"All conveyances of real property of any decedent made by any devisee or heir at law, within two years from the grant of letters, shall be void as to the creditors, executors, administrators and collectors of such decedent; but such conveyances to bona fide purchasers for value and without notice, if made after two years from the grant of letters, shall be valid even as against creditors."

Ward died intestate in 1900. Administration of his estate was not granted until March 26, 1912. Before administration, on November

20, 1909, the heirs of Ward instituted proceedings for partition, under which the land was sold to M. J. Wrenn for \$2,018. The sale was confirmed by order of the state court May 20, 1910, and conveyance made to the purchaser May 23, 1910. This sale was binding only on the heirs of Ward, as they were the only parties to the proceeding. It was in effect a conveyance made by the heirs, and not having been made two years after the administration, it could not affect the rights of the United States as the holder of valid judgment liens, on the land. Renan v. Bank, 83 N. C. 485; Davis v. Perry, 96 N. C. 260, 1 S. E. 610; Camp Mfg. Co. v. Liverman, 128 N. C. 52, 38 S. E. 27.

The case is a hard one on the purchaser of the land, but his misfortune results from the disregard by him of established legal prin-

ciples, which the court must enforce.

The decree of the District Court is reversed, and the case remanded for further proceedings in accordance with this opinion.

Reversed.

ETCHEN et al. v. CHENEY et al.

(Circuit Court of Appeals, Eighth Circuit. July 29, 1916.)

No. 4583.

1. INDIANS \$\infty\$15(1)\to Lands\to Conveyance by Minor.

Under Act May 27, 1908, c. 199, § 1, 35 Stat. 312, deeds of Indian minors to allotment lands in Oklahoma, made without authority of the proper probate court, are void.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 37; Dec. Dig.
□5(1).]

2. Indians \$\infty\$16(1)—Lands—Lease by Guardian.

An oil and gas lease, executed by the guardian of an Indian minor in Oklahoma and approved by the proper probate court, is valid for its term, although the minor reaches majority before its expiration, and gives the lessee the right of possession, although the land is at the time in possession of another, claiming under a void deed from the minor.

3. CHAMPERTY AND MAINTENANCE \$\infty 7(3)\$—CHAMPERTOUS CONTRACT—OIL LEASE.

Under the law of Oklahoma, by which an oil and gas lease creates only an incorporeal hereditament, such a lease is not within the champerty laws.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ S4-110; Dec. Dig. ⇐ 7(3).]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit in equity by H. G. Cheney, C. C. Harmon, A. F. Vandersall, John Jelinek, and E. K. Cheney against David Etchen and W. C. Drumm. Decree for complainants, and defendants appeal. Affirmed.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

James C. Denton, of Muskogee, Okl. (William S. Cochran, of Tulsa,

Okl., on the brief), for appellants,

James A. Veasey, of Tulsa, Okl. (J. Wood Glass and E. B. Lawson, both of Nowata, Okl., and Roger S. Sherman and J. P. O'Meara, both of Tulsa, Okl., on the brief), for appellees.

Before SMITH and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. The appellees, hereafter called plaintiffs, being in possession of certain land located in the county of Nowata, Okl., commenced this action against appellants, hereafter called defendants, for the purpose of restraining the defendants from entering upon said land or otherwise interfering with the possession of the plaintiffs. The defendants answered the complaint, and also filed a cross-complaint. The case came on for hearing upon pleadings, proofs, and the master's report. The court at this hearing granted plaintiffs the relief prayed for. Before a decree was entered the defendants, on leave granted, filed a supplemental answer and cross-complaint. After issue joined the case again came on for hearing, and the court, adhering to its prior opinion, rendered a decree for the

plaintiffs. Defendants appealed.

Plaintiffs and defendants claimed the right to the peaceable possession of the land in controversy under certain conveyances executed by the owner thereof, one Frank C. Elliott, who obtained title to the same May 29, 1906, by patent from the Cherokee Nation of Indians. The conveyances obtained by plaintiffs are as follows: (1) An oil and gas lease executed by Edmund Elliott, guardian of Frank C. Elliott, dated January 14, 1911, approved the same day by William F. Gilluly, county judge. This instrument was duly recorded January 20, 1911. An oil and gas lease executed by Frank C. Elliott in person January 26, 1911, and recorded January 27, 1911. The conveyances obtained by defendants are as follows: (1) A warranty deed dated November 4, 1910, executed by Frank C. Elliott in person to one Peevehouse. (2) A quitclaim deed from Peevehouse to David Etchen, the real defendant in this action, dated December 1, 1910. (3) A warranty deed from Frank C. Elliott in person to David Etchen, dated January 2. 1911. (4) A warranty deed from Frank C. Elliott in person to David Etchen, dated June 14, 1911. (5) Warranty deed from Frank C. Elliott to David Etchen, dated January 3, 1912.

[1] The enrollment record introduced in evidence showed the date of the enrollment of Frank C. Elliott, an Indian, to be October 16, 1900, and his age at that time to be 10 years. On this evidence the trial court found that Elliott became 21 years of age October 16, 1911. The master found when the case was last before him that Elliott was born January 26, 1890, and reached his majority January 26, 1911. The finding of the master must stand, although it makes no material difference in this case which day is taken. We held in McDaniel and Paraffine Oil Co. v. Robert L. Holland (No. 4461), 230 Fed. 945, — C. C. A. —, that the date of enrollment, standing alone, was not evidence that a particular Indian was born on that day. Deeds of In-

dian minors, made without the authority of the proper probate court in Oklahoma, are void under Act Cong. May 27, 1908, c. 199, 35 Stat. 312. Barbre v. Hood, 228 Fed. 658, 143 C. C. A. 180 (8th Cir.); Truskett v. Closser, 198 Fed. 835, 117 C. C. A. 477; Id., 236 U. S. 223, 35 Sup. Ct. 385, 59 L. Ed. 549; Jefferson v. Winkler, 26 Okl. 653, 110 Pac. 755; Barbre v. Hood (D. C.) 214 Fed. 473; Priddy v. Thompson, 204 Fed. 955, 123 C. C. A. 277 (8th Cir.); Bell v. Cook (C. C.) 192 Fed. 597; Reid v. Taylor, 43 Okl. 816, 144 Pac. 589; Tirey v. Darneal, 37 Okl. 606, 133 Pac. 614; Tirey v. Darneal, 37 Okl. 611, 132 Pac. 1087. The following Oklahoma cases are also in point: Kirkpatrick v. Burgess, 29 Okl. 121, 116 Pac. 764; Gill v. Haggerty, 32 Okl. 407, 122 Pac. 641; Yarbrough v. Spalding, 31 Okl. 806, 123 Pac. 843; Bruner v. Cobb, 37 Okl. 228, 131 Pac. 165; Dodd v. Cook, 41 Okl. 105, 137 Pac. 348; Cochran v. Teehee, 40 Okl. 388, 138 Pac. 563.

This being the law, the conveyances under which the defendants claim, dated November 4, 1910, December 1, 1910, and January 2, 1911, are void. The oil and gas lease under which plaintiffs claim, dated January 14, 1911, and made by the guardian of Elliott, with the approval of the county judge, is valid, and, even if not, then the lease executed by Elliott in person and dated January 26, 1911, the date on which he reached his majority. Both of these leases were on record at the time the deeds dated June 14, 1911, and January 3, 1912, respectively, were executed by Elliott to Etchen.

[2] The lease of January 14, 1911, duly approved by the county court, was a valid lease for its full term of five years and so long thereafter as oil and gas continued to be found in paying quantities, notwithstanding the fact that Frank C. Elliott reached his majority on January 26, 1911. Cabin Val. Min. Co. v. Hall (Okl.) 155 Pac. 570; Mallen et al. v. Ruth Oil Co. et al., 231 Fed. 845, — C. C. A. - (8th Cir.). If the lease was voidable by Elliott after he reached his majority, there is no evidence that he ever did anything to avoid it. The lease of January 26, 1911, the day on which Elliott reached his majority, must be held to be confirmatory of the lease of January 14, 1911. These leases gave the plaintiffs the right to enter upon the land in question to explore for oil and gas, and we agree with the trial court that the circumstances under which the lease of January 14, 1911, was given, including the approval thereof by the county court, made the transaction in the nature of a judicial sale. Morrison v. Burnette, 154 Fed. 617, 83 C. C. A. 391; Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co., 165 Fed. 162, 91 C. C. A. 196. And therefore the fact that at the time the lease was executed the land was in the possession of Etchen would not render the lease by the guardian a champertous transaction.

[3] The possession of Etchen of the land in question when the leases of January 14 and 26, 1911, were executed was under void deeds, and to hold that his possession could defeat a lease lawfully made would result in nullifying the laws of Congress relating to Indian lands. Ashton v. Noble (Okl.) 148 Pac. 1042. The possession of Etchen was also during the minority of Elliott, and therefore not ad-

verse. Moore v. Baker, 92 Ky. 518, 18 S. W. 363. An oil and gas lease creates only an incorporeal hereditament under the decisions of Oklahoma, and therefore such a lease is not within the champerty laws. Kolachny v. Galbreath, 26 Okl. 772, 110 Pac. 902; Frank Oil Co. v. Belleview Oil & Gas Co., 29 Okl. 719, 119 Pac. 260, 43 L. R. A. (N. S.) 487; Priddy v. Thompson, 204 Fed. 955, 123 C. C. A. 277; Hegan v. Pendennis Club (Ky.) 64 S. W. 464; Williams v. Poole (Ky.) 103 S. W. 337; Coleman v. Manhattan Beach Improvement Co., 94 N. Y. 229; Corning v. Troy Iron Co., 40 N. Y. 191; Sherwood v. Burr, 4 Day (Conn.) 244, 4 Am. Dec. 211; People's Electric Co. v. Capital Gas Co., 116 Ky. 76, 75 S. W. 280; Armstrong v. Caldwell, 53 Pa. 284.

The lease made by Elliott on October 16, 1911, to Hugh M. Branson, and subsequently assigned to the plaintiffs, was not an abandonment of the lease of January 14, 1911. It was evidently executed for the purpose of confirming the rights of the plaintiffs as lessees of the land; it being assumed, no doubt, as the court below held, that Elliott reached his majority on October 16, 1911. The court below also finds that Elliott knew, when he executed the lease of October 16, 1911, to Branson, that Branson was taking the lease and any and all rights it purported to convey for the use and benefit of the plaintiffs, and understood and intended that the lease should be effective as a ratification and affirmance of the prior lease by his guardian.

The other errors assigned have been duly considered and are found

to be without merit.

The decree was for the right party and should be affirmed; and it is so ordered.

THE WILLIAM E. CLEARY.

THE TRANSFER NO. 10.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 232.

Collision \Longrightarrow 95(2)—Tugs with Tows in East River—Failure to Keep Near Middle of Channel.

A transfer tug, with two car floats alongside, held solely in fault for a collision at night in East River between one of her tows and a barge in tow alongside of another tug, which was maneuvering to pass the end of a pier on the Manhattan side against the flood tide, and which stopped and backed on the approach of the Transfer to keep out of the way, on the ground that the Transfer was coming down too close to the piers, instead of keeping near the middle of the river, as required by the regulations; the collision having occurred not more than 300 feet from the pier end.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. €=95(2).]

Coxe, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty for collision by Clarence L. Bleakley, owner of the barge U. H. No. 66, against the steam tug William E. Cleary, the Cornell Steamboat Company, claimant, and the steam tug Transfer No. 10, the New York, New Haven & Hartford Railroad Company, claimant, impleaded. Decree for libelant against the Cleary, and her claimant appeals. Reversed, and decree entered against the Transfer No. 10.

This is an appeal from a decree in admiralty of the District Court entered on August 2, 1915, after a hearing upon a libel in rem. The occasion of the suit was injuries to the barge U. H. No. 66, loaded with a cargo of stone and injured by contact with a railroad float in tow of Transfer No. 10 at 9 p. m. on January 30, 1914. The owner of the barge U. H. No. 66 filed a libel in rem against the steam tug William E. Cleary, which had her in tow at the time of the collision. The Cleary's owners appeared and answered, denying fault, and petitioned in the Transfer No. 10, whose floats came in contact with the U. H. No. 66. The New York, New Haven & Hartford Railway Company claimed the Transfer No. 10, and answered the petition of the Cleary's owners, and also answered the libel. The decree dismissed the petition against the Transfer No. 10, with costs, and awarded damages against the William E. Cleary for \$1,436.40, with costs and interest.

The facts are as follows: The U. H. No. 66 on the 30th day of January, 1914, was taken in tow by the tug Terry, belonging to the Cornell Steamship Company, at the foot of Fifty-Fifth street in the North River, bound for the south side of Pier 42 in the East River, where her cargo was to be discharged. She was taken into a general tow at about 4:30 p. m. that day; the weather being clear, the wind light, and the tide flood. The Cleary was a helper tug engaged with the tow in picking out separate barges and taking them to their destination. After the tow had rounded the Battery and had gone up the East River to about Corlear's Hook, the Terry rounded to, facing the flood tide and letting her tow tail off up the river, opposite Cherry street. She waited in this position some time until the Cleary, which had been towing two other barges to Wallabout Bay, came back and took upon her star-board hand the barge U. H. No. 66. This was well above Corlear street. The Cleary proceeded along the port side of the tow, keeping inshore so as to get the effect of an eddy which makes at that point upon the flood tide close in towards Corlear's Hook Park. Pier 42 is just south of the Jackson Square pler, and in order to reach it the Cleary had to starboard her wheel somewhat so as to clear the end of the pier. In doing so she exposed the starboard bow of the barge at a substantial angle to the full force of the flood tide, which is close to the pier ends at that point. This caused the barge to swing off so much to port that the Cleary had to drop back and to try a second time to clear the pier ends by keeping further off, so that she would have to starboard only a little and not expose the bow at so great an angle to the tide. She had worked down until she was just about off the end of the Jackson Street pier and in a position almost to clear it.

Meanwhile, the Transfer No. 10, with a car float on either hand, was coming down the river and had starboarded around Corlear's Hook under the tail of the Terry's tow, which had remained in place. She passed the tow on her starboard hand and eventually came in sight of the Cleary in a position which seemed to the Transfer's captain to be hauging to the end of the Jackson Square pier. Shortly thereafter, the Transfer blew two blasts, and her captain says that she got the same in answer. The captain of the Cleary says that, at once upon hearing the blasts of the Transfer, he looked about and was afraid, if he ported, he would expose his stern to the Transfer, which was coming down too close for safety. Therefore he backed and blew an alarm, and he continued backing until the time of the accident. The Transfer for a time continued her course, but, seeing the lights on the Cleary change, and eventually getting her red light half a minute or less before the accident she starboarded and backed. Through the backing of the Cleary, probably coupled with the strength of the tide, the barge was swung strongly

to port nearly across stream, and her port bow struck the starboard car float a little forward of amidships, causing the damage in question.

Kirlin, Woolsey & Hickox, of New York City (J. P. Kirlin, William H. McGrann, and Robert S. Erskine, all of New York City, of counsel), for appellant.

C. M. Sheafe, Jr., of New York City, for appellee Transfer No. 10.

Peter Alexander, of New York City, for appellee Bleakley.

Before COXE and WARD, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge. The important time in this case was after the Transfer had cleared the Terry and caught sight of the Cleary below her and on her starboard bow, up to which time the Transfer's navigation could have no relation to the Cleary. Her subsequent conduct must be judged by what appeared to her at that The District Judge has found that the case was not one of overtaking vessels, and we agree with him. So far as the Transfer could see, the case was one of special circumstances, and we find no fault in the navigation of the Transfer after that time. Her only possible fault was her position. As the District Judge has heard all the witnesses, and among them all has chosen Lundquist, the master of the Transfer, for his confidence, we should be governed by his finding, and we should therefore accept the finding that the collision occurred about 300 feet off the pier ends. There is, it is true, considerable difficulty in seeing just how the Cleary, which had been continually backing, could get the bow of the barge so far from the pier ends, especially as the witnesses assert that the tide runs true at that point. It is. moreover, notorious that the estimate of distances, particularly at night, is most unreliable. We therefore have considerable doubt as to just where the accident was; but, as it makes no difference in our judgment, we shall accept the finding of the District Court as above stated, particularly as the barge herself says that her bow was about 150 feet from the pier ends.

The District Court has found, and we accept this finding also, that the Transfer had met an upbound tow and had ported to avoid it; but we place the fault in her porting so far towards the New York shore. If the upbound tow was in the middle of the river, the Transfer had a channel of 750 feet, and she was bound to keep nearer to the middle of the stream. The mere occurrence of the collision in our judgment proves this, because the Cleary was at the very pier end when she began to back, and all she did was to back, trying to get out of the way. It may be that her judgment was bad under the circumstances, but it seems to us that a car float tow in any event comes too close to the pier ends if she collides with another tow itself at the very pier ends, which is doing, and has done, nothing but its best to keep out of the way. It was the purpose of the statute to keep such vessels out of the way of shipping, navigating in and out of slips, and this court has already held it a fault to come within even 400 feet of the pier ends. The Amos C. Barstow, 66 Fed. 366, 13 C. C. A.

515.

The decree is reversed, and a decree will be entered for the libelant against the Transfer, with costs, and for the Cleary, with costs against the Transfer.

COXE, Circuit Judge. I dissent. I think the Cleary was plainly at fault, if not solely at least jointly with the Transfer.

EXPLORATION CO., Limited, et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. August 2, 1916.)

No. 4676.

Limitation of Actions \$\iff 99(1)\$—Fraud as Ground for Relief—Effect of Concealment.

Concealment of a fraud will prevent the running of the statute of limitations against an action based thereon, whether the concealment is active, or whether the fraud is committed in such manner as to conceal itself.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 477; Dec. Dig. &=99(1).]

Appeal from the District Court of the United States for the District of Colorado: Jacob Trieber, Judge

trict of Colorado; Jacob Trieber, Judge.
Suit in equity by the United States against the Exploration Company, Limited, and Philip L. Foster. Decree for the United States and defendants appeal. Affirmed.

For opinion below, see 225 Fed. 854. See, also, 203 Fed. 387, 121

C. C. A. 491.

Henry McAllister, Jr., of Denver, Colo. (George E. Tralles, of Den-

ver, Colo., on the brief), for appellants.

Frank Hall, Sp. Asst. Atty. Gen., of San Francisco, Cal. (Harry B. Tedrow, U. S. Atty., of Denver, Colo., on the brief), for the United States.

Before SMITH and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. This case was before us at a former term of the court on an appeal from a decree sustaining a demurrer to the complaint. The decree was reversed. United States v. Exploration Company, 203 Fed. 387, 121 C. C. A. 491. A trial of the case has been had, and a decree rendered in favor of the plaintiff. Defendants have again appealed, assigning error.

The principal question in the case now, as well as on the former appeal, is as to whether plaintiff's cause of action, at the time the complaint was filed, had been barred by the statute limiting the time for the institution of suits to vacate and annul land patents. The statute referred to may be found in 26 Stat. 1095, 1099, 1093, and 29 Stat. 42, being Act March 3, 1891, c. 559 (Comp. St. 1913, § 4992), and chapter 561, and Act March 2, 1896, c. 39 (Comp. St. 1913, §§ 4901—

4903). We are not asked to reverse our former decision holding that the cause of action was not barred, and we adhere to our former ruling, the reasons for which are stated at length in the opinion of the court on the former appeal. It is now claimed, however, that the evidence introduced at the trial in support of the complaint failed to establish the facts alleged. The trial court made findings of fact and they appear in United States v. Exploration Company, Limited, 225 Fed. 854.

We have carefully considered the evidence taken at the trial, and find that it fully supports the findings of the trial court. It is now claimed, however, that our former ruling on the statute of limitations was based on the allegations of the complaint to the effect that the defendants actively engaged in a conspiracy to conceal the fraud committed in obtaining the patents. In deciding the questions raised by the demurrer, we of course referred to the language of the complaint; but the reason for our ruling, and the authorities cited in support thereof, applied to cases of concealed fraud, whether active or passive. In our former opinion we quoted an excerpt from Bailey v. Glover, 21 Wall. 342, 22 L. Ed. 636, as follows:

"To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."

Indeed, the rule seems to be well established. The important question in this case is as to whether it may be applied to the statute of limitations under consideration. For the reasons stated on the former appeal, which need not be repeated here, we hold that it does. In the case at bar the defendants did not advertise the fact that they were committing a fraud, nor did they discuss the fraud among themselves in the presence of others, but the manner in which the fraud was committed constituted all the concealment that was necessary. After it was supposed the statute of limitations had barred any action, the participants in the fraud talked very freely, telling the truth when it was thought it would do no harm. The findings of the trial court, in our judgment, are fully sustained by the evidence, and the findings sustain the decree rendered.

In regard to the point that the right Exploration Company was not sued, we are satisfied with the disposition of that question, and the reasons therefor appearing in the opinion of the trial court. 225 Fed. 860. It is further objected that the decree entered should have recognized the interest of one Alexander Burrell. Burrell was originally named as a defendant in the suit. He appeared and filed a separate demurrer. The demurrer was sustained, and a decree entered dismissing him from the case. On the former appeal counsel moved to dismiss the same, for the reason that Burrell was a party defendant in the court below, and was not made a party on the appeal. We then decided that it did not appear that Burrell, taking the allegations of the complaint to be true, had any interest in the controversy, nor does it now appear from the evidence. Having demurred to the

complaint on the ground that it stated no cause of action against him, Burrell cannot now be heard to say that he should be recognized in the decree.

The decree is affirmed.

THE DANIEL WILLARD.

(Circuit Court of Appeals, Second Circuit. June 6, 1916.)

No. 300.

Collision @==96-Vessel Leaving Slip-Obstruction of View by Pier-Duty to Give Signals.

A steamship, leaving her pier and passing out into North River close along the north side of a covered pier 1,000 feet long, which cut off the view to and from the south, was in a situation requiring great care, and her failure to go at slow speed, or to give warning to approaching vessels after her slip signal on leaving her own pier, 1,300 feet distant from the end of such long pier, rendered her in fault for a collision with another vessel approaching from the south.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 203-205; Dec. Dig. ⋒⇒96.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty for collision by Michael Blasius and Nicholas Blasius, owners of the steamer Seneca, against the steam tug Daniel Willard; the Pennsylvania Coal Company, claimant. From a decree holding both vessels in fault, libelants appeal. Affirmed.

On appeal from a decree of the District Court for the Southern District of New York holding the steam tug Daniel Willard and the steamer Seneca jointly in fault for a collision which occurred in the North River about 150 feet northeast of the corner of the Scandinavian Pier which extends into the river about a fifth of a mile from the Weehawken Cove, New Jersey. The Willard was destined for the Coal Pier at Weehawken; the Seneca was proceeding out into the North River from her berth in the rear of the Scandinavian Pier. The Seneca alone appeals.

Alexander & Ash, of New York City (Peter Alexander, of New York City, of counsel), for appellants.

Barry, Wainwright, Thacher & Symmers, James K. Symmers, and Earle Farwell, all of New York City, for appellees.

Before COXE and WARD, Circuit Judges, and CHATFIELD, District Judge.

COXE, Circuit Judge. The District Court held both the Willard and the Seneca liable. The Willard has not appealed. The only question, therefore, is—was the Seneca also guilty of negligence? The District Judge found her liable for going out of the slip at too great a rate of speed so that when the vessels saw each other they were only about 200 feet apart and in a position where collision was in-

evitable. The Scandinavian Pier is a covered structure about 1,000 feet long. It is impossible for a vessel passing out along this structure to see a vessel approaching from the south until the bow of the former projects from the end of the pier. The same is true of the northbound vessel. She cannot see a vessel coming out along the pier until her helmsman or lookout has passed the corner of the pier. Manifestly the situation was such as to require great care and caution on the part of both the approaching vessels. That whistles were blown while the Seneca was passing along the north side of the pier and was nearing the river is doubtful. The mate, a deckhand on the port bow and another deckhand on the port side near the pilot house of the Willard were in a position where they must have heard any signal coming from the Seneca if one were given, but they testify that they heard none. When first seen by those on the Willard the Seneca was coming out directly across the course of the Willard. It was then too late to avoid collision. We find it difficult to believe that if the proper signals had been sounded from the Seneca the collision would have occurred. The situation unless handled with skill and caution was one of great peril. The Seneca was about to enter the North River in such a manner that a vessel going north or intending to enter the Weehawken Cove could not possibly know of any approaching danger until she had passed the Scandinavian pier head. A vessel intending to leave the Cove was unquestionably required to notify passing vessels of her intention so to do. Especially is this true when a vessel intends to pass out so near to the pier that a north-bound vessel cannot be expected to see her until her bow is about even with the pier head.

Rule V of article 18 of the Inland Rules provides for such a situation as is here shown but its directions were not followed by the Seneca. Of course the blowing of a long slip whistle when the Seneca left her own pier behind the Scandinavian Pier cannot be regarded as a compliance with the rule as she was then about 1,300 feet from the head of the pier. A signal at that point would have given the Willard no definite information as to the Seneca's course. By hugging the Scandinavian Pier so closely she created a situation which made it more than ever incumbent upon her to inform vessels approaching the pier end from the south of her presence and her intentions. If she had passed out into the North River at a speed so moderate that she could have controlled her movements the collision would probably have been averted. We do not think the Seneca can be held free from negligence on this proof.

The situation was analogous to that shown in the case of The Steinway, 135 Fed. 344, 68 C. C. A. 14, where this court decided that it was negligence for a vessel to round a dangerous point so near the shore that it was impossible to get an accurate view of the situation on

her port hand until she had actually rounded the point.

The decree is affirmed with costs.

235 F.—8

UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MD., v. G. W. PARSONS CO.

(Circuit Court of Appeals, Eighth Circuit. July 6, 1916.)
No. 4655.

SALES \$\infty 474(2)\$\to Conditional Sale\$\to Validity of Unrecorded Contract.

An unrecorded conditional sale contract for a machine, by which the seller reserved title until full payment, although void under the statute as to good-faith purchasers and incumbrancers for value, is good as against one holding a prior contract, executed by the purchaser, giving a lien on after-acquired property, although possession was taken under the contract, the machine sold, and the purchaser credited with the proceeds, without notice by the creditor of the conditions of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1397; Dec. Dig. & 474(2).]

In Error to the District Court of the United States for the Southern District of Iowa; John C. Pollock, Judge.

Action at law by the G. W. Parsons Company against the United States Fidelity & Guaranty Company of Baltimore, Md. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 225 Fed. 252.

Jesse A. Miller, of Des Moines, Iowa (J. D. Wallingford and Roy E. Curray, both of Des Moines, Iowa, on the brief), for plaintiff in error.

William B. Brown, of Des Moines, Iowa, and C. O. McLain, of Newton, Iowa, for defendant in error.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. March 22, 1913, Misho & Co. contracted with the city of Edmonton, in the province of Alberta, Canada, to construct a sewer for it. Plaintiff in error, the United States Fidelity & Guaranty Company, became surety on its bond for the faithful performance of the contract. As one of the considerations for becoming surety the bond specified that Misho & Co. assign to the surety "all our right, title, and interest in and to all tools, plant, equipment, and materials of every nature and description that we may now or hereafter have upon said work, or in or about the site thereof," and empowered the Surety Company to take possession of the property in the event of default on the part of Misho & Co. in their contract with the city. More than a month subsequent to the giving of this contract of indemnity, Misho & Co. purchased a trencher of the plaintiff below, the G. W. Parsons Company, for a consideration of \$7,000, only \$1,500 of which was paid. The balance was evidenced by notes and a check. The contract of sale reserved title to the property until the entire consideration was paid. Neither this contract nor any note or memorandum thereof was filed for record either in Iowa, where the plaintiff has its place of business, or in Alberta, to which the trencher

was immediately removed. By the statute in both jurisdictions this failure to file rendered the conditional sale contract void as to good-faith purchasers and incumbrancers for value. In September, 1913, Misho & Co. abandoned the contract, and authorized the Surety Company to take possession of the trencher and other property. This it did, and completed the work at a loss of about \$10,000. The Surety Company examined the records in Alberta, and found no evidence of a conditional sale. At the completion of the job they sold the trencher for \$3,500, and credited Misho & Co. with the sum in their account. This suit was brought by the Parsons Company against the Surety Company to recover the value of the trencher as for conversion. The case was tried before the court without a jury, special findings were made, and a judgment entered in favor of the plaintiff for the sum of \$5,000. The Surety Company, which was defendant below, brings error.

The case is controlled by Holt v. Henley, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767. That suit involved a contest between the vendor under a conditional sale, and a mortgagee under a mortgage which was executed and recorded previous to the sale, so the cases are parallel. Here the contract granting the Surety Company its rights was executed prior to the sale to Misho & Co. Defendant attempts to distinguish the case of Holt v. Henley upon the ground that there was no taking possession of the property in that case by the mortgagee before the conditional contract was filed, and urges that, as the Surety Company there took possession without notice of the conditional sale, it thereby acquired a right superior to the title held by the vendor. The fallacy of that argument arises out of the fact that the mortgagee in the case of Holt v. Henley filed his mortgage (see decision of trial court, In re Williamsburg Knitting Mill [D. C.] 190 Fed. 871, 872), and that, under all the decisions, was tantamount to the taking of possession. So the contest in Holt v. Henley was between the vendor under an unrecorded conditional sale and a prior mortgagee under a mortgage embracing after-acquired property, which mortgage was duly filed and thus had the same effect as the taking of possession by the mortgagee. The Supreme Court held that the mortgagee was not a good-faith incumbrancer for value of this after-acquired property, and sustained the claim of the vendor under the conditional sale contract. The present case cannot be distinguished from that decision in any material feature. The Surety Company has no standing in equity. It parted with no value. Its claim that the giving of credit to Misho & Co. was sufficient to make it a purchaser for value, is unsound. There were no present negotiations between the Surety Company and Misho & Co. by which the latter transferred title to the trencher to the former in consideration of the credit. That was a mere matter of bookkeeping on the part of the Surety Company.

The decision was right, and is affirmed.

THE POCAHONTAS.

THE MAIA.

(Circuit Court of Appeals, Second Circuit. June 6, 1916.)

Nos. 298, 299,

Collision 6-71(2)—Passing Tow and Anchored Steamship—Negligent Navigation of Tow.

A steamship, by anchoring in the North River at a place where it is a mile wide and navigable from shore to shore, even though she was partly or entirely off the designated anchorage ground, cannot be held chargeable with fault for a collision with one of the barges of a passing tow, which had a clear space of a quarter of a mile on one side and a half mile on the other; but the fault must be attributed solely to the towing tugs for negligent navigation.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. 100, Dec. Dig.

Appeals from the District Court of the United States for the Southern District of New York.

Suits in admiralty for collision by John H. Flannery, owner of the barge Economy, against the steam tug Pocahontas, the Cornell Steamboat Company, claimant, with the steamship Maia impleaded, Otto Schacht, claimant, and by Otto Schacht against the tug Pocahontas. Decree in the first suit for libelant against both the tug and steamship, and both appeal; and in the second case for libelant for half damages, and libelant appeals. Modified on both appeals.

For opinion below, see 217 Fed. 135.

On appeal from decrees entered in the District Court for the Southern District of New York in the above entitled actions growing out of a collision in the North River between the steamship Maia and the barge Economy in tow of the tug Pocahontas belonging to the Cornell Steamboat Company. The District Court found that both the Pocahontas and the Maia were at fault and divided the damages between their respective owners.

Both parties insist that the decree is erroneous and each argues that the other was solely at fault and liable for the damages which resulted from the

collision.

Kirlin, Woolsey & Hickox, J. Parker Kirlin, and Robert Erskine, all of New York City, for Cornell Steamboat Co.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Chauncey I. Clark, both of New York City, of counsel), for Schacht.

James J. Macklin and William F. Purdy, both of New York City,

for Flannery.

Before COXE and WARD, Circuit Judges, and CHATFIELD, District Judge.

COXE, Circuit Judge. On the 18th day of May, 1914, the steam tug Pocahontas assisted by the tug Virginia was proceeding down the North River opposite Palisades Park with a tow of from 18 to 24 barges, the majority being loaded. There were 3 or 4 boats abreast in the three forward tiers, the barge Economy being the outer port

boat in the third tier. The remaining tiers were made up with less than 4 boats each. The Maia was anchored off Palisades Park and in passing down the river the Economy came into collision with the stern of the Maia, causing the damage complained of. The owner of the Pocahontas impleaded the Maia, alleging that she was improperly anchored across the channel, that she failed to give warning and did not have a proper lookout.

We think that there can be no doubt regarding the negligence of the Pocahontas, but it seems to us that the Judge was in error in holding the Maia. It is argued that she was anchored outside the anchorage ground and across the fairway, that she had no lookout and that she gave no warning signal indicating that she was off the anchorage ground. If the locus in quo had been a narrow, tortuous stream, there might be some reason for such contentions but we are dealing here with a river nearly a mile wide and navigable the entire distance from shore to shore. The anchorage regulations are not in evidence. We do not think the Maia was anchored off the anchorage ground but if she were partly off or wholly off, that did not justify other vessels in running into her. There was nothing to prevent the Cornell tugs from taking down their tow with perfect safety had they been properly handled; they had a quarter of a mile unobstructed water on the Jersey side and over half a mile on the New York side. The suggestion that there was danger of colliding with ascending tows on the New York side is not at all persuasive. If the helping tug had been sent back to aid the flotilla in passing the Maia, there would have been no collision.

It seems to us that the tugs were clearly responsible for the collision and that the judgment against the Maia is based upon technical considerations too refined to be considered. The tugs had practically the entire river in which to pass the Maia and if they had been properly handled they would have passed without danger. They should be held solely responsible.

The cause is remanded to the District Court with instructions to enter a decree in accordance with this opinion. In the second suit a decree should be entered for full damages to the libelant, with costs.

THE NELLIE T.

(Circuit Court of Appeals, Second Circuit. June 9, 1916.)

No. 245.

ADMIRALTY S-S-JURISDICTION-POSSESSORY ACTION.

Admiralty has jurisdiction of a suit by a time charterer of a vessel, who is the owner pro hac vice, to recover possession from the owner, who, having taken possession to make repairs, refuses to return the vessel.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 121-125; Dec. Dig. ⇐⇒8.]

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty by the Brooklyn Ash Removal Company against the scow Nellie T.; Ellen T. Connell, claimant. From a decree dismissing the libel on exceptions, libelant appeals. Reversed.

Alexander & Ash and Mark Ash, all of New York City, for appellant.

Hyland & Zabriskie and Nelson Zabriskie, all of New York City, for appellee.

Before COXE and WARD, Circuit Judges, and CHATFIELD, District Judge.

WARD, Circuit Judge. This libel is filed against the scow Nellie T. and her owner, alleging that the libelant is charterer for a term beginning January 15, 1914, and ending December 31, 1916, with an option for a further term of two years; that on November 15, 1915, the owner withdrew the scow temporarily from the possession of the libelant to make certain repairs, as required by the charter party, and upon their completion refused to return her to it. The relief prayed for is that the scow may be ordered to be returned to the libelant, and the owner ordered to pay him the damages he sustained by being deprived of the use of the scow in the meantime.

The owner filed exceptions to the libel on the ground that the court had no jurisdiction to entertain a libel for possession by a time charterer. The District Judge sustained the exceptions and dismissed the libel, from which decree this appeal is taken. The opinion of the District Judge is as follows:

"There seems to be no warrant in admiralty for the maintenance by a time charterer of an action against the owner for possession of the vessel. Exceptions sustained."

As the allegations of the libel must be taken to be true, we have the question whether a charterer under a charter demising a vessel, because that is what the libel plainly describes, and entitled to the possession may maintain a possessory suit in the admiralty. It is strange that no case can be found in the books in which such a suit has been considered. Still petitory and possessory suits instituted by vessel owners are rare. A suit which involved similar considerations was maintained in the case of a sheriff from whose possession a vessel had been taken. It is true that in it the sheriff's claim was defeated, because he had levied upon the vessel as belonging to the defendant in an action at law in the state court, whereas she belonged to another person who was the claimant in the admiralty suit. However, the jurisdiction to entertain such a possessory suit was not questioned. The Bonnie Doone (D. C.) 36 Fed. 770.

The libelant's right is not an equitable one which courts in admiralty may not enforce (The Eclipse, 135 U. S. 599, 10 Sup. Ct. 873, 34 L. Ed. 269; Wenberg v. A Cargo [D. C.] 15 Fed. 285), but is legal, and we see no reason why it is not within the admiralty jurisdiction. The difference between the title of an owner of a vessel and that of

a charterer, owner pro hac vice, is but in degree. A right to present possession is as good as an absolute title as against the owner or anybody else who wrongfully disturbs it. A charter is a maritime contract, and when it has been executed by delivery of the vessel no equitable powers are needed by the court for the enforcement of the charterer's right to possession. A possessory suit is in the nature of a common-law action of replevin.

We do not pass upon the merits, and in order that the court below

may do so the decree is reversed.

THE NOE G.

THE L'ETRURIA.

(Circuit Court of Appeals, Ninth Circuit. August 7, 1916.)

No. 2689.

COLLISION \$\infty 83\to Motor Boats Meeting in Fog-Mutual Faults.

A collision between two gasoline motor boats, which met nearly head on in a heavy fog, held due to faults on the part of each; one being in fault for failure to keep an efficient lookout, and the other for not sounding fog signals.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 156, 167, 175;

Dec. Dig. €==83.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trip-

pet. ludge.

Suit in admiralty for collision by M. Costa and others, owners of the gasoline boat L'Etruria, against the gasoline boat Noe G.; Onerato Chappi, claimant, Decree dividing damages, and claimant appeals. Affirmed.

Charles C. Crouch and Claude L. Chambers, both of San Diego, Cal., for appellant,

C. G. Selleck and Marks P. Mossholder, both of San Diego, Cal.,

for respondents.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. This case arose out of a collision between two gasoline power boats, one named Noe G. and the other L'Etruria. At the time of the collision and for some time prior thereto there was a heavy fog prevailing, and the two boats were approaching each other

practically dead ahead.

The court below found as facts that the lookout on L'Etruria sighted the Noe G. when the two boats were from 40 to 50 feet apart, whereupon the helm of L'Etruria was at once ported and she went to starboard; that the Noe G. did not sight L'Etruria until 10 to 15 feet from her, and that, had the lookout on the Noe G. been properly placed and attending to his duties, he could have seen L'Etruria when she was at least from 40 to 50 feet distant; that, after sighting L'Etru-

ria, the Noe G. held her course and struck L'Etruria on her port bow just forward of the chain plates, breaking a large hole in that boat, through which the sea entered so rapidly that within a few minutes she sank, with a consequent loss of \$2,500—no damage resulting to the Noe G.

The court having further found that L'Etruria, although running in a heavy fog, had not prior to the collision been blowing her fog horn, accordingly found both boats equally in fault, and divided the damages. Manifestly the court was right in so doing, unless, as contended on the part of the appellant, owner of the Noe G., the finding of fact in respect to her lookout was not sustained by the evidence; but, after a careful reading of the testimony of the witnesses, we are of the contrary opinion, and accordingly affirm the judgment.

The judgment is affirmed.

ECONOMY FUSE & MFG. CO. v. KILLARK ELECTRIC MFG. CO. * (Circuit Court of Appeals Eighth Circuit. July 29, 1916.) No. 4679.

APPEAL AND ERROR \$\infty 70(3)\to APPEALABLE ORDERS\to Permitting Dismissal of Counterclaim.

An order permitting a defendant to amend the answer, by dismissing without prejudice a counterclaim pleaded therein, is interlocutory, and not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 370, 411; Dec. Dig. ⇐ 70(3).]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by the Economy Fuse & Manufacturing Company against the Killark Electric Manufacturing Company. From an interlocutory order, complainant appeals. Dismissed.

Henry M. Huxley, of Chicago, Ill., for appellant.

Before SMITH and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. Appellant filed its complaint for patent infringement. Appellee answered, and set up a counterclaim alleging infringement by appellant. Appellant replied, and filed certain interrogatories. Appellee answered the same. Appellant then moved the court to dismiss the counterclaim for want of equity. Subsequently appellee moved for leave to amend its answer, by striking therefrom its counterclaim without prejudice. The court heard appellee's motion, and granted it January 31, 1916. March 1, 1916, the court denied appellant's motion, and refused to vacate the order of January 31, 1916. On the last date mentioned appellant appealed from the orders of January 31 and March 1, 1916. The case is still pending in the United States District Court at St. Louis, Mo., on the complaint

of appellant and answer of appellee. There has been no appearance by appellee, but this court must notice a want of jurisdiction, if any exist, as all its acts depend for their validity on its having jurisdiction.

Our power to review the proceedings of the District Courts is limited to the final decisions thereof, except interlocutory orders in relation to injunctions and receivers. The order of January 31, 1916, manifestly is not a final decision within the meaning of the law, as it decided no issue in the case arising either on the counterclaim or the complaint, and therefore the appeal from that order must be dismissed. If the order of March 1, 1916, denying the motion to dismiss the counterclaim for want of equity, is appealable, we can do nothing but affirm the order, for the reason that it was the only order that the court could make, having already allowed appellee to amend its answer by striking the counterclaim therefrom. The court could not grant both motions, and the first order not being reviewable here forecloses all further proceedings.

The appeal from the order of January 31, 1916, is dismissed, and the order of March 1, 1916, affirmed, for the reason that at the time it was made the counterclaim had already passed from the case; and

it is so ordered.

PAGE MACH. CO. v. DOW, JONES & CO.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 238.

PATENTS \$\iff 328\$—Infelingement—Printing Telegraph Receiver.

The Joy patent, No. 780,664, for a printing telegraph receiver, claim 12, which is for one feature only of a complicated machine, construed, and held not infringed.

'Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Page Machine Company against Dow, Jones & Co. Decree for complainant (230 Fed. 164), and defendant appeals. Reversed.

See, also, 200 Fed. 72, 74.

This is an appeal from a decree of the District Court, entered on December 21, 1915, awarding an injunction for the infringement of letters patent 780,664, issued to John M. Joy on January 24, 1905. The invention relates to a printing telegraph receiver of the class known as "Page printers," and the chief object of the invention was to increase the rate of speed at which such receiver might be worked with a minimum of power; but it had as subsidiary objects to improve the machine in various details of operation and organization, one of which is in question here. The patent was not the first in the art, which goes back to 1878, G. L. Anders, 210,895. Other machines of the same general character are shown in the two Wright patents, 460,328 (1891) and 466,858 (1892).

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digesta & Indexes

The first efforts of this patentee were in conjunction with one B. F. Merritt and are shown in Merritt & Joy, 558,506 (1896), which contains a device for the feeding of the paper to make successive lines, which is relevant here. The printing is done by a wheel containing all the letters and numbers, which revolves along with a shaft on which it is fixed, until the proper letter is opposite the paper. After the printing of one letter the type wheel carriage must move to the right to make a letter space, when in its new position it is turned on its own axis to the next letter, and so proceeds to the end of the line at the right. After it reaches the end of the line it must be retracted to the extreme left again, and at or after its retraction the paper must be fed one line. In Merritt & Joy's patent the feeding of the line, which is the feature here in question, was accomplished by the impact of the type wheel carriage as it moved from right to left under the influence of a retracting spring, the energy in which was stored up by the motion of the type wheel carriage itself. The paper feed in this patent did not directly obtain any energy from the shaft which moved the carriage to the right and rotated the wheel to the proper point for printing, but in the patent in suit the paper feed was energized directly by the same shaft which drove the type wheel to the right and rotated it. This was the source of the claim in question, which was No. 12 of the patent, and read as follows: "In a printing telegraph receiver the combination of a type wheel, paper feeding mechanism, a constantly acting source of power, and means for continuously feeding the paper without feeding the type wheel as long as said source is supplying power, for substantially the purposes set forth." This claim had once been in suit between the parties, and was held invalid by the Circuit Court. 166 Fed. 479.

Thereupon the plaintiff filed a disclaimer of claim 12 as follows: "As to claim 12 for a constantly acting source of power in the combination of element therein contained excepting a constantly rotating drive shaft." Thereupon the plaintiff in the suit mentioned filed a supplemental bill, and the court held that claim 12, as modified by the disclaimer, was valid and infringed. (C. C.) 200 Fed. 72. Thereafter the defendant changed its machine, and on contempt proceedings the second machine was held to violate claim 12. (D. C.) 200 Fed. 74. Finally, the defendant changed its machine a second time, and this suit was brought in the District Court, which held the machine so changed for a second time to be also within claim 12. It is this decree which is now here upon appeal.

The defendant's machine is of the same general character as the plaintiff's. It will be necessary only to consider the machine now in question and that known in the case as the "contempt" machine. In the "contempt" machine, through the interposition of a relay battery, it was possible to feed the paper space while the type carriage remained stationary at the extreme left of the line. This was accomplished by repeatedly making and breaking the electric current which actuated a magnet the armature of which in turn operated the feed mechanism. The Circuit Court held that this constituted a means for continuously feeding the paper without feeding the type wheel as long as said source is supplying power. In the present machine the paper feed is operated by a battery, but the current is made and broken only by the movement of the type wheel carriage.

The defendant claims that it has adopted the earlier disclosure of the Merritt & Joy patent, combining therewith the relay battery shown in the patent of Essick, 531,677, in which when the type wheel carriage is retracted to the extreme left it closes a contact which operates the paper feed for one line. The carriage must then be moved one space to the right to open the contact and prepare the paper feed for another space, and finally it must be retracted a second time to the left again to close the contact. In Essick, therefore, it is necessary that the wheel carriage shall continuously oscillate through small distances to the right and then to the left in order to feed the paper successive lines, but the energy which actuates the paper feed is not the source of power which actuates the type wheel carriage unless within the term "actuates" is included the mere opening and closing of the circuit. The details of the structure are not necessary to state more fully.

Gifford & Bull, of New York City (J. Edgar Bull and Charles S. Jones, both of New York City, of counsel), for appellee.

Newell & Neal, of New York City (Frederick P. Fish and Emerson R. Newell, both of New York City, of counsel), for appellant.

Before COXE and WARD, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). In this case we do not think it necessary to take up the question of validity at all, since we are satisfied that the claim should not receive a broad interpretation, because it is for only one feature of a highly complicated and detailed machine coming into a closely settled art, and the invention must be therefore confined to the disclosure. The issue of infringement turns on the interpretation of the words, "for continuously feeding the paper without feeding the type wheel." We pass the validity of the disclaimer, assuming for argument's sake, that the phrase, "constantly acting source of power," is to be read, "a constantly rotating drive shaft." The words in question ought to be interpreted by the specifications as far as these throw any light, and they not only throw light, but absolutely define and control these words as used in the claim. On page 3, lines 81-100, the patentee speaks of a mechanism for shifting the operating clutch, which is lettered C on the drawings, and to understand which perhaps the best figure for practical purposes is Figure 2, although the section drawing in Figure 9 also illustrates it. He then says that, before describing the present mechanism for shifting this operating clutch and its operation, he "will state generally that according to my invention means are provided for continuously feeding the paper without feeding the type wheel, and to be more particular the means for accomplishing this end are connected with the mechanism for shifting the operating clutch C." This mechanism is clearly that referred to in claim 12. The description of the operation of the line-spacing mechanism begins at page 5, line 130, and ends at page 6, line 88. It describes how the lever, 113, rocks idly so long as the pins, 121 and 126, are not in abutment. It is during this period that the carriage of the type wheel is being advanced to the right with every oscillation of the escapement lever, 93, actuated by the magnet, 99, through its proper key, a device clearly shown in Figure 1. The description of how the type wheel is retracted and a single line of paper is fed begins on page 6, line 18, and ends on the same page at line 74. The important part of this specification for our present purposes is lines 74-88 on page 6, which are as follows:

"It will now be seen that after the operating clutch C has been shifted in such manner that the type wheel mover shaft 8 retracts the type wheel 7 against the buffer 72 by continuing to successively actuate the armature 97, causing the rotation of the escapement wheel 70 tooth by tooth, the paper may be fed line by line without feeding the type wheel, 7, forward, for with the type wheel mover resting against buffer 72, as long as the stop 126 on shaft 6 is maintained in such position that finger 121 will hit against it whenever the lever 113 is actuated, rotation of the type wheel mover shaft in either direction cannot take place."

It is quite clear from this description what the patentee meant. By a continual feed of paper he meant that the operator should be able to make successive blank lines without moving the type wheel in any degree whatever, and it is also clear that he supposed he had solved this. He presupposed that the pins, 121, 126, should remain in abutment by pressing the proper key operating the type-wheel shaft, 6. While they so remain, any energizing of the poles, 99, allows one tooth of the escape wheel, 70, to be released, this causes the cam, 65, to rock the lever, 113, upon the pin, 126, as a fulcrum and necessarily to move the lever, 110, which acts as an escapement for the paper mechanism. Now the member, 60, of the clutch, slips freely on the shaft (page 2, lines 74, 75), and the gears, 64, 66, therefore rotate the worm shaft, 8, only by virtue of the clutch, 57. Indeed, the only member of the clutch C rigidly attached to the shaft, 8, is the bracket, 58, which is adjustably connected with the shaft by a set screw, 59, Figure 9. If the clutch 57 were a friction clutch, then when the pin, 105, began to push away the member, 57, of the clutch, as it would do at once upon the beginning of the action of the cam, 65, it would at once release that clutch and make the member, 60, turn idly upon the shaft, 8. Such a clutch would therefore certainly enable the linespacing mechanism to operate without the most minute angle of rotation of the shaft, 8. In the design in question, while it may be debatable whether the operation of the pin, 105, to disengage the clutch, 57, 60, will be quick enough to avoid a minute angle of revolution of the shaft, 8, which would carry the type wheel carriage a minute distance away from the buffer, 72, to be returned as soon as the clutch, 52, 56, engaged and retracted it, it is clear that the patentee thought it would, because the language quoted is explicit and clearly indicates that the clutch, 57, 60, will disengage too quickly to move the type wheel carriage at all. No other meaning can be attributed to the phrase, "rotation of the type wheel mover shaft in either direction cannot take place," page 7, lines 86–88. As this is the operation referred to by the words in claim 12, "for continually feeding the paper without feeding the type wheel," it is irrelevant whether in practice the type wheel carriage is in fact moved a step or two to the right to avoid "skating through." This was the patent, and if the patentee has now learned that for "unison" he must abandon rigid adherence to this feature, he can surely make no monopoly out of his inability to foretell the exact results of his invention and out of his subsequent practice.

Turning now to the defendant's device, we find quite a different organization. As long as the point, 32, remains in contact at the point, 33, the circuit is made and energizes the magnet, 26, which will hold down the armature, and allow only one tooth of the escapement to feed the paper. Another space cannot be made without moving the type carriage to the right far enough to break the circuit at 32, 33, de-energize the magnet, and release the armature. It is functionally necessary, therefore, to oscillate the type carriage in order to give a continuous line spacing, and that is directly the contrary of the claim in suit. This was not true in the so-called "contempt" machine, because, when the pins, 121, 126, were in abutment, any operation of

the cam, 65, would continue to make successive contacts at the point, 200a, after the type wheel carriage had been retracted to its step by the first raising of the bar, 24. No oscillation of the wheel carriage was necessary for continuous line spacing. The operation of the defendant's two machines in this respect was therefore diametrically opposed.

The defendant derives directly from Merritt & Joy and Essick and has borrowed nothing from the patent in suit so far as concerns claim 12. In both these patents it is absolutely necessary for the type wheel carriage to move to the right for a continuous line spacing; either by the momentum of the type wheel carriage, or by its closing of a circuit to operate the paper feed, the return, and only the return, can feed the paper. It is true that in Merritt & Joy the momentum of the type wheel carriage furnishes the sole energy for this purpose, a momentum imparted to it by the retracting spring in which some of the energy of the constantly driven shaft has been stored. It was probably in order to differentiate the patent in suit from his patent, that the patentee provided that the type wheel carriage should not move to the right. But in Essick the paper feed not only required a movement of the type wheel carriage, but also was actuated by a completely independent source of energy, a battery, and the only energy used from the source which supplied the type wheel carriage was to close the contact. It is an abuse of words to speak of the closing of those contacts as though it drove the paper feed. However, we may pass by that, because the defendant's machine, and so Essick's, which he has borrowed, can operate only by a movement of the type wheel carriage, quite as much as Merritt & Joy, and that for present purposes is a crucial distinction. This movement is not a mere accidental concomitant, associated for other reasons, as is the movement of the type wheel carriage in actual practice in the patent in suit; it is a functional necessity, the condition of any operation whatever of the paper feed, the direct opposite of the theory upon which that patent was planned. It makes no difference whether the designer of the defendant's machine was deliberately trying to circumvent the patent; whatever his purpose, he had open to him the materials of the art, and so long as he took no suggestion from the patent in suit he did not invade its monopoly.

The decree is reversed, and the complaint dismissed, with costs in both courts.

STRAUSE GAS IRON CO. v. WILLIAM M. CRANE CO.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 144.

1. PATENTS \$\infty\$ 168(2)—Construction—Limitations Imposed by Patent Office.

A limitation imposed by the Patent Office to distinguish from prior references, and accepted by the applicant, cannot be disregarded, although it may have been unnecessary.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 244; Dec. Dig. ©=168(2).]

2. PATENTS \$\infty 328-Infringement-Gas Sad Iron.

The Spahr and Stichler patent No. 948,773, for a gas sad iron, construed in view of the limitations imposed by the Patent Office, held not infringed.

3. PATENTS \$==150-DISCLAIMER-CONSTRUCTION AND OPERATION.

The differentiation introduced into the claims of a patent by a disclaimer must have previously appeared somewhere, either in the drawings or specification; otherwise, the disclaimer becomes no more than a making over of the whole patent, and the matter discarded must appear with sufficient clearness to advise the art and to show that it was comprehended by the patentee.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 224; Dec. Dig. 5-150.]

4. PATENTS \$\simes 28-Designs-Invention.

The test of invention is the same for designs as for mechanical patents, and to show invention the design must have been something beyond the ability of the ordinary routine designer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 33; Dec. Dig. ©=28.]

5. PATENTS \$\infty 328-Invention-Design for Sad Iron.

The Spahr and Stichler design patent, No. 42,443, for a design for a sad iron, held void for lack of invention.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Strause Gas Iron Company against the William M. Crane Company. From the decree, both parties appeal. Modified.

This is an appeal by each party from a decree in equity awarding an injunction upon a mechanical patent and dismissing the bill upon a design patent. The subject-matter of each patent is a gas sad iron, which can be kept heated by flexible attachment to an ordinary gas pipe. The mechanical patent, 948,773, was issued on February 8, 1910, to Spahr and Stichler, and contained seven claims, of which numbers 2 and 7 are as follows:

"2. In a sad iron, a body having intake passages directly in the base thereof, said base having separated side walls, forming a chamber centrally between the separated side walls of said base, said passages leading to said chamber, and a suspended burner having jet openings deflected to the right and left to said walls, said chamber being between said jet openings, whereby air is supplied to the inner sides of the flames produced at said lets."

"7. In a sad iron, a body, and a base therefor, said base being centrally separated forming side walls, there being a chamber centrally between the same, gas-supplying means, air intake passages directly in said base leading to said chamber, and a burner suspended from the gas-supplying means and having jet openings deflected right and left to said walls, said openings flank-

ing the top of said chamber, whereby air is supplied from said chamber to the inner sides of the flames produced at said jets."

On May 13, 1914, the assignee, who is the plaintiff here, feeling that the validity of the claims in question might be imperiled by the British patent to Stichbury, No. 3,474 of 1874, filed a disclaimer in the Patent Office reading as follows: "To that part of said letters patent which is described in the second and seventh claims thereof, disclaiming the body described in said claims unless that body has the air escape openings further apart and larger in area than the inner ends of the oppositely located air inlet passages." It is upon claims 2 and 7 as so modified that this suit was brought.

The patent in suit describes an iron with a burner suspended from a gas tube which runs into the handle, the handle and cover of the iron being hinged at the rear, so that the burner may be raised at one end for ignition. In the base of the iron which is thick, runs a chamber or deep longitudinal groove, above, and parallel with, which the burner lies when in position. The burner is perforated with two lines of holes so arranged as to throw two series of jets upon the top of the base which flanks either side of the chamber. From the outside of the base a series of air inlet holes are driven from either side, normal to the line of the chamber, and leading into it, whose function is to draw air into the chamber and so up under the gas jets to supply them with a continuous feed of air. The products of combustion are carried off through vents at the top of the vertical sides of the iron. In the specifications nothing was said of the size of the vents or of their area as compared with that of the inlet air-holes. The figures showed three vents and five inlet air-holes; and joint area of the vents proves to be not very perceptively different from that of the holes, and only after the most careful measurement can the difference be ascertained.

The defendant relied upon noninfringement and invalidity. Upon the latter point he relied chiefly upon the British patent to Stichbury already cited, which showed a reversible gas sad iron, in which the vents in one operation served as the air intake holes in the reverse. The operativeness of this iron in practice was sharply contested at the trial, as well as the question whether it was intended to heat the surface in use by the gas jets or only the upper surface. The defendant's iron has its burner supported in the two ends of the vertical sides of the iron and is not suspended from the gas-supplying means at all. It is in other respects substantially like the plaintiff's iron.

The design patent, 42,443, is also for a sad iron, the infringement being a very near approximation to the design. The defenses are that the subject-matter, being unbeautiful, cannot be patented, and that in any case the art pressed too closely about the design to allow invention.

Hans von Briesen, of New York City (Arthur von Briesen and Fred A. Klein, both of New York City, of counsel), for plaintiff.

William J. Dolan, and Rogers, Kennedy & Campbell, all of New York City (Odin Roberts, of Boston, Mass., and Donald Campbell, of New York City, of counsel), for defendant.

Before COXE and WARD, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). Upon the mechanical patent we are for reversal, for two reasons: First, because the claim is not infringed; and, second, because the disclaimer is invalid. The validity of the patent we do not consider.

[1] We think the claims are not infringed because the use of the term "suspended burner" in claim 2, and the more definite phrase "a burner suspended from the gas supplying means" in claim 7, only included a burner which was held by the gas pipe. A careful scrutiny of the action in the Patent Office leaves us no doubt that this was the

meaning attributed to the phrase by the examiner, and that it was only when the phrase with that meaning was inserted in the two claims in question that he would allow them over the patent to Nickerson, 406,-943. Perhaps it was not necessary, in order to distinguish from Nickerson, that the examiner should have required the insertion of that element; but that was his purpose, and when the patentee consented to the insertion, under the well-settled rule, he accepted the imposed limitation and cannot disregard it now. It is therefore necessary to discuss in some detail what took place in the Patent Office, and for that purpose it is also necessary to take up claim 3.

[2] When the application was originally presented the examiner, in the action of May 10, 1909, at once rejected claims 3, 4, and 5 upon the Nickerson patent. (We may leave out all discussion for the time being of claim 4, because, although the present claim 2 was substituted for it, it is so entirely changed as to leave no resemblance between the two.) Claims 3 and 5, however, became claims 1 and 3 of the patent, and with very little change; but for the purpose in question the history of claim 5 is the more important. The applicant on May 22, 1909, made one change in claim 5: He inserted at the end the words, "a movable top carrying said burner and its supply tube." In other words, he inserted the limitation specifically that the burner must be carried by the top, and by that single change procured allowance. Let us see, then, what the claim covered before this insertion, which he abandoned in the face of Nickerson. It contained the feature of a chamber situated in the center of the base with walls on opposite sides of the chamber and a burner over the chamber with jets deflected to the side walls. Turning to Nickerson's patent, in order to see why the examiner rejected this claim as it stood, it becomes apparent that he must have regarded the vertical ribs, b, as making the walls of the central chamber, because there was nothing else to serve for walls. He must also have thought that it was not a patentable distinction to direct the jets upon the top of these side walls instead of against their sides as Nickerson did. It is true that the words of claim 5 do not limit it to jets upon the tops of the side walls; but the disclosure clearly does, and the phrase, "burner over said chamber" with "deflected" jets, could not have been understood differently in view of the specifications (page 1, lines 91-94).

Now the plaintiff says that the changes made in claim 2 were to distinguish from Nickerson's vertical ribs and from his jets playing upon the sides of the walls. The foregoing analysis of claim 3 is a complete answer to such a position, because it is clear that the examiner thought that claim 3 was anticipated by Nickerson, so long as it was in the same form as claim 2 now is, if that claim be interpreted as the plaintiff desires. In other words, if the word "suspended," in claim 2, is to be interpreted as meaning that the jets must play upon the top of the walls, and if the word "forming" means that the walls shall be other than the vertical ribs, b, then the examiner could never have rejected claim 3 as he did, before the specific addition was made to it. It would obviously be inconsistent to suppose that the examiner took one view of language in claim 3, whose equivalent he took otherwise in claim 2.

But if there be any ambiguity whatever, especially in regard to the meaning of the words "deflected to the right and left to said walls" of claim 2, it is altogether cleared up by considering the history of claim 7. That claim as originally filed had the phrase, "said openings flanking the top of said chamber." yet it was equally rejected upon Nickerson. There can hardly be any reasonable doubt that the language cited referred precisely to that element which the plaintiff now asserts to have been imported into claim 2 by the word, "suspended"; yet, as we have said, it was not sufficient to satisfy the examiner in allowing claim 7. He could only have thought the modification in structure not a patentable distinction, and he must have supposed the very definite phrase, "suspended from the gas-suspended means," a necessary element to patentability. Claim 7 seems to us to be far too definite to allow the modification necessary for infringement. Claim 2 doubtless admits of a much more persuasive argument, yet we feel that, when it is so obvious how the terms were used in the Patent Office, we are not at liberty to disregard the clear understanding of the parties. Hence we find both claims not infringed.

[3] The next point is of the validity of the disclaimer. The element added by the disclaimer to the claims appears nowhere in the specifications, as every one concedes, though it limits the patent to only one species of the genus originally covered by claims 2 and 7. Nothing whatever was said in either claim about the air outlet passages. They were taken for granted and they had appeared generally in the As nothing was said of them, no comparison could be made in the claims between their area and those of the air inlet passages, and, although they are mentioned in the specifications, their size does not appear. To introduce that element into the claims was therefore to provide a differentiation not suggested anywhere, unless it be in the figures themselves. When examining the figures, the area of the end of each air inlet passage is not to be compared with the area of each outlet passage, because the air is coming in at all the inlets at once and must get out of all the outlets. We are to take the five air inlet passages disclosed in the figures, and compare their total area with that of the three outlet passages, and then there is grave question whether the total area of the one is greater by any amount than the total area of the other. Moreover, we are not satisfied that a very slight difference in area would be enough, because, although the exact proportion is not perhaps important, where once the principle of relatively large vents is appreciated, yet some indication of substantial difference in area is very important, where the question is whether or not the size of the vents was considered at all.

We do not mean to suggest that a disclaimer may not add a new element to the combination, thereby limiting it to a part only of what was covered by the specifications. That was the effect of the disclaimer in Carnegie Steel Company v. Cambria Iron Works, 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968. We do not mean even to say that a gross and clear element, shown in the figures and not mentioned in the specifications, may not be an adequate basis for a disclaimer, as Judge Wallace held on the second trial of Roemer v. Newman, as re-

ported in Electrical Accumulator Co. v. Julien Electric Co. (C. C.) 38 Fed. at page 136. The figures and the specifications must, of course, be read together. We do think, however, that the differentiation afterwards incorporated into the claims must appear somewhere in either figures or specifications, and that unless it does the disclaimer becomes no more than a making over of the whole patent.

Of course, the patent may not truly describe the invention; the scrivener or the draughtsman may have misunderstood what he was told; the patentees may have been inexperienced in reading such descriptions; they may have clearly comprehended a necessary element, and even disclosed it to their solicitor, without making clear to him what they meant. That would result in an erroneous reduction of the invention to definite form; it would be ground for application for a reissue, and perhaps this patent might be reissued, if the proper evidence were at hand to show that kind of mistake or inadvertence. But the mistake which justifies a disclaimer is not that; it is one which appears upon the face of the patent itself. It must appear that the matter discarded was clearly distinguished within the patent, so that it can be seen that by the disclaimer the patentee rejects an addition which he comprehended as an addition in the patent. The patent must show the differentia of that species to which the patentee wishes later to confine his monopoly. He may not, by suggesting an independent distinction, introduce a new element into the whole invention. Were it not so, he could cover the art most broadly, and later by successive disclaimers return to the public domain so much of the field as he found himself unable successfully to defend. His disclosure would be a mere vague incubus upon the art, frightening off the timid, to be dislodged only by attack, and without danger to so much as might eventually be determined to constitute a genuine invention.

The necessary element should, moreover, appear with sufficient clearness to advise the art; it ought not to depend upon the meticulous niceties of figures, which are at most only diagrammatic. If the specifications were enough, we could disregard the figures; but, where the specifications are silent, the figures should show the detail broadly, and this they do not do. If we are to judge only by the patent, it is extremely doubtful whether the patentees ever had learned that the outlets should be greater than the inlets. The prior art had not thought so, and it is therefore too much to ask us to assume that the proportion was obvious. We think it should have been shown.

The defendant does not in our opinion infringe, and the disclaimer is invalid. A decree dismissing the bill should therefore be entered.

[4, 5] As to the design patent, we agree with the court below that the bill should be dismissed. If there be any room at all in the subject-matter for a design patent, the patentees have not found it. Perhaps the nearest approach to the patented design is Sullivan's patent, 610,836. The proportions are not quite the same, but the ordinary eye would scarcely see the difference when the two were not juxtaposed. The vents at the top are divided; there are no air inlet holes, but those are hardly distinctive feature of design. Perhaps in those respects, Grussi, 75,156, comes nearer to the patent, though the outline

is not the same. Gray, 474,470, is not far away. The modification of these forms into the design patent does not seem to us to have been dictated by other than utilitarian considerations. To suppose that any inventive effort was necessarily addressed towards pleasing even a most rudimentary æsthetic susceptibility appears to us far-fetched. Since the decision of this court in Steffens v. Steiner, 232 Fed. 862, — C. C. A. —, decided February 15, 1916, any doubt as to the test of invention in design patents which might arise from Graff, Washbourne & Dunn v. Webster, 195 Fed. 522, 115 C. C. A. 432, Dominick v. Wallace, 209 Fed. 223, 126 C. C. A. 317, and Mygatt v. Schaffer, 218 Fed. 827, 134 C. C. A. 515, must be considered laid, and the test for invention is to be considered the same for designs as for mechanical patents; i. e., was the new combination within the range of the ordinary routine designer? We believe that any one starting to design sad irons with the art before him, and governed only by considerations of proportion and plan, would have had no difficulty in making the plaintiff's

A decree will be entered, modifying the decree below as indicated, with costs to the defendants in this court and in the court below.

PELTON v. WILLIAMS.

(Circuit Court of Appeals, Sixth Circuit. June 16, 1916.)

No. 2822.

1. Patents \$\iffill 328\$—Infringement—Heating System for Automobiles.

The Williams patent, No. 873,399, for a heating and ventilating system for automobiles, as the claims were amended to meet the requirements of the Patent Office is for an indirect or circulatory system having as one of the elements of the combination a register which may be opened and closed by the occupants of the car, and is not infringed by a system which heats by direct radiation and has no register.

2. Words and Phrases—"Direct and Indirect Heating Systems"—"Radiating and Circulatory Heating Systems."

All heating apparatus is of one or the other of two types, direct or indirect. In the direct, the heating body or box is in the room to be heated and the radiation is direct; in the indirect, the heating box is outside the room to be heated, and it heats a body of air in passing over it, which body of air is then conducted to the room to be heated, thus indirectly accomplishing the result. The two systems are also distinguished as "radiating" and "circulatory."

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John H. Clarke and Arthur J. Tuttle, Judges.

Suit in equity by Nathan W. Williams against Clyde S. Pelton, trading as the Alton Sales Company. From an order granting a preliminary injunction, defendant appeals. Reversed.

M. W. Church, of Washington, D. C., for appellant.

S. W. Banning, of Chicago, Ill., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. [1] This is an appeal from an order granting a preliminary injunction against appellant for alleged infringement of letters patent No. 873,399, issued December 10, 1907, to appellee. The pleadings, so far as reference to them is necessary, are in the usual form for presenting issues of infringement and validity of the patent in suit. We do not find it necessary to pass upon the validity of the Williams' patent, for we are convinced that the infringement alleged cannot be sustained. The patented device is for alleged improvements in a combined heating and ventilating system for automobiles. The declared object of the invention is—

"to utilize the heat of the escaping products of combustion for heating purposes, by tapping the exhaust pipe intermediate the engine and muffler and conveying a portion of the heated waste gases to a heater located beneath the floor of the automobile for the purpose of heating the air supplied to the closed vehicle body."

There was very likely distinct merit and patentability in the broad idea that part of the gases from the muffler pipe might be diverted through a by-pass and box with an independent discharge to the outer air, whereby this box would serve both as a supplemental muffler relieving back-pressure and as a radiator box for heating the car; but this broad idea was neither new with Williams nor does it purport to be protected by his claim.

Kempshall certainly had the broad idea. He says that his object is to utilize the exhaust gas for either foot-warmer or other form of heater, located at such place as may be convenient and serviceable to the rider, and that the secondary muffler may be adapted as a footwarmer and placed in any suitable location, or it may be of any form and placed in any location in the wagon, to serve as a heat radiator coil.

The same idea is shown by British patent No. 1,820, of 1901, and also by Dunham & Fox, No. 707,908. The latter does not specify that the radiator box is a supplementary muffler; it might perhaps be the main and only muffler; but the idea of using a muffler as a radiator box for direct heating is clearly shown.

[2] All heating apparatus is one or the other of two types, direct or indirect. In the direct the heating body or box is in the room to be heated, and the radiation is direct; in the indirect the heating box is outside the room to be heated and it heats a body of air in passing over it, which body of air is then conducted to the room to be heated, thus indirectly accomplishing the result. The two systems are also distinguished as "radiating" and "circulatory." In the heating of houses the ordinary hot-air furnace is circulatory or indirect; the more common steam system, with a radiator in each room, is radiating or direct; though steam heating is sometimes applied on the indirect system by passing fresh air from outside over the body of steam coils in the cellar and carrying this heated air into the room through pipes and registers.

It is clear, and is conceded, that the Williams' patent belongs to the circulatory system. If there was otherwise doubt about this, it would be removed by the Patent Office proceedings. Williams' original claim 3 seemingly referred to a circulatory or indirect device, because it provided for an air inlet port and air outlet port from the radiator box.

When it was rejected on several references, he undertook to avoid them merely by specifying the function of his discharge from the radiator box, viz.: "For preventing increased or back-pressure on the engine." It was again rejected on the same and other references, and he amended by specifying the main muffler as an outlet, and also by specifying that the intake opening into the radiator box was for supplying fresh air. It was still again rejected, with the requirement that the claim should include the register as an element of the combination. By the "register" the Patent Office meant the opening in the floor of the car, provided with an ordinary valve or with gates for opening and closing; nothing else could have been intended. Williams says (in line 110, p. 2), that the register "may be of any suitable character to regulate the amount of heat supplied to the car," and (line 25, p. 2), that "the heated air will be admitted in any suitable quantity through the register in the floor of the car, which is under the control of the occupant and may be opened or closed to any desired extent." This is Williams' own declaration of the meaning of register. "A patentee is at liberty to supply his own dictionary; and a claim is neither enlarged nor limited by taking its terms in the sense given in the lexicon of the specification." Kennicott Co. v. Holt Ice & Cold Storage Co., 230 Fed. 157, 160, — C. C. A. — (C. C. A. 7). In response to this requirement, Williams inserted in his claim as an additional element "a register in communication with the inclosing box for controlling the flow of heated air therefrom." He thus not only made a register, so defined, an element of his claim, but more expressly limited his patent to the indirect, as contrasted with the direct, system of heating. This same limitation is emphasized by the title and introductory paragraph of the patent, which specifies that he has in mind a "heating and ventilating system."

Pelton belongs to the direct or radiating class. He had two forms of his device. In the first, the radiating coil was below the floor of the car, and it was surrounded by a tight box, except as it carried an open grating on top and in the floor of the car. It might be possible to consider this as a radiator box. In the second form, the radiating coils were in the body of the car, and surrounded by no box, but partly covered by a protecting screen or hood. So far as concerns the feature of direct or indirect heating the two are alike; both are direct. Each set up a circulation within the room itself, because colder air falls to the bottom of the room, is heated, and then rises, but neither one takes any body of fresh air from the outside, heats it, and then discharges it into the room. In the second form the radiator is set out into the room; in the first form the radiator is in a recess, which in fact is part of the room. It is a mistake to suppose that the water-drip hole, the size of a lead pencil, in the bottom of the casing in the

first form is an opening for the admission of fresh air from the outside. It was not made for that purpose; only a negligible amount of air could get in; and when the car is in motion there would be a suction tending to pull the air the other way. So it is also a mistake to suppose that the devices belong to the circulatory system, because air from the inside of the car passes down in contact with the radiator and then rises; the same thing is true of every direct radiating coil in any room; the grating in the floor in one form and the perforated screen in the other have nothing to do with the air circulation; lay the coil, uncovered, on the car floor and we get the same "circulation."

The fact that the two heaters (Williams' and Pelton's) belong in two systems is emphasized by the register. An opening and closing register is essential to the proper operation of the indirect system; so the Patent Office properly insisted that it should be included as an element. A direct system uses no register, but controls the situation by turning off the heat from the radiating coil, so that the coil ceases to radiate. This is what Pelton does. He has a grating in the floor of his car, but no register whatever. He controls the temperature by closing the valve which admits heat to the radiating coils, so that they cease to radiate, just as in a steamheated room you turn off the steam from the radiators.

No permissible stretch of language can make this valve in the heating pipe in a direct system over into a register in a heated air pipe in an indirect system. In a vague and broad sense there is equivalency because they are two known methods of controlling temperature, but Williams, in order to get his patent, was compelled to limit himself to a controlling register, and he must be held to his limitation.

It is another way to get at it to say that even if Williams' claim 3, as originally rejected, and then his claim 1, as twice rejected, might be so read as to cover Pelton, still, in order to get his patent, he inserted, and accepted as a limitation, a register which Pelton does not have. It is a typical case of estoppel by Patent Office proceedings.

It results that the order of injunction must be reversed and the cause remanded, with instructions to enter an order directing the clerk of the court below to return all moneys received by him from appellant in pursuance of the injunction order mentioned, and also dismissing the bill, with costs. Smith v. Vulcan Iron Works, 165 U. S. 518, 525, 17 Sup. Ct. 407, 41 L. Ed. 810; Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 495, 20 Sup. Ct. 708, 44 L. Ed. 856.

VAN KANNEL REVOLVING DOOR CO. v. STRAUS et al. (Circuit Court of Appeals, Second Circuit. April 19, 1916.)

No. 242.

1. PATENTS \$== 176-Scope of Claims.

A patent for a revolving storm door having wings with "self-releasing locking devices," which will be "automatically unlocked" when an unusual pressure is exerted against the wings, as in case of panic, held to cover a structure in which the wings are held together by chains made light enough to be easily ruptured by any unusual pressure.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 250%-252; Dec.

Dig. €=176.]

2. Patents @=328-Validity and Infringement-Revolving Door.

The Van Kannel patent, No. 656,062, for a revolving door, the purpose of which is to so construct the wings that they will yield to the rush of a panic-stricken crowd, held valid and infringed.

3. PATENTS 235-INFRINGEMENT-CHANGE OF FORM.

Infringement is not avoided by using the inventive idea of the patent in another structure in an imperfect form.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 371; Dec. Dig. ©=235.]

Appeal from the District Court of the United States for the Southern District of New York,

Suit in equity by the Van Kannel Revolving Door Company against Nathan Straus, Jesse I. Straus, Percy S. Straus, and Herbert M. Straus, trading as R. H. Macy & Co. Decree for complainant, and defendants appeal. Affirmed.

This is an appeal from an interlocutory decree of the District Court entered October 28, 1915, finding claims 2 and 8 of United States patent No. 656,062 valid and infringed and awarding an injunction against the defendant for infringing the same. The patent is for certain improvements in revolving doors of the class which has a series of radiating wings rotating in a casing. The object of the present invention is to construct the wings in such a way that they will yield to the rush of a panic-stricken crowd; the wings of the door all being pushed together to the front, so as to provide a wide and unobstructed passage at each side of the center of the door structure. The claims in suit are as follows:

"2. The combination, in a revolving door, of a structure mounted so as to rotate about a central axis, a series of wings mounted so as to swing independently of their joint rotating movement about said axis, and self-releasing locking devices, whereby said wings are normally retained in fixed radial relations to said central axis."

"8. The combination, in a revolving door, of a center post, with radiating wings normally locked to said center post but mounted so that they will be automatically unlocked therefrom, and swung forwardly to project side by side when pressure is exerted upon them in other than a normal direction."

The patentee was the inventor of a former patent for revolving doors, No. 387,571, which had expired before the supposed infringement of the defendant herein. This patent operated upon a similar method, except for the fact that there was no provision for the wings' swinging except on their center of rotation; that is, there was no method by which they could be automatically released so as to provide an exit for a panic-stricken mob. The defendant's device consists of a revolving door of the same general character having four radial wings all rotating with a pintle in the center of the casing. Three of these are hinged so as to have a rotary motion relative to the pintle, while

&=>For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the fourth is rigidly connected with the pintle and can rotate only with it. Between each adjacent couple of wings is a chain, made light enough to be easily ruptured in case a strong pressure is exerted upon opposing sides of two adjacent wings. When the chain between any two wings is ruptured by pressure from the inside they collapse outwardly. Since the hinged wings will not all lie flat with the rigid wing, and since the rigid wing must turn the pintle itself to assume a position of egress, it chances to result that there is only one position in which an exit is permitted on both sides of the pintle, and that in every other position the wings block one of the two exits. The theory of the operation of the door is, first, that the panic-stricken crowd shall break the chain; and, second, that unless the favorable position by chance happens to be the resultant of the pressures, the hinges of one, or at most two, of the hinged wings will also rupture, so as eventually to swing the rigid wing, and then all the other wings parallel with the egress of the crowd. A rupture of the hinges, as well as of the chain, is therefore presupposed for the proper operation of the door, except in the single condition above indicated. The sole important question is of infringement.

Baird, Cox, Kent & Campbell, of New York City (Clarence G. Campbell, of New York City, of counsel), for appellants.

Titian W. Johnson, of Washington, D. C. (C. P. Goepel, of New

York City, of counsel), for appellee.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). [1] Although the complete purpose of the patent is secured only by the rupture of the defendants' machine in two respects, yet it may well be that to make those ruptures effective the principle of the patent must still be taken. That question turns upon whether the defendants' structure fairly embodies the invention contained in the claims themselves; that is, whether in claim 2 the phrase "a series of wings mounted so as to swing independently" covers a door in which three out of four wings are so mounted, and whether the phrase "self-releasing locking devices" covers a chain which will be ruptured when panic ensues. The question also depends upon whether in claim 8 the wings are "automatically unlocked" and whether all "swing forwardly to project side by side" when panic ensues. The phrases "automatically unlocked" and "self-releasing locking devices" ought to cover any devices which have been deliberately planned, whether by a mechanical adjustment, or by the proper proportioning of the parts, to effect a release of the wings at the proper moment, without the interposition of any human agent. Such is the fair meaning of the words; such the conceded purpose of the patentee. There is nothing in the specifications to limit the claims to a part only of this their natural meaning; had the arrangement of the defendants' wings been the same as that of the patent, the infringement would have been too plain for argument.

[2] The real question of doubt is because of this arrangement of the wings. Taken literally, the defendants' door infringes; it has a series of wings, though the series does not include all, which are mounted to swing independently of their joint rotating movement, as claim 2 demands. Claim 8 is more doubtful in its application, because the wings can hardly be said to swing side by side unless they

include in the process the rupture of the hinges, a question which we leave for the moment. We do not mean to determine the cause upon a nice consideration of the language of the claims; that is, because claim 2 happens to fit verbally, and claim 8 perhaps not to fit. The test should be whether the defendant has used the idea of the patent and modified it only in respects which the patentee left open for modification. This we think the defendant has done. The purpose of each was of course the same, to make a door which would secure safe egress to a frightened mob; that purpose was realized in each case by making the wings collapse and in the final event fold side by side away from the pintle in the direction of egress. To do this the wings must, at the moment of need, have a motion relative to the pintle and that motion must be capable of realization then, and then only.

oniy.

[3] As we have already said, the release of the wings by rupture of the chain seems to us certainly the equivalent of a release by unlocking, and we think that by precisely the same reasoning the folding of the wings side by side, in part accomplished by the rupture of the hinges, is an equivalent of the more elaborate mechanism of the patent. The wings, in short, are consciously planned so that, first by swinging, and then by breaking, they will assume the necessary position in the door. That is what the patentee disclosed, and that is what the defendant uses; the only difference between them is that the defendant, either to economize, or to evade the patent, organizes its door so that it must be repaired after it has operated once. That is, it has used the idea in the invention, but has incorporated it in an imperfect form, a subterfuge which the courts will not pass. Crown Cork & Seal Co. v. Standard Stopper Co. (C. C.) 136 Fed. 199, 207; Hubbard v. King Ax Co. (C. C.) 89 Fed. 713; National Binding Machine Co. v. James D. McLaurin Co. (D. C.) 186 Fed. 992.

The elements of both claims being therefore appropriated by the defendant, the decision below was correct, and must be affirmed, with

costs.

AMERICAN GRAPHOPHONE CO. v. AMERICAN PARLOGRAPH CORP.

(Circuit Court of Appeals, Second Circuit. June 6, 1916.)

No. 134.

PATENTS \$\infty 174\to Claims\to Construction.

Claims in patents for minor improvements, in an art already well understood, should be strictly construed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 249; Dec. Dig. ⊕ 174.]

Appeal from the District Court of the United States for the Southern District of New York.

Bill by the American Graphophone Company against the American Parlograph Corporation. From a decree dismissing the bill, complainant appeals. Affirmed.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

On appeal from a decree of the District Court for the Southern District of New York dismissing the bill which was based on five letters patent for Graphophone-reproducers and Sound-reproducers.

C. A. L. Massie and Ralph L. Scott, both of New York City, for appellant.

Cabell & Gilpin and Hartwell Cabell, all of New York City, for appellee.

Before COXE, Circuit Judge, and HOUGH and MAYER, District Judges.

COXE, Circuit Judge. This is an equity action to restrain the infringement of five letters patent for improvements in dictating machines. Three of these patents were granted to McDonald, one to Gilbert and one to Haines. These patents are for minor improvements which required little exercise of the inventive faculties. The trial judge dismissed the bill without opinion.

The defendant's contention as to all the claims in issue is that if the claims are construed broadly enough to include the defendant's devices they are invalid, in view of the prior art; if, on the contrary, they are confined to the precise structures described and shown they are not in-

fringed.

The defendant is the selling agent of a German corporation engaged in the same business as the complainant. The patent to Haines No. 1,042,110 which, apparently, is chiefly relied on by the complainant, must, in view of the prior art, be strictly limited to the construction shown and described. When so limited the defendant does not infringe. The Haines patent is dated October 22, 1912, and the McDonald patent 842,897 was issued February 5, 1907. It discloses a weight to force the stylus into contact with the record tablet. This patent and the patents to Clarke and the Clarke Exhibits Y and X leave little room for invention in the structures shown in the claims in controversy.

The McDonald Mandrel patent No. 579,595 is invalid for lack of invention. In view of the admission of the complainant's expert that the principle of operation is identical with that shown in a drawing of

the prior Watson patent, nothing further need be said.

The Gilbert patent in view of the prior art was properly held invalid

for lack of invention.

The McDonald Long Bearing and Center of Gravity patents, if they contribute anything to the art which rises to the dignity of invention must be strictly construed, and as so construed they are not infringed.

The decree is affirmed with costs.

UNITED SHOE MACHINERY CO. v. FARMINGTON SHOE MFG. CO. et al.

(District Court, D. Maine. July 1, 1916.)

No. 732.

PATENTS \$\iff 328\to Validity and Infringement\to Machine for Nailing Shoe Soles.

The Casgrain patent, No. 864,951, for a machine for nailing the soles and heels of shoes, the essential feature of which is mechanism by which a single depression of the treadle first positively raises the horn on which the shoe is fixed for nailing into operative position, and then starts the machine, and on the release of the treadle the machine is automatically stopped and the horn lowered, was not anticipated, and is valid, as disclosing a new, useful and meritorious invention; also held infringed.

In Equity. Suit by the United Shoe Machinery Company against the Farmington Shoe Manufacturing Company and the Champion Shoe Machinery Company. On final hearing. Decree for complainant.

Fish, Richardson, Herrick & Neave, of Boston, Mass., for com-

John H. Bruninga, of St. Louis, Mo., and Bradley & Linnell, of Portland, Me., for defendants.

HALE, District Judge. This suit in equity is brought by the United Shoe Machinery Company, assignee of Louis A. Casgrain, patentee, on United States patent No. 864,951, granted September 3, 1907, against the Champion Shoe Machinery Company, alleged to be the manufacturer of certain infringing machines, and against the Farmington Shoe Manufacturing Company, alleged to be using the infringing machines in this district. The invention of the patent in suit relates to a nailing machine for nailing soles and heels on boots and shoes. The complainant alleges infringement of claim 4 of the patent.

The defendants say that the claim in suit is invalid in view of the prior art, and that it is not infringed by either of the machines of the defendants.

In reference to the subject-matter of the patent in suit, it may generally be said that, in such a machine, a series of nails is driven rapidly along the edge of the sole or heel, as one continuous operation; the shoe being fed automatically between the successive nail-driving operations. The shoe is supported, bottom side up, on a horn, which, as soon as the machine starts and while it is running, must firmly hold the work, pressed upwardly, or clamped against an abutment upon the head of the machine, so that the work will resist the downward thrusts of the awl and nail driver. The horn thus is held up against the work by the medium of a heavy spring, known as the horn spring; this spring must be of sufficient strength to resist the thrusts of the awl and nail driver while it affords the necessary yield of the horn at

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

certain other stages of the operation of the machine. As soon as the machine is started in operation, the awl descends and punctures the work, and then the awl moves horizontally and feeds the work along; after this, the awl is withdrawn from the work, and thereafter is moved back horizontally to its original position. After the awl has been withdrawn from the work, the driver drives a nail into the hole which the awl has left; the awl then descends again, makes a new hole, feeds the work along again, and so proceeds. Just before and during each feed movement, the horn is automatically depressed to a slight extent, against the tension of the horn spring, in order to relieve the clamping pressure on the work and permit it to be fed; after this the horn is again raised by its horn spring to clamp and support the work. When the machine is at rest the horn is supported in a position well below the head of the machine, so that a shoe can readily be placed on the horn by the operator, or the shoe, previously operated on, may be removed.

In describing the work of the machine, the learned counsel for the complainant explains that when the machine is started, and before the awl makes its first stroke, the horn must be fully raised, and put completely under the influence of the horn spring, so as to hold the work solidly in position by the full force of the horn spring. The quicker these two operations of raising the horn and starting the machine can be made to follow each other, while insuring their proper sequence, so that the horn will be completely raised with the full clamping pressure before the awl makes its first descent, the more rapidly can the operator turn out work on the machine; and if these two consecutive operations can be successfully brought about, by a single continuous movement of the operator, such as the depression of the treadle by the operator's foot, it is evident that great economy of time and effort on the part of the operator will be effected. Not only is this so in starting the machine, but also in stopping it. The operator, by removing his foot from the treadle, causes the machine to come to a stop and the horn to drop; and these two operations are practically simultaneous, but with sufficient interval between to insure that the last fastener shall be fully driven before the horn is lowered. It is explained, further, that such a single treadle mechanism for starting and stopping the machine, and for controlling the movements of the horn at these times, must, of course, be properly correlated and combined with the power-driven mechanism for periodically depressing the horn, during the feed movement.

It is urged by the complainant that the Casgrain patent in suit describes such a single treadle mechanism, combined with such power-driven, horn-depressing mechanism; the single treadle mechanism having certain positive connections which insure these results. Claim 4, the only claim involved in this litigation, is as follows:

"4. In a machine for inserting fastenings, a horn or work support, a main driving shaft, mechanism controlled thereby to depress the horn periodically, a clutch for the said shaft, controlling means to throw said clutch into or out of operation, a treadle, operating connections between it and said means, to

start the machine, and positive connections between the treadle and horn, to raise the latter manually when the machine is started."

In reference to the word "manually," the specification points out that:

"The term 'manually operated' is intended to mean operated or controlled by the workman or operator."

It is alleged by complainant that the claim presents the alleged single treadle mechanism, and achieves the result of positive connections, which other machines had failed to reach. It is urged that the Casgrain invention consists in simple and effective means whereby the horn is firmly held in raised or clamping position during the operation of the machine, is automatically lowered when the nailing ceases (that is, when the operator stops the machine by removing his foot from the starting treadle), and is automatically put in this position again when the machine is set in motion to resume the nailing; that is, when the operator depresses the treadle to start the machine.

In his specification, the inventor points out that the invention relates to mechanism for controlling the position of the horn, and for

effecting its movements, and proceeds:

"While a fastening is being driven into the work, the latter is firmly held or clamped between the horn and a co-operating presser, and I have provided herein simple and effective means for so controlling the horn that it will be automatically moved away or lowered from the presser, when nailing ceases, and maintained in such lowered position until the apparatus is set in motion to resume nailing. Such separation of the horn and presser permits the instant removal of the work from, or application of the work to, the horn with entire freedom."

The machine is a somewhat complicated one. So far, however, as relates to the issues in this case, the features of primary interest are the means controlled by the single treadle for starting the machine and for positively raising the horn, and the power-driven means for periodically depressing the horn during the feed movement.

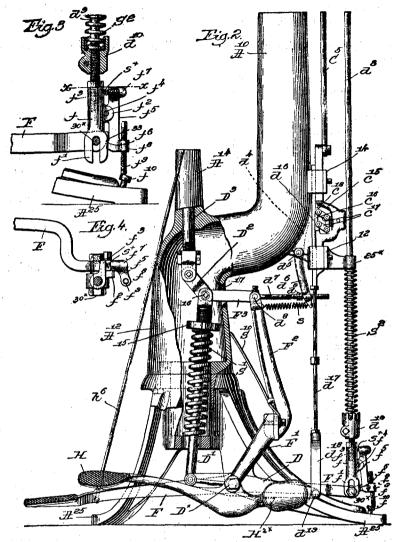
The treadle in question has, rigidly connected with it, an upwardly extended arm; pivoted to the upper end of this arm is one end of a link, whose other end is pivotally connected to a pivot connecting the

ends of two toggle-forming links.

The learned counsel for the complainant explains at length the details of the device, and, in reference to the positive or unyielding feature, says:

"While the Casgrain connections for straightening the toggle, and thus raising the horn to its final work-clamping position, under the full influence of the horn spring, are entirely positive and unyielding, so that this operation cannot fall to take place, no matter how thick the work may be, the necessary capacity for yielding of the horn, due to the horn spring itself, is always present for and utilized to a greater or less extent in the means for raising and supporting the horn. In short, the horn spring yields during the horn-raising operation, when the horn can go no higher."

We may better understand the important features of the patent in suit, if we refer to Figure 3:



Upon this subject it is pointed out in the specification that the depression of the end of the treadle acts "to positively straighten out or set the toggle, and thereby elevate the horn"; and the complainant urges that the "setting of the toggle before the machine is actually started" is the essential thing the patentee was seeking to do, and is precisely what he did. It is not necessary to discuss all the intricacies of this complex machine. We must, however, refer to what is called the "lost motion" result. Leading to this subject the complainant's counsel calls attention to these features: The rear end of the treadle carries a stud operating in the slot, connected to a rod which connects with the controlling means of the clutch for starting and stopping the machine. The stud and slotted foot form a lost motion connection

between the treadle and the clutch, so that, upon depression of the lefthand end of the treadle, the stud on the right-hand end of the treadle rises idly in the slot, without having any effect to raise the rod and start the machine, until the treadle has been depressed sufficiently to insure full straightening of the toggle and putting the horn fully under the influence of the horn spring, before the awl makes its first stroke. Just at the end of the depression of the treadle, the stud strikes the top of the slot, raises the rod, and starts the machine. The specification points out:

"The horn is therefore always moved into operative position in advance of the starting of the machine, so that there is no danger of a fastening being driven before the work is in position to receive it."

The treadle is acted upon by the flat spring, which, as the treadle is depressed, is put under strong tension and will return the treadle to its normal inoperative position as soon as the operator removes his foot from the forward end of the treadle. When the treadle is thus moved to inoperative position, as soon as its rear end begins to descend, it permits the rod to be forced downwardly by its spring, thereby disconnecting the clutch, and stopping the machine; and this is immediately followed by the complete breaking of the toggle and the lowering of the horn.

The counsel for the complainant then enters upon a full description of the details of operation, which I do not think it necessary to repeat. He urges that the vital thing to which attention should be called in this litigation is the attempt of the patentee in claim 4 to fully straighten the toggle before starting the machine, so that the awl will

have something firm to strike against.

In order to show precisely how the straightening of the toggle was effected by the patentee of the patent in suit, it is well to refer at once to the prior art. The main reference in the prior art is the Cutter patent, No. 582,579, dated May 11, 1897, disclosing a device for inserting nails in the soles and heels of boots and shoes. Both parties lay great stress upon this patent. The defendant says that claim 4 distinguishes from the construction which the defendants present in the same way that this claim distinguishes from Cutter, and that the defendants do not infringe claim 4. It is urged by the complainant that Cutter was aiming to produce the same results which Casgrain later did produce, namely, raising and lowering of the horn and starting and stopping the machine in proper sequence, by a movement of a single treadle in a nailing machine of the general type now before us. It is urged that Cutter failed, because he provided his machine with lost motion and yielding connections between the treadle and the hornraising toggle, in order to insure the starting of the machine after securing the necessary delay relatively to the horn raising, while Casgrain met with success because he located his lost motion connection between the treadle and the clutch controlling mechanism, and provided positive connection from the treadle to the horn-raising toggle, so that the toggle would always be fully straightened and the horn fully raised, and put under the influence of the horn spring before the first stroke of the awl upon starting the machine, no matter how thick the work to be operated on. And the complainant urges that the "sole question in the case is whether defendants have the positive togglestraightening connections of Casgrain, or whether they have the lost motion and yielding connections of Cutter between treadle and toggle."

In order to present clearly the features of the Cutter patent involved in this suit, we refer to Figure 1 of that patent. Cutter's object is stated to be:

"To produce a more practicable, smoother operating, and a more reliable machine than others now in common use."

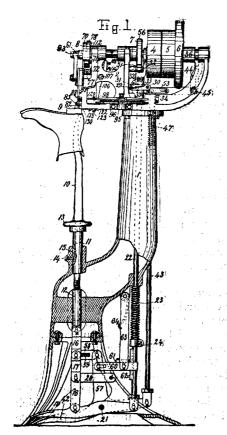
Claim 16 is as follows:

"A vertically movable stock support, toggles to raise and lower said support, a starting and stopping treadle mechanism operated thereby to start or stop the machine, a yielding connection between the treadle and the toggles, whereby the stock support is automatically raised when the treadle is operated to start the machine and automatically lowered when the treadle is operated to stop the machine; said yielding connection allowing the treadle to be further operated provided the stock support is raised as far as possible before the treadle has caused the starting of the machine, for the purpose set forth."

The purpose and working of this patent can be seen more clearly by having Figure 1 before us.

In reference to the features disclosed in this figure, the specification

points out:



"To allow the starting treadle to be fully depressed in case the stock support is raised as far as possible prior to the withdrawal of the wedge 46 from under the dog 37 and the consequent starting of the machine, I provide the link 58 with a slot, through which one of the pins pass which connect said link to the toggles or to the projection on the starting lever and insert a spring 59 within said slot, as shown in Fig. 1, so that said spring will yield and allow the treadle to be further depressed, if necessary. This yielding in the connection between the starting treadle and the toggles may be accomplished by any other and equivalent means than by the use of the spring 59 without departing from my invention.

"The yielding connection between the starting and stopping treadle and the device to raise and lower the stock support is necessary, or especially desirable, when stock of greater thickness than that just nailed is to be nailed, as the support will be raised as far as possible before the wedge is withdrawn from the dog and the machine started. If this yielding connection were dispensed with, it would be necessary in such a case to depress the treadle with sufficient force to overcome the influence of the spring 23 and to force the rod 22 upward until the wedge 46 was freed from the dog 37, which operation would require a great pressure on the treadle.

"By the use of the connection between the starting lever and the device to raise and lower the support for the stock it will be seen that said support is automatically raised into operative position by the starting of the machine, and automatically lowered so as to remove the stock therefrom or to replace it when desired by the stopping of the machine."

It is urged by the complainant that the Casgrain machine of the patent in suit improves upon the Cutter machine by providing positive connection from the treadle to the toggle, insuring that the toggle shall be fully straightened and the horn positively raised and put under the influence of the horn spring, before the machine makes its first stroke, entirely irrespective of the thickness of the work, the proper sequence being obtained by actuating the clutch just as the straightening of the toggle is being completed; this will insure full straightening of the toggle before the machine makes its first stroke. Mr. Calver, the defendant's expert, says:

"The real difference between the two machines is that the lost motion which, in the Cutter machine, is between the treadle and the toggle, is, in the Casgrain machine, between the treadle and the clutch-operating rod."

The desirability that the toggle should be straightened before the machine is started is admitted on all hands; and it is contended by the complainant that this is achieved by Casgrain over Cutter. The two machines were brought in conflict at the Patent Office. Casgrain's claim was first rejected on the Cutter patent; then the claimant insisted upon his claim; the force of his argument may be seen by examining the figure of Cutter's patent, to which reference has been made. The applicant in the Patent Office said:

"In Cutter, when the lever 42 is depressed into the position shown in Fig. 1, the arm 57 will push to the left the link 58 to set the toggle levers 16, 17; but the joint connecting the toggles 16, 17, enters a slot in the link 58, and a spring 59 is interposed between the right-hand end of the slot and the pivot, so that the action of the treadle to set the toggle is not positive, but is more or less yielding, and must be so at all times. A positive connection such as shown by applicant is not and cannot be construed to be the same as a spring connection in Cutter, and we have to ask that these claims be reconsidered with this point in view, and it is submitted the claims should be allowed."

After a hearing, the Patent Office allowed the Casgrain claim. It will be noted that Casgrain calls for a connection from the treadle to the toggle, which "will set the toggle, there being no lost motion, play or yielding action whatever in the operation." This is clearly distinguished from the spring 59 of Cutter, which forms a yielding connection between the treadle and the toggle, "whereby the action of the treadle to set the toggle is not positive, but is a more or less yielding one, and must be so at all times."

Without going further into details, I am forced to the conclusion that claim 4 of the patent presents a distinct and meritorious inven-

tion, and is not anticipated by Cutter.

Weeks & Tuttle's patent is cited in the prior art. It is No. 566,359, dated August 25, 1896. In this patent the inventor shows three distinct and separately operated treadles—one for raising the horn before starting the machine, another for starting the machine after the horn has been raised, and for stopping the machine before the horn

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has been lowered, and a third for lowering the horn after the machine has been stopped.

It is clear that the Weeks & Tuttle patent shows three separately

operated treadles. In the specification it is said:

"The horn being depressed by the breaking of the toggle p, the work is placed upon it and then lifted by restoring the toggle to a vertical position, it being understood, of course, that the horn has first been adjusted to the thickness of the work to be nailed."

Clearly this patent discloses three treadles; and I find nothing in the specification, or in the figures, tending to the conclusion that any two of the treadles are operated as one. The complainant in the patent in suit points out the advantage of the single treadle over the three treadles:

"The great practical advantage of raising the horn and starting the machine by a single treadle or equivalent device, operated by a single continuous depression of the operator's foot, and of stopping the machine and dropping the horn by simply releasing the one treadle or equivalent device, as compared with separately actuated treadles for these different operations, as in Weeks and Tuttle, will be more fully appreciated, when it is realized at what speed a machine embodying the Casgrain construction can be and is operated in practice."

In the Casgrain machine the horn is raised by a single treadle operated by the single depression of the operator's foot, and is stopped by releasing the single treadle. It is unnecessary, at this point, to refer to the bearing of the Weeks & Tuttle patent upon the question of the defendant's infringement. On the question of anticipation, it is clear that nothing is disclosed in the Weeks & Tuttle patent which should be held to avoid the Casgrain patent by reason of anticipation.

The Goddu patent in the nailing machine art, No. 310,816, is re-

ferred to, but, I think, requires no comment.

After examining the patents that have been brought before me in the prior art, I am constrained to find that claim 4 in the patent in suit is not rendered invalid by reason of anticipation. I think the improvement brought before me in claim 4 shows something more than a mere mechanical advance in the art, and must be held to be an invention of merit. The improvement which the inventor made in this claim over anything in the prior art seems to have worked a beneficial result and to be entitled to recognition as the result of an exercise of the creative faculty. The whole case shows, I think, that the patentee in this claim took the step which turned failure into success. Under the well-known principles of the patent law he should have the benefit of his inventive thought. Barbed Wire Case, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154; Expanded Metal Co. v. Bradford, 214 U. S. 366, 381, 29 Sup. Ct. 652, 53 L. Ed. 1034.

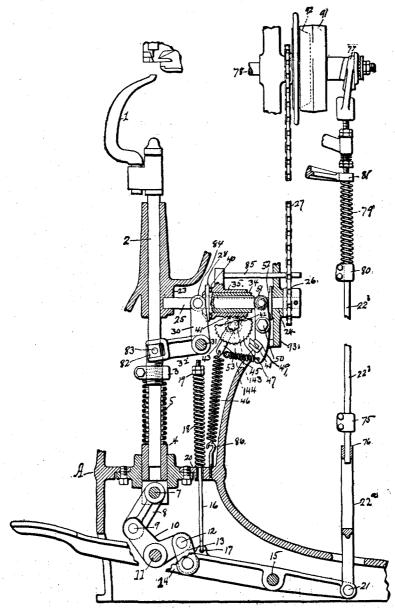
Infringement.

The defendants say that their machines do not infringe claim 4, because they do not have the positive connections specified in the claim for raising the horn, but that they have yielding connections for this purpose.

The defendants bring two machines before the court. Their main construction is shown in the drawing produced at the trial, offered on

page 5 of the complainant's record, and shown at page 59:

Defendants' Construction



In this drawing is the horn (1); above it is the fixed abutment upon the head of the machine, against which the work is pressed by the horn when raised in position. The awl and driver make their downward strokes through this abutment, as in the Casgrain device, the

awl feeding the work and the driver driving the nail in the awl hole after the awl has been withdrawn. Below is shown the treadle at 14, pivoted at 15 to the base of the machine, and positively connected at 13 with one arm of the bell-crank lever 10, fulcrumed at the base at The other arm of the bell-crank lever 10 is pivoted at 9 to the link 8; this arm and this link together form a toggle for raising the horn; this toggle is positively connected to the treadle and is positively straightened to raise the horn fully and put it under engagement with the horn spring whenever the treadle is depressed. The upper end of the toggle link 8 is pivotally connected at 7 to a movable sleeve 4, upon which rests the horn spring 5. Through this sleeve, the horn spindle 2 projects; and this spindle carries the horn. spring δ , at its upper end, abuts against a collar β , on the horn spindle 2. When the treadle 14 is depressed, and the toggle positively straightened, sleeve 4 is raised; this raises the horn spring, the horn spindle, and the horn, until the horn and its spindle are stopped by the work coming in contact with the presser or abutment; then the continued straightening of the toggle and raising of the sleeve 4 will compress the horn spring, thus putting the horn under the influence of this spring, and applying to the work the firm clamping pressure of the horn spring. It is pointed out that if the work be thick the horn spring, in straightening the toggle, will yield more than if the work be thin. The contention of the defendants is that this machine does not have positive connections between the treadle and the horn within the meaning of claim 4. They contend that their horn spring takes part in the raising of the horn and yields more or less at the end of the operation. On examination of the two devices it seems to me to be clear that the defendant's machine has positive connections for straightening the toggle and putting the horn under the influence of the horn spring; that it shows the important function which Casgrain shows, of making a firm support upon which the work may be done, by substantially the same means employed by Casgrain. Where Casgrain has improved upon Cutter, eliminating the yielding device of Cutter, the defendant has followed Casgrain. As we have seen, Casgrain puts his lost motion connection between the treadle and the clutch-controlling rod, and provides positive connections from his treadle to his toggle; thereby, he produces a firm support, made by a fully straightened toggle and a horn spring raised positively. In this respect, the defendants have clearly followed Casgrain, and have not followed Cutter.

With reference to the defendants' contention that their horn spring takes part in the raising of the horn and presents a yielding action at the end of the operation, I think it must be said that the horn spring plays the same yielding part with the raising of the horn, in Casgrain's machine, that it plays in the defendants' machine; so that, if this yielding element in the horn spring negatives the presence of positive connections of Casgrain's claim 4 in the defendants' machine, it does the same thing in the Casgrain machine.

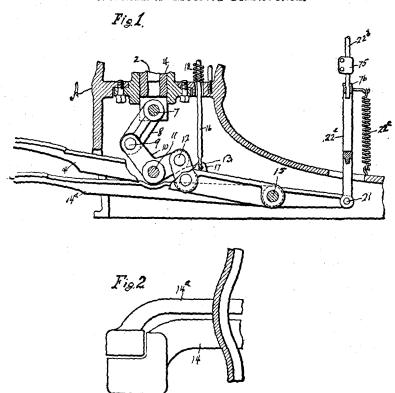
In Casgrain's machine the lower link of the horn-raising toggle pushes against the horn spring; and in the defendants' machine the upper link of the toggle pushes against the horn spring. The purpose and result seem identical in the two cases. The complainant's expert gives clear testimony upon this subject:

"The spring 5 in the defendants' machine and the spring 8' in the Casgrain machine are practically identical in function, and have no more to do with the operation of the parts which raise the horn in one case than in the other. For this reason I, accordingly, have no hesitation in stating it as my opinion that the last element of claim 4 of the patent in suit, reads upon and applies to the construction exhibited by the defendants' machine, as fully as it reads upon and applies to that of the Casgrain patent in suit."

The learned counsel for defendants has illustrated his contention by the use of models in his interesting argument and able presentation of the case. After a careful study of the two mechanisms brought before me, I am forced to the conclusion that the main construction of the defendants' machine shows all the features of claim 4 of the patent in suit, and is an infringement upon that claim. I think the record in the Patent Office, as shown in the file wrapper, tends also to this conclusion.

The defendants bring before the court a modified machine. A drawing of this machine is offered in evidence and appears in the record:

Defendants' Modified Construction.



This machine is like their main construction, except that the treadle 14 in the modified construction is split into two parts, one of which raises the horn; the other starts the machine.

The defendants contend that, in this modified construction, they are following the Weeks & Tuttle machine, and are not infringing the Casgrain patent. Defendants say that the two Weeks & Tuttle treadles for raising the horn and starting the machine are adapted and intended to be operated as a single treadle by a single depression movement of the operator's foot, and that the Weeks & Tuttle machine is essentially the same as the defendants' modified machine. Upon examination of the two machines, I cannot sustain this contention. The Weeks & Tuttle specification does not support the idea of "simultaneous depression," of the horn-raising and machine-starting treadles, as I have already shown. It cannot, I think, be said that in Weeks & Tuttle there are two treadles placed near together, so that they may be operated and are intended to be operated by a single downward movment of the foot of the attendant. I think it cannot fairly be said that, in the Weeks & Tuttle machine, we have a two-part treadle, as we clearly have in the defendants' modified machine.

The splitting of the treadle into two parts does not affect its use as a single treadle, and does not prevent infringement. The proofs and the drawing show that the two treadle parts in the machine present in effect a single treadle surface, and that the operator, in fact, operated them the same as he would have operated a single piece treadle; that he engaged both parts of the treadle with his foot in a single depressing movement, in the same way that he would depress the one-part treadle of the defendants' main construction. In other words, there was clearly "simultaneous depression" of the two parts of the treadle in the defendants' machine, and that such "simultaneous depression" did not exist in the Weeks & Tuttle device. Without dwelling on the details of proof, brought before me, I am constrained to find that the defendants' modified construction cannot be sustained as following the Weeks & Tuttle patent, but that it does clearly follow claim 4 of the patent in suit, and is an infringement of such claim. I think it is as clear an infringement as is the machine of the defendants', first brought before us.

My conclusion, then, is that claim 4 of the Casgrain patent is not invalidated by the prior art, but is a valid claim; that it presents a new, useful, and meritorious invention; that the defendants have infringed this claim, both by their main construction and also by their modified construction.

A decree may be entered for an injunction and an accounting as to both constructions of the defendants. The complainant recovers costs.

The complainant may present a draft decree, on or before July 17, 1916. The defendants may present corrections, if any, on or before July 31, 1916. The decree is to be settled August 7, 1916, at 10 o'clock a. m.

THACHER V. INHABITANTS OF TOWN OF FALMOUTH.

(District Court, D. Maine, June 27, 1916.)

No. 731.

1. PATENTS \$\infty 328 VALIDITY CONCRETE ARCH.

The Thacher patent, No. 617,615, for a concrete arch, is void for lack of invention; the arch of the patent in all its essential features having been previously described and illustrated in a printed publication in this country and in a foreign country.

2. PATENTS \$\infty\$-Description in Printed Publication.

A printed publication, describing a device or structure, to be effective to invalidate a subsequent patent therefor, under Rev. St. § 4886 (Comp. St. 1913, § 9430), is anything which is printed and, without any injunction of secrecy, is distributed to any part of the public in any country. It is not essential that the device so described should have been in use, if the information conveyed to the public is sufficient to enable one skilled in the art to make and use it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 82, 83; Dec. Dig. ⊕ 68.]

In Equity. Suit by Edwin Thacher against the Inhabitants of the Town of Falmouth. On final hearing. Decree for defendant.

- A. Alexander Thomas, of New York City, for complainant.
- S. W. Bates and David E. Moulton, both of Portland, Me., for defendant.

HALE, District Judge. [1] This suit in equity alleges infringement of the first and third claims of letters patent of the United States, No. 617,615, issued to the complainant, Edwin Thacher, January 10, 1899, and relating to concrete arches for bridges, or vault covering, or for spanning openings in building construction. The claims in suit are:

"1. The combination with abutments, and a concrete arch spanning the intervening space, of a series of metal bars, in pairs, one bar of each pair above the other, near the intrados and extrados of the arch, and extending well into the abutments, each bar of a pair being independent of the other, substantially as described."

"3. The combination with abutments, and a concrete arch spanning the space between the abutments, of a series of metal bars in pairs, one bar of each pair above the other bar, near the extrados and intrados of the arch, each bar of the pair being independent of the other, and one bar of each pair extending well into the abutment, substantially as described."

At the outset of the specification, the inventor says:

"My invention relates to concrete arches for bridges or vault covering, or for spanning openings in building construction; and it has for its object an improved arch structure in which from or steel bars are imbedded in concrete near the outer and inner surfaces of the arch in such a manner as to assist the concrete in resisting the thrusts and bending moments to which the arch is subjected."

The inventor then proceeds to state in detail certain details of his construction:

"By my invention I provide, first, for an effective connection between the bars and the concrete, employing lugs, dowels, bolts, or rivets, which pass through the bars and project into the concrete, in which they are embedded, and thereby reinforce the adhesion between the metal and the concrete and prevent any end movement of the bar through the concrete, so that the complete crushing or shearing of the concrete must take place before a separation can be effected. Second, I employ bars of such a form that they can readily and cheaply be spliced if a greater length of bar is required than that which can be conveniently rolled or shipped. Third, I provide bars that can be manufactured at a small cost and as a standard or stock article and can be readily bent when used to the curve of the arch into which they are to enter. Consequently they can be stored or shipped in straight form. In ordinary structures and generally I arrange the bars in pairs, which are usually disposed so that one of the pair rests vertically above the other member of the pair; although I do not consider this manner of disposing of the bars as essential in all cases. The bars act as the flanges of beams to resist bending moments, whereas the shearing stresses, which are small, are taken by the concrete alone. In their normal condition the bars and the concrete act together, and the work done by each depends on its moment of inertia and modulus of elasticity; but if the concrete is defective and has a tendency to crack, the bars will greatly aid in resisting such tendency, and if a crack should take place the relation of the parts will be changed, and the bars will do the work of the concrete, and prevent the falling of the structure."

The defendants say that the claims in suit are invalid by reason of anticipation, and because, in view of the state of the prior art, they do not disclose invention. They allege also that, under a proper construction of this claim, no infringement is shown.

The patent has been sustained by the District Court of Maryland. Thacher v. Mayor and City Council of Baltimore (D. C.) 219 Fed. 909. The opinion of Judge Rose has been affirmed by the Circuit Court of Appeals for the Fourth Circuit. 230 Fed. 1022, 144 C. C. A. 659. It has been sustained in Thacher v. Transit Const. Co. (D. C.) 228 Fed. 905, where Judge Thomas, for the District Court in the Southern District of New York, held that the patent was valid, but was not infringed by the defendant company. The decision of Judge Thomas has been affirmed by the United States Circuit Court of Appeals for the Second Circuit, 234 Fed. 640, — C. C. A. —.

The defendants, however, have cited certain printed publications relating to examples of German Monier construction, which, it is contended, were not before the court in the cases to which I have referred, were not shown in the Patent Office, and are now for the first time brought before a court.

[2] The Revised Statutes of the United States, in section 4886, provide:

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof," etc. Comp. St. 1913, § 9430.

The defendants contend that the invention disclosed in the patent in suit was described in a printed publication in this and in a foreign

country before the invention set forth in the patent.

An important publication, brought to the attention of the court, is the following: It is in evidence that in 1895 the Zeitechrift, of the Austrian Society of Engineers and Architects, published in a supplement the results of a series of tests made in full-sized arch bridges of certain well-known types, for the purpose of getting data for calculations. Among other publications was the description of a bridge 75 feet long, built on the Monier plan, with longitudinal wires about one-half inch in diameter and cross-wires about one-fourth inch in diameter. The proofs contain also cuts and descriptions of the bridge construction. This publication is shown to have been made some time before the application for this patent was filed. The complainant objects to the Zeitschrift as a publication. I find, however, that it was published in May, 1895, before the date of Thacher's invention; that it is the official journal of the Austrian Society of Engineers and Architects. I can see no reason why it should not be admitted as one of the proofs in the case.

A printed publication is anything which is printed, and, without any injunction of secrecy, is distributed to any part of the public in any country. Walker on Patents (4th Ed.) § 56. In Rosenwasser v. Spieth, 129 U. S. 47, 9 Sup. Ct. 229, 32 L. Ed. 628, the Supreme Court held that the device before it had been anticipated in a German publication half a century before. The publication in that case does not appear to have been anything more distinct or definite than the publication be-

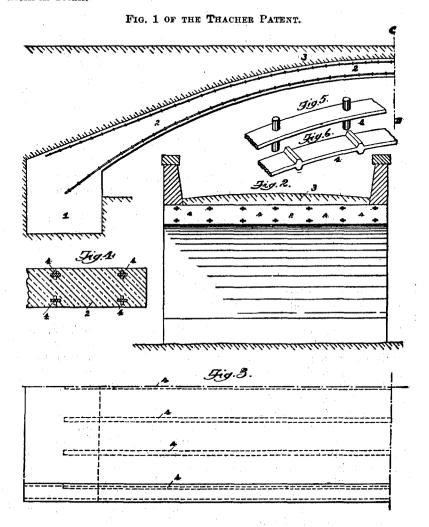
In Britton v. White Manufacturing Co. (C. C.) 61 Fed. 93, 95, for the purpose of showing the state of the art, Judge Townsend of the Circuit Court admitted in evidence a pamphlet purporting to be a number of a coachmakers' magazine, printed for general circulation, bound up with other numbers, and containing references to advertisements, with terms therefor.

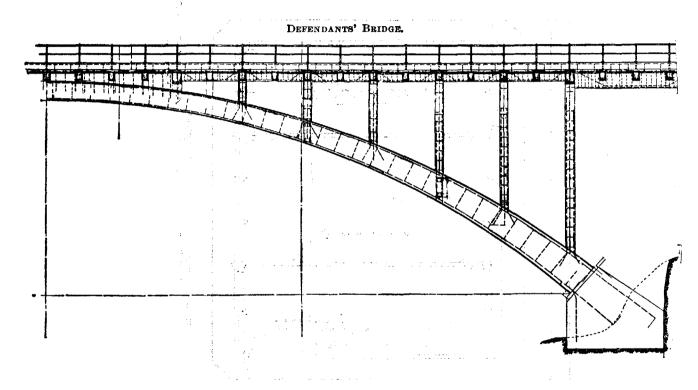
fore us in the case at bar.

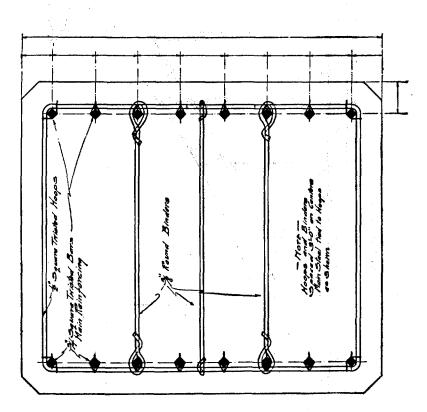
I think the Zeitschrift must be held to disclose a construction having in combination all the elements of the patent in suit. It contains the abutments, the concrete arch, the series of pairs of bars, one bar of each pair near the intrados, and the other pair near the extrados; it shows each bar extending well into the abutments, after the completion of the abutments. I think there can be no doubt that the concrete work, into which the arch extends, must be held to be a part of the abutment after the construction is complete. Each bar of the pair is clearly independent of the other bar of the pair. It appears that the wires in use, under the system disclosed in this publication, were one-half inch in diameter. A wire of this character may well be called a bar; the reinforcement used in the construction described in the publication was something more than a wire netting.

We have before us the drawing of Figure 1 of the Thacher patent; also of the defendant's construction at page 4 of the record. Having these two drawings in mind, if we examine the drawing described by

the Zeitschrift publication, found at page 74 of the record, we shall see that this drawing appears to present the elements of the Thacher patent and of the defendant's construction, as I have just referred to them in detail.

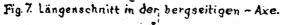




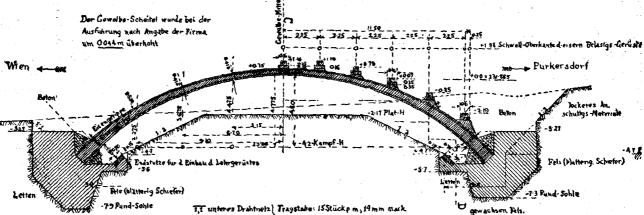


TRANSVERSE SECTION OF RECH RING SHOWING REINFORCEMENT.

Moniergewölbe



Z.Z oberes



Vertheilungsstabe 15 Stuck p.m. 7mm stark.
Naschenweite 65 cm von Milte zu Milte

The learned counsel for the complainant urges that the exhibit illustrating the Zeitschrift disclosure shows merely an experiment, that the bridge shown in the drawing was never used for commercial purposes, and that, after the tests were made, it was torn down by placing predetermined loads upon the horizontal platform with which it was provided.

The court is now dealing with the question whether or not this complainant had invented or discovered any new and useful improvement, not described in any printed publication in this or any foreign country, before his invention or discovery thereof. It is the duty of the court to find whether or not the complainant had a right to a monopoly claimed by his patent; whether or not there was public knowledge, derived from a printed publication before his patent, of the improvement described in it. Upon this issue the Zeitschrift disclosure is offered in evidence, to show what knowledge the public had, from a printed publication, at the time of this patent. Under section 4886 of the Revised Statutes of the United States, patents and printed publications rest upon the same ground. Equitable Asphalt Maintenance Co. v. Parker Washington Co. (D. C.) 197 Fed. The question in each is whether sufficient information is given to enable one skilled in the art to make and use the invention disclosed. It is not necessary to show that the device illustrated has been in use, if the publication is made and the information conveyed to the public is sufficient. As bearing on this question the publication is not invalidated by the fact that it was made for the purpose of giving the result of a series of tests. Courts have discredited works of experimentation by patentees, because experiments are made, not for the purpose of commercial use, but merely to see whether the inventors making the experiments will apply for a patent. What the courts have said upon this subject bears upon the question of public use, and does not apply to a case where the court is seeking to find whether an alleged improvement has been discovered in a printed publication. In Walker on Patents (4th Ed.) § 95 et seq., and cases cited thereunder, is found a discussion of the effect of experimental use as opposed to public use; but this has nothing to do in deciding whether a patentee's alleged invention "was described in any printed publication in this or any foreign country before his invention or discovery thereof."

The Zeitschrift device appears to belong to the German Monier system. It is not necessary, however, to decide to what system it belongs. In my opinion it discloses public knowledge of the improvement in question. In view of this disclosure, the proofs lead me to believe that the complainant did not discover anything new. He enlarged some of the longitudinal wires; he omitted some of the lateral wires; he made some other mechanical changes; by these means he thought he would be enabled to build a bridge more economically than it could be built under the Monier system. The result is shown in what the complainant has brought before the public. He testifies that he had read a paper produced by Frederick Von Emperger before the American Society of Civil Engineers, giving a sketch of the

Monier system. This was some time before Von Emperger produced his patent, No. 583,464 in 1897, to which reference has been made by the courts. The complainant testified that this paper started him upon the line of inventive thought which led up to this patent. The proofs do not induce the belief, however, that Mr. Thacher made any advance in the art. Variations of size of wires do not constitute invention; widening the spaces between the bars, to enable an engineer to use coarser concrete, is not invention; dispensing, in whole or in part, with unessential parts, is not invention; producing economy in bridge building, by consolidating numerous small bars into one large bar, cannot be said to be invention. These things are mechanical; they relate to good engineering; they do not disclose inventive thought. The courts have never had before them examples of the publications to which I have called attention. In the Maryland case the District Court did not refer to any publication like this. In speaking of the Monier invention Judge Rose said:

"In all the forms of his invention, and all the purposes to which he sought to apply it, a metallic grillage remained an essential element of the completed structure."

When we examine the samples of Monier construction brought before Judge Rose, we find that the elements of that construction consisted of a rude arch of reinforcing grillage distributed generally through the mass, as shown in the United States Monier patent. appears, also, that a certain French patent, 77,165, was also shown in the Maryland case. This appears to show a Monier bridge having upper and lower networks arranged in the arch and extending into the abutments. When we examine the description of that patent, and the uncertain character of the drawing, it appears that, while three lines of reinforcement were shown extending longitudinally to the arch, there seems to be a grillage of wire reinforcement running vertically and horizontally through the mass, so that the whole arch apparently becomes a solid body of wire and concrete, and to present what Judge Rose has spoken of as a metallic grillage. There is nothing in what the court has said in that case which induces me to believe that any patent or publication was brought before it showing the essential elements shown in the Zeitschrift publication. It is clear that no such elements were before the court in the Transit Construction Case. In that case, in speaking for the Court of Appeals, Judge Chatfield points out the leading elements of Thacher's patent:

"The specification in the original Thacher application shows that the patentee was seeking to imbed his bars firmly, and that he contemplated for this purpose the use of bars with extensions or projections in order to allow better holding by the concrete. He also contemplated the possibility of using jointed or extension bars, so that they might be put in place in smaller sections and that the lower bar or the lower part of each bar could be covered with concrete first. He planned to have one of the bars near what is called the extrados of the arch and other near the intrados, thus having one follow the curve of the upper surface and the other the curve of the lower surface. He contemplated and has always used some means of holding the bars in position until the concrete was completely around them, and these means can be left in the concrete or removed as may be most convenient. But in all of this structure the patentee had in mind the idea which was not claimed by

Milliken (but was recognized by Von Emperger) of using two single rods or bars, which should not in any way obtain power to resist a strain or stress by direct truss-like connection with the other bar of the pair.

"This proved to be the ultimate patentable idea in the Thacher application

and in this sense the patent seems to have properly been held valid.

When we examine the Zeitschrift publication, we find the same elements in this construction which the court points out to have been the leading elements in the Thacher patent. We find the idea of the two single rods or bars, one near the extrados and the other near the intrados; one following the curve of the upper surface of the arch and the other the curve of the lower surface. The purpose of these rods in the Thacher patent and in the Zeitschrift drawing is to resist the tensile stress, as has been pointed out by one of the experts. This was the leading feature of both structures. As I have already pointed out, we find all the other elements of the Thacher patent in this publication. I think it may fairly be said that there is no publication like the Zeitschrift before either of the courts which have heretofore passed upon the validity of this patent.

After a careful examination of the Zeitschrift publication, I am constrained to hold that Mr. Thacher's alleged invention in the patent in suit was described in a printed publication previous to his application for a patent, and that such printed publication was made in this country and in a foreign country. By reason of this publication I find that the patent in suit does not disclose invention; it is therefore invalid.

Having taken this view of the publication to which I have referred, it is not necessary to refer to other publications, although other publications are produced, illustrating the German Monier system.

In view of my conclusion as to the validity of the patent, it is

not necessary to discuss the question of infringement.

The bill of complaint is dismissed, with costs. A decree may be drawn dismissing the bill. Let such decree be filed in court on or before July 25, 1916. The defendant may present corrections not later than July 31, 1916; the decree to be settled August 7, 1916, at 10 o'clock a. m.

H. D. SMITH & CO. v. SOUTHINGTON MFG. CO.

(District Court, D. Connecticut. July 26, 1916.)

No. 1431.

1. Patents == 283(1)—Agreements—Estoppel.

Where defendant, having been threatened with an infringement suit, agreed to destroy all machinery used in the construction of those portions of the tool which were claimed to be an infringement, to deliver up all tools on hand, to respect the validity of the patent, and to thereafter avoid all infringements, such agreement as between the parties established the validity of the patent and the prior infringement, but does not prevent defendant from showing that tools subsequently constructed, differing from the original ones, did not infringe the patent, and for that purpose

defendant may show the prior art as limiting the scope of complainant's patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448–450, 452; Dec. Dig. ≈⇒283(1).]

2. Patents \$\infty\$272, 311-Infringement Suits-Prior Art.

In an infringement suit, proof of the state of the prior art to aid in the construction of the patent is admissible in equity cases without any averment in the answer touching the subject, and in actions at law without the giving of the notice required when evidence is offered to invalidate a patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 417, 541, 542; Dec. Dig. \$\infty 272, 311.]

3. EVIDENCE ←5(1)—JUDICIAL NOTICE—MATTERS OF COMMON KNOWLEDGE.

The court is bound to take judicial notice of matters of common knowledge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. €=5(1); Patents, Cent. Dig. § 543.]

4. PATENTS €==168(2)—CLAIMS—SURRENDER.

Where a patentee did not appeal from the decision of the examiner rejecting his claims, but filed new and more restricted claims, he is, regardless of the propriety of the examiner's decision, presumed to have dedicated to the public all claims withdrawn.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 244; Dec. Dig. ©=168(2).]

5. Patents \$\sim 328\$—Construction—Infringement.

Patent No. 737,179, for an improvement in screw-drivers, *held*, in view of the proceedings in the Patent Office and the prior state of the art, to be limited to the conoidal shape of the bolster and lower part of the handle, and, as limited, not to be infringed.

6. PATENTS \$\infty 316-Infringement Suits-Relief-Unfair Competition.

In a suit for infringement of a patent, no relief for unfair competition, in that defendant dressed its goods so as to palm them off on the public as those of complainant, can be granted.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 562; Dec. Dig. \$316.]

In Equity. Suit by the H. D. Smith & Co. against the Southington Manufacturing Company. Bill dismissed without prejudice to suit for other infringement.

Samuel H. Fisher and H. E. Rockwell, both of New Haven, Conn., for plaintiff.

George D. Seymour, of New Haven, Conn., for defendant.

THOMAS, District Judge. The plaintiff is the owner of letters patent No. 737,179, granted August 25, 1903, upon the application of William S. Ward, plaintiff's assignor, for an improvement in screwdrivers. The patent contains two claims, and the bill of complaint charges the defendant with infringement of both claims. An answer has been filed denying infringement, and the case arises upon final hearing on the pleadings and proofs.

[1] Prior to October 7, 1912, the defendant had made a Chinese copy of the device of the patent. Suit for infringement was threatened by the plaintiff and thereupon on said date the plaintiff and the defendant entered into an agreement whereby the defendant agreed

to destroy all dies used in the construction of the parts of the screwdrivers which were claimed by the plaintiff to be an infringement of the patent, to deliver up to the plaintiff all such screw-drivers then on hand, to respect the validity of the patent, and thereafter to avoid any and all infringements, direct or indirect, either by the manufacture of screw-drivers of the forms particularly involved or otherwise. The defendant then proceeded to manufacture and sell another screw-driver which it now alleges does not infringe the patent. The effect of this agreement is such that the validity of the patent and the fact of infringement prior to the date of the agreement, including such a construction of the claims as would include the article previously made, are no longer in issue between the parties. But this estoppel does not prevent the defendant from showing that the screwdrivers made since the date of the agreement (assuming that they differ from those made before) do not infringe the patent. For the purpose of showing that the new article does not infringe, the defendant is at liberty to prove the prior art and the proceedings in the Patent Office while the application was there pending. This view is directly supported by the decision of the Circuit Court of Appeals for this circuit in American Specialty Co. v. New England Enameling Co., 176 Fed. 557, 558, 100 C. C. A. 193, 194, which, in its controlling features, is the counterpart of the case at bar. There the defendant in an infringement suit had, prior to the suit, entered into an agreement with the plaintiff conceding the validity of the patent and agreeing not to infringe it in the future. The Circuit Court granted the plaintiff a preliminary injunction, which on appeal was reversed, the defendant contending that the new article was of a somewhat different type from the article included in the agreement, and therefore not an infringement. The judgment of the Circuit Court of Appeals granting a reversal was delivered by Judge Lacombe, who, in the course of the opinion, said:

"While defendant may not dispute the validity of the patent, nor such a construction of its claims as will cover kettles of the type it first made, it may show, if it can, that those of the later type are not within the patent; and in considering this question the court may look into the prior art and construe the specifications in the light of the file wrapper, in order to determine whether the new style of kettle also infringes the patent."

Such again is Noonan v. Chester Park Athletic Club Co., 99 Fed. 90, 91, 39 C. C. A. 426, 427, decided by the Circuit Court of Appeals for the Sixth Circuit (Taft, Lurton, and Day, Judges) where it was held that an estoppel preventing a defendant from denying the validity of the patent did not prevent him from denying infringement, and that in determining such an issue it is admissible to show the state of the prior art involved that the court may find what the thing was which was included in the estoppel, and thus determine the primary or secondary character of the patent, and the extent to which the doctrine of equivalents may be invoked against an infringer. The estoppel in that case arose from an assignment of the patent in suit, and the court in its opinion said:

"It seems to be well settled that the assignor of a patent is estopped from saying his patent is void for want of novelty or utility, or because anticipated

by prior inventions. But this estoppel, for manifest reasons, does not prevent him from denying infringement. To determine such an issue, it is admissible to show the state of the art involved, that the court may see what the thing was which was assigned, and thus determine the primary or secondary character of the patent assigned, and the extent to which the doctrine of equivalents may be invoked against an infringer. The court will not assume against an assignor, and in favor of his assignee, anything more than that the invention presented a sufficient degree of utility and novelty to justify the issuance of the patent assigned, and will apply to the patent the same rule of construction, with this limitation, which would be applicable between the patentee and a stranger. Babcock v. Clarkson, 63 Fed. 607, 11 C. C. A. 351; Ball & Socket Fastener Co. v. Ball Glove-Fastening Co., 58 Fed. 818, 7 C. C. A. 498; Cash-Carrier Co. v. Martin, 67 Fed. 786, 14 C. C. A. 642; Chambers v. Crichley, 33 Beav. 374; Construction Co. v. Stromberg (C. C.) 66 Fed. 550; Clark v. Adie, 2 App. Cas. 423, 426."

- [2] These authorities are directly in line with the well-established rule that proof of the state of the art is admissible in equity cases without any averment in the answer touching the subject, and in actions at law without giving the notice required when evidence is offered to invalidate the patent, for the purpose of aiding the court in the construction of the patent. Dunbar v. Meyers, 94 U. S. 187, 198, 24 L. Ed. 34
- [3-5] We are therefore brought to the vital question here involved, Is the difference between the new screw-driver and the old screw-driver made by the defendant such as to take the case out of the claims and thus enable the defendant to escape the charge of infringement? These claims are as follows:
- "1. As a new article of manufacture, the herein-described screw-driver, consisting of the blade, the round shank, conoidal bolster, handle-web, and butt, all formed in one piece, and the handle-scales secured to the said handle-web, the handle portion being elliptical in cross-section for the most part, but gradually merging with the conoidal bolster by a gentle taper into the circular tool-shank, thus providing for a firm grasp while facilitating a nice control by pressure of the finger and thumb upon the shank of the tool.
- "2. As a new article of manufacture, the herein-described screw-driver, consisting of the blade, the round shank, conoidal bolster, handle-web, and butt all formed in one piece of drop-forged metal shaped as described, the handle portion being elliptical in cross-section for the most part, but gradually merging with the conoidal bolster by a gentle taper into the circular tool-shank, thus providing for a firm grasp while facilitating a nice control by pressure of the finger and thumb upon the shank of the tool."

In construing these claims and determining the question of their construction and just what they cover, the best source of information is the specification of the patent, and, in connection therewith, the history of the application while it was pending in the Patent Office. The patent is a very simple one. The patentee first states that the object of his invention "is efficiency of the article." He then proceeds to describe its mechanical construction by reference to the accompanying drawings, after which he states that:

"The screw-driver is very firm, substantial, and solid, while at the same time it is of a graceful and effective form and particularly convenient to handle."

From the prior art which is introduced in evidence, and from matters of common knowledge and use which the court is bound to judicially notice (Brown et al. v. Piper, 91 U. S. 37, 23 L. Ed. 200; King v. Gallum, 109 U. S. 99, 3 Sup. Ct. 85, 27 L. Ed. 870), it appears that various kinds of cutlery and utensils used by hand had scale handles in which the blade, the shank, the handle-web, and the butt were all formed in one piece, and the handle-scales were secured to the handle-web. Such general construction is shown in the Rubel patent, No. 86,252, of January 26, 1869, the Rubel patent, No. 78,328 of May 26, 1868, and the Frary patent, No. 172,874 of February 1, 1876, all of which preceded, by a considerable time, the application for the patent in suit. The prior art also shows high-class wrenches of the same construction with handle-web and wrench-bar made of a single drop forging.

The original application for the patent in suit as filed contained

only one claim covering these devices, which was as follows:

"As a new article of manufacture, the herein-described screw-driver, consisting of the blade, shank, conoidal bolster, handle-web, and butt all formed in one piece, and the handle-scales secured to the said handle-web."

This claim was promptly rejected on the ground that the applicant's device presented a mere double use of the structure shown in the Rubel patent, No. 86,252, the Rubel patent, No. 78,328, and the Frary patent, No. 172,874. This rejection was acquiesced in, and the claim amended by characterizing the word "shank" by the adjective "round," and by inserting an additional claim as follows:

"The herein-described screw-driver, consisting of the blade, shank, bolster, handle-web and butt, all formed in one piece with the hammer face 12 at the extreme end of the butt, and the handle-scales secured to the said web"

—the applicant at the same time stating that:

"The amended claims are thought to avoid the references, because none of the references show either the round shank, the conoidal bolster, nor the butt with the hammer face."

These amended claims were again promptly rejected because they did not present any invention over the references of record, and this

rejection was acquiesced in.

The applicant thereupon amended his specification by substituting for the word "shoulder" the word "face" as it now appears in lines 31, 32, 35, and 37 of page 1 of the printed specification, and by adding the word "drop" before the word "forged," as it now appears in line 42 of page 1 of the printed specification, and by inserting further the following:

"I deem the conoidal shape of the bolster and lower part of the handle, merging from an elliptical cross-section into the circular one of the blade-shank by a gentle taper without any shoulder or abrupt break, as important because it permits the operator, while maintaining a firm grip upon the main portion of the handle, to bring his finger and thumb down upon the bit-shank to control the point of the blade with great nicety. I also deem as important the particular form of the handle-scale-receiving faces of the bolster and butt of the metal part of the tool, which are readily manufactured by drop-forging"

—and further by inserting after the last line of claim 1, the following:

"The handle portion being elliptical in cross-section for the most part, but gradually merging with the conoidal bolster by a gentle taper into the circular

tool shank, thus providing for a firm grasp while facilitating a nice control by pressure of the finger and thumb upon the shank of the tool"

—and by striking out claim 2 and substituting therefor the second claim as allowed.

The patent was then allowed with these amendments after the patentee had an opportunity to appeal from the decision of the examiner rejecting his application. No appeal was taken. He must therefore be held to have surrendered to the public what he thus conceded, and it is immaterial whether the examiner was right or wrong in making the rejection. Sargent v. Hall Safe & Lock Co., 114 U. S. 63, 86, 5 Sup. Ct. 1021, 29 L. Ed. 67; Shepard v. Carrigan, 116 U. S. 593, 598, 6 Sup. Ct. 493, 29 L. Ed. 723; Roemer v. Peddie, 132 U. S. 313, 317, 10 Sup. Ct. 98, 33 L. Ed. 382; Knapp v. Morss, 150 U. S. 221, 224, 14 Sup. Ct. 81, 37 L. Ed. 1059; Morgan Envelope Co. v. Albany Paper Co., 152 U. S. 425, 429, 14 Sup. Ct. 627, 38 L. Ed. 500. These amendments to the specification and claims, and the amended claims, must be construed with reference to the specification, and were manifestly a narrowing of the patent and its claim as originally applied for, and this narrowing of the claim was accepted by the patentee as a condition precedent to the grant of the patent. The claims as allowed cannot, by any possibility, be construed to cover what was previously rejected, and this is particularly true as the patent in suit is of a narrow character of invention which does not entitle the patent to any considerable range of equivalents, but must be strictly construed and limited. Computing Scale Co. v. Automatic Scale Co., 204 U. S. 609, 621, 27 Sup. Ct. 307, 51 L. Ed. 645.

It follows therefore that the defendant does not infringe unless its alleged infringing device contains those elements or characteristics which were injected into the patent in suit as a condition precedent of the grant. In my opinion, the defendant's device does not contain these elements or characteristics. To be sure, the difference is very slight, but slight as it is, it was sufficient to convince the Patent Office that the patent should be allowed, and if it was sufficient for the latter purpose, it must be sufficient to escape the charge of infringement. The patent was not allowed until the conoidal bolster had been characterized as to shape and function, and this feature now becomes the prime feature of the patent, and, with respect of patentable novelty, it is the exclusive feature; indeed, it was so recognized by the Patent Office as differentiating applicant's device from the table knives of the prior art. Moreover, the "gentle taper" of the bolster "without any shoulder or abrupt break" is permissive and not positive. The real fact is that the ultimate control of the blade is not effected through the bolster, but through the bit shank which is circular in cross-section. With his finger and thumb stretched over the smooth taper of the bolster the operator can reach down over the same upon the bit shank and thus effect the control of the blade. But the patentee abandoned to the public by his failure to appeal from the examiner his original broad claim covering a screw-driver having its metal portion made in one piece and provided with handle-scales, and accepted a patent with a limitation restricting his monopoly to a screw-driver possessing certain alleged functional advantages proceeding from a carefully defined form. Even if the theory upon which the patent was granted was chimerical and imaginative, the patentee is as much bound by it as though supported by a sound distinction, and if sufficient to justify the issuance of the patent, it must be sufficient now to show what was old and to distinguish what is new, and thus to aid the court in the construction of the patent. My conclusion therefore is that, as the defendant does not use the conoidal shape of the bolster and the round shank as set forth fully in the amendment to the specification and definitely described in the claims as allowed, it does not infringe.

[6] Plaintiff's counsel has called attention to apparently unfair devices in the way of get-up, dress, etc., from which it is suggested that defendant is seeking to deceive the public into a belief that its screw-drivers are those of the plaintiff. This inquiry is not open in this case, as the plaintiff must stand or fall upon its patent rights exclusively. New Departure Mfg. Co. v. Sargent & Co., 127 Fed. 152, 155, 62 C. C. A. 266.

The bill of complaint is dismissed, without prejudice, however, to the plaintiff's right to maintain a suit against the defendant if it can show the manufacture or sale by defendant of screw-drivers the same as those manufactured before the agreement of October 7, 1912.

Let a decree to that effect be entered.

QUINN v. J. H. FAW, Inc.

(District Court, S. D. New York. July 8, 1916.)

PATENTS 328-INFRINGEMENT-AUTOMOBILE HEADLIGHT.

The Myers patent, No. 1,099,715, for an automobile headlight having one-half of the light bulb silvered, so as to deflect the rays of light to the opposite side of the reflector, thus intensifying the same and narrowing their field, together with means by which the driver can rotate the bulb to reflect the light in any desired direction, narrowly construed, as required by the prior art and the proceedings in the Patent Office, held not infringed.

In Equity. Suit by Nelson J. Quinn against J. H. Faw, Incorporated. On final hearing. Decree for defendant.

This is the usual suit in equity to enjoin infringement of the first four claims of a patent to H. A. Myers, No. 1,099,715. The invention relates to directing rays of light, projected forward by a reflector, particularly in connection with motor vehicles; the purpose being to increase the intensity and decrease any objectionable light dispersion. The apparatus described in the patent consists of silvering one hemisphere of the ordinary electric light bulb fixed in the approximate focal point of a projecting reflector. The result is that from the interior of the silvered part of the bulb the light is projected normally emanate from the light itself in the same direction, and reflecting both sets of rays from the reflector in the usual way. If the lower hemisphere of the bulb is silvered, all the rays of light will be reflected to the upper side of the reflector, and from it reflected downward upon the road; the result being to intensify the rays projected on the road and to obscure altogether those rays which would be reflected upward from the lower side of the re-

flector and into the eyes of passersby. There was also disclosed a method of rotating the lamp within the reflector. This rotation permits the driver in his seat to intensify any part of the projected cone of light and to cut off the opposite hemisphere of the cone. The first four claims are as follows:

"1. A headlight provided with a first forwardly directing reflector having its axis of projection forwardly, an incandescent bulb therein having a portion thereof silvered to reflect a portion of the rays from the light toward the first reflector for directing in a concentrated light field paternally of the axis of the first reflector, and means for adjustably mounting the bulb for determining the lateral direction of the light field projection.

"2. Deflectable light-projecting means embodying the combination with a first projecting reflector of a light therein having fixed therewith a second reflector directed toward the first reflector, and means for adjusting the reflectors relatively to each other, whereby a portion of the light field of the first reflector may be intensified at the sacrifice of other portions of the

light field of the first reflector.

"3. Deflectable light-projecting means embodying the combination with a first projecting reflector of a light centrally disposed therein having fixed therewith a reflector directed to reflect rays from the light toward one side of the reflector, and adjusting means for the light for varying the direction of ray projection, whereby a portion of the light field of the first reflector may be intensified at the sacrifice of other portions of the light field of the first reflector.

"4. A dirigible headlight provided with a first forwardly directing reflector, a light bulb therein having a lateral portion thereof silvered to reflect rays of light toward the opposite side of the first reflector, and means for turning to determined positions the light bulb to change the direction of projection

of rays by the first reflector."

The defendant's alleged infringing device consists of a silvered cap which fits over the bulb, holding it firmly in place. It obscures half of the bulb and may be placed or shifted to any desired location. This shifting, however, must be done by hand after opening the glass front of the reflector; it cannot be done from the driver's seat, and it cannot be done while the motor is moving.

The defenses are two: (1) Invalidity; and (2) noninfringement. The defense of noninfringement depends upon the theory that all the claims included some means of mechanically adjusting the obscured part of the bulb, and also that in each of the four claims the silvered hemisphere was an integral part of the bulb itself. In claims 1 and 4 the words relied upon for the last element are, "having a portion thereof silvered"; in claims 2 and 3 the words relied on are, "fixed therewith." The adjustable means also appear in each of the claims.

The plaintiff answers that the defendant's cap is in fact fixed to the bulb, and that it is also the equivalent of silvering a hemisphere; that the adjustable means is provided, because the operator may by hand shift the silvered portion to any angle that he desires. A discussion of the prior art and of this point of noninfringement appears in the opinion.

George E. Kirk, for plaintiff.

R. C. Mitchell, of New York City, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). Whether it would have been invention to combine the bulb reflector of Sachs, 1,069,035, or Miller, 486,729, with a large reflector, is an academic question, in view of the file wrapper, as I shall show; but it is important to observe that Miller actually disclosed the whole combination as used by the defendant in lines 54–56 of his patent, which reads as follows:

"By this means I can use any style of globe reflector upon the fixture with my improved shade, without one interfering with the other."

Miller's shade was especially arranged to be shifted about by hand to any radial angle. It is true that Miller speaks of a "globular reflector," but there is nothing in the patent which confines it to parabolic reflectors, and indeed the section shown in the diagram is of a globular reflector. I can hardly see anything in the patent, if the disclosed means of adjustment be omitted, except a new use for the combination disclosed by Miller, and I think it would be invalid.

However, as I have said, this consideration is academic, because, whether the reference in Miller's specifications was enough to anticipate the invention so construed, it is clear that the examiner thought the combination of Sachs (and Miller was in fact even a better reference) with an ordinary reflector did not constitute invention. This he said in the action of Februaary 13, 1914. This position of the examiner was answered on March 5, 1914, by the suggestion that Sachs' bulb reflector was a separate piece, and the applicant made appropriate changes in the claims to confine them to bulb reflectors which were inseparable. From that time on the examiner abandoned reference to Sachs, obviously upon the understanding that the changes in the claims had limited them to a form in which the bulb reflector was not of the Sachs type.

This is in itself enough to put the defendant's bulb reflector out of the claims. Judge Killitts held, and I agree with him, that the word "silvered," in claims 1 and 4, was intended literally, especially when used in apparent distinction with the term "fixed therewith"; but possibly he had not before him the file wrapper, from which it appeared that "fixed therewith" was also used to avoid exactly the kind of device employed by the defendant. In any case I cannot doubt that this was its purpose; indeed, it was implied to be the purpose in the applicant's own letter of March 5, 1914, as already quoted.

The patent did not issue, however, even then. The examiner still thought that the mere combination of a silvered bulb (e. g., Waters, 265,475) with a large reflector (such as Hewling, 984,480) was not invention. He did allow, however, claims 2, 3, 4, and 5, which contained as an element means of adjustment, and disallowed a claim which was just the same, except for the omission of the means for adjusting the reflectors relatively to each other. This shows conclusively, especially when coupled with his comments, that he did not mean to allow the patent, except when the adjusting means was added. This conclusion is, indeed, fortified, if necessary, by his allowance of the disallowed claim when the adjustment was added.

Thus we see that the element of adjustability was in the examiner's mind necessary to the invention as granted. Now the patentee seeks to supply that element in the defendant's device by suggesting that the ability to shift the bulb reflector by hand makes it adjustable. In so doing he seeks to avoid the first limitation which he accepted; i. e., that the bulb reflector must be fixed to the bulb. Not until he assented to that limitation would the examiner abandon his position that Sachs was a good anticipation. After he had, then the examiner, confining himself to Waters, a silvered bulb, suggested new difficulties, which were finally overcome. The necessary result is that the patent ac-

cepted both limitations: First, that the bulb reflector should be fixed; second, that it should be adjustable. The invention patented is therefore shown to be exactly what the words of the claim would normally mean; i. e., a bulb reflector integrally connected with the bulb, yet capable of adjustment with the large reflector. That the defendant has not. This is not a harsh interpretation of the patent, because it is precisely the scope to which the patentee by degrees chose to limit it in order to get a patent at all. There is no injustice in holding him to his deliberate bargain.

The case is the common one in which the applicant assents to conditions imposed in the Patent Office, and then, having got his patent, tries to expand it to cover exactly what he agreed it should not. Such a game of hide and seek the courts have always refused to allow. He had his remedy by appeal, and only by appeal, if the examiner was

wrong.

Bill dismissed, with costs, for noninfringement.

LOYELL-McCONNELL MFG. CO. v. GENERAL AUTOMOBILE SUPPLY CO.

(District Court, S. D. New York. September 14, 1915.)

PATENTS \$\infty 328--Invention-Electric Horn.

The Dean patent, No. 1,105,324, for an electric horn, in view of the prior art, is void for lack of invention.

In Equity. Suit by the Lovell-McConnell Manufacturing Company against the General Automobile Supply Company. On final hearing. Decree for defendant.

George C. Dean, of New York City (Drury W. Cooper and Irving M. Obrieght, both of New York City, of counsel), for complainant. Howard P. Denison and Eugene A. Thompson, both of Syracuse, N. Y., for defendant.

AUGUSTUS N. HAND, District Judge. Complainant sues for infringement of claim 7 of United States letters patent No. 1,105,324, to George C. Dean, for an improvement in mechanical horns. There seems to be no contention that defendant has not infringed, but the latter solely relies for its defense upon anticipation and lack of invention.

Claim 7 reads as follows:

"7. A horn or signalling device having a casing member presenting a threaded portion, a diaphragm clamped to said casing member adjacent the periphery of the latter and an electric motor including an armature and a casing having a cylindrical threaded wall and transverse wall, said transverse wall being spaced from and substantially parallel to said diaphragm and serving as a bearing for one end of the armature shaft, a rotor on said armature shaft between said transverse wall and said diaphragm for vibrating the latter, the threaded engagement of said shell and said casing serving to adjust the position of said rotor in respect to said diaphragm."

In his specification Mr. Dean says in regard to the mechanism:

"The novel features of construction hereinafter described, and by means of which the diaphragm is caused to vibrate upon the rotation of the rotary member, form no portion of the present invention and are not claimed herein; the same being claimed in a copending application. * * * By employing a threaded connection between the motor casing, or shell, and a portion of the diaphragm casing, a very delicate adjustment is secured by a relative rotation of the parts. * * * The motor casing or shell preferably has spaced end walls including bearings for the armature shaft. One of these walls is preferably substantially parallel to the diaphragm, and spaced only a short distance therefrom, so as to form, with the diaphragm supporting member and the diaphragm, a substantially air-tight chamber in the rear of the diaphragm, and in which the air may be compressed and expanded during the vibration of the diaphragm. The adjustment of the motor toward and from the diaphragm, and vary the volume of the air chamber in the rear of the diaphragm, and vary the volume of the air chamber in the rear of the diaphragm."

Now, all of the elements in the patent in suit seem to be old; but it is insisted that the combination is new and useful, and particularly that the "threaded engagement * * serving to adjust the position of said rotor in respect to said diaphragm," mentioned in claim 7, and the "substantially air-tight chamber in the rear of the diaphragm, and in which the air may be compressed and expanded during the vibration of the diaphragm," referred to in the specification, but not mentioned in claim 7, are useful elements additional to those appearing on other horns of similar design.

A threaded engagement similar to that of the patent in suit appears in the British patent to Rogers, No. 23,802, and in the French patent to Monnot, No. 422,256. The "air-compression space or chamber," mentioned in claim 21 of patent to Miller Reese Hutchinson, No. 1,-111,463, closely resembles the "air-tight chamber in the rear of the diaphragm," referred to in the specification of the patent in suit, and the Hutchinson patent also has a thread and screw mechanism to adjust the diaphragm and vibrator. On page 3, line 18, of the specification of the Hutchinson patent it is said;

"On the back side of said diaphragm may be a 3-point contact buckling spring 23 and behind this adjustably mounted a resonating wall or partition 24 carried by a cylindrical flange 25, exteriorly screw-threaded to fit the interior of the cylinder 13."

The specification likewise contains a further description of a screwthreaded bridge to support the vibrating circuit-closing device. It is to be noted that complainant's assignor, Dean, signed the drawings for the foregoing Hutchinson patent, the application for which was made some years before that of the patent in suit.

The Newtone horn introduced in evidence by the defendant had in place of the threaded engagement a slot and bolt engagement of the shell and casing which adjusted the rotor in respect to the diaphragm and answered the same purpose as the threaded engagement of Dean.

There seems to be doubt whether there is any utility in the air-tight chamber in the rear of the diaphragm. In any event, that feature appears, as I have said, in the Hutchinson patent. The threaded engagement seems no more than a mechanical equivalent for the slot and

bolt adjustment of the Newtone horn. This threaded adjustment of various parts of automobile horns was so well known that I can see no novelty in the addition of this element or in the combination sufficient to constitute a patentable invention.

For the foregoing reasons the patent is void for lack of invention,

and the bill should be dismissed.

DAY v. AABLING-EBRIGHT SEED CO.

(District Court, W. D. Washington, N. D. March 20, 1916.)

No. 70.

PATENTS \$\ightharpoonup 328\to Validity and Infringement\to Device for Watering Chicks.

The Day patent, No. 727,597, for an automatic watering device for chicks, held not anticipated, valid, and infringed.

In Equity. Suit by John Mills Day against the Aabling-Ebright Seed Company. On final hearing. Decree for complainant.

E. W. Howell and John Mills Day, both of Seattle, Wash., for complainant.

Trefethen, Grinstead & Laube, of Seattle, Wash., Chappell & Earl, of Kalamazoo, Mich., and Hirschl & Hirschl, of Chicago, Ill., for defendant.

NETERER, District Judge. Complainant charges defendant with infringing a device for watering chicks, covered by his letters patent No. 727,597, in which he makes the following claims:

- "1. In an automatic watering device, the combination of a jar or bottle, with the top so constructed that a cap may be screwed upon it, a pan with the bottom raised toward the center, an inverted screw cap for said jar secured to said pan near the center of its raised bottom, with an opening through said inverted screw cap near the perimeter of the lower part of the same, said opening being lower than the sides of said pan, so that said pan may be attached to the said jar or bottle by means of said screw, substantially as described.
- "2. In an automatic watering device, the combination of a jar or bottle, with a top so constructed that a cap may be screwed upon it, a pan with the bottom raised toward the center, an inverted screw cap for said jar secured to said pan near the center of its raised bottom, with an opening through said inverted screw cap near the perimeter of the lower part of the same, said opening being lower than the sides of said pan, so that said pan may be attached to said jar or bottle by means of said screw and a bar across underneath the raised bottom of said pan to serve as a handle, substantially as described.

"3. In a watering device, the combination of a pan with a screw cap inversely attached to the inside of said pan, with an opening in said cap to admit of the passage of air and water, the sides of said pan rising higher than said opening, and a jar or bottle attached to said cap.

"4. In a watering device, the combination of a fruit jar or bottle with the top so constructed that a cap may be secured thereto, and a pan having secured within itself a cap so constructed as to be attached to the top of said jar or bottle, with an opening in said cap at a point above the bottom of said pan but below the sides of the same, substantially as described."

A combination of a jar and pan, by inverting the jar filled with water into the pan, permitting the water to rise above the opening and seal it, and not permit the water to leave the jar until the water has been lowered beneath the opening or mouth of the inverted jar, is old in the art and not a novelty. Nor is it novel to provide a space for the passage of water and air between the opening of the jar and the bottom of the pan. Old results more advantageously obtained by new devices are a novelty, Rose v. Hirsh, 77 Fed. 469, 23 C. C. A. 246; Sewing Mach. Co. v. Frame (C. C.) 24 Fed. 596. The combination of an inverted jar and pan with a screw attachment, with an opening to afford passage of air and water, has been held by Judge Cushman, in Day v. Lilly, 234 Fed. 661, to be a novelty, and I will adopt such conclusion. It is admitted that the defendants are vending the "All-Rite Chick Fountain," manufactured by Keyes-Davis Company, and the "Star Fountain and Feeder," manufactured by Otis & Moe. I think that the "Star Fountain and Feeder" clearly is within the claims of the plaintiff:

"A screw cap inversely attached to the inside of such pan, with an opening * * * to admit the passage of air and water, the sides of said pan rising higher than said opening, and a jar * * * attached to said cap."

The fact that the screw is in sections, rather than continuous, does not change the principle or combination. The result and the relation of all of the elements, the jar, the pan, and water, are the same in the "All-Rite Chick Fountain" as in complainant's device. The jar, instead of being secured by the "screw cap inversely attached to the inside of said pan," is supported by a "wire loop" secured to the top and outside of the pan, and so adjusted as to secure the neck of a glass jar, holding it within the pan, leaving space between the jar and the bottom of the pan to admit the passage of air and water, practically the same as plaintiff's device.

The fact that the same result is obtained does not make it an infringement, if the same combination of elements and devices are not used, and it is not merely a "colorable evasion." The jar, the pan, and the "wire loop," or screw, are not in themselves novelties. It is the combination of elements which secures the jar within the pan, so as to permit the passage of water and air that is novel. These elements are different, and not similarly applied. The one (complainant's) secures the inverted jar by a screw cap firmly attached to the inside of the pan, while the other (Keyes-Davis Co.'s) secures the inverted jar by a detachable "wire loop" fastened over the top on the outside of the pan.

A decree may accordingly be prepared.

AMERICAN SULPHITE PULP CO. v. HINCKLEY FIBRE CO.

(District Court, N. D. New York. September 4, 1916.)

PATENTS 328-INFRINGEMENT-PULP DIGESTER.

The Russell reissue patent, No. 11,282 (original No. 445,235), for a pulp digester, held infringed.

In Equity. Suit by the American Sulphite Pulp Company against the Hinckley Fibre Company. On motion for rehearing and to vacate decree entered. Motion granted, and decree for complainant.

For prior opinion, see 217 Fed. 57.

Benner & Brown, of Boston, Mass., for the motion. Henry Schreiter, of New York City, opposed.

RAY, District Judge. The reissued letters patent in suit, to George F. Russell, No. 11,282, dated November 15, 1892, long since expired, and there can be no injunction.

In deciding this case (217 Fed. 57), attention was centered on the Panzl patent, and the question whether defendant was using that patented composition, or the Russell composition, and lost sight of the fact that defendant had used the Russell patented composition in certain cases and for certain lengths of time, and hence was an infringer.

The motion is granted, and the decree dismissing the bill vacated, but only one-half costs and disbursements are allowed, as both parties succeed in part.

In the decree for complainant, signed and filed herewith, I have found it necessary to state the facts as to infringing acts, and it is not necessary to repeat them here.

In re McAUSLAND.

(District Court, D. New Jersey. August 8, 1916.)

1. EXECUTORS AND ADMINISTRATORS €==272—Debts of Testator—Charging on Land.

By New Jersey laws, a direction by testator in his will that his debts be paid charges such debts on his realty.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1052-1057, 1059, 1065, 1068; Dec. Dig. ⇐=272.]

2. WILLS \$\infty\$ \$\frac{241}{2} \text{-Liabilities of Devisees}\$—Debts of Testator—Actions against Devisees—Limitation.

By New Jersey laws, where a will charges a debt on land of testator, the creditor obtains an equitable estate or interest in such realty enforceable within 20 years from testator's death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2143, 2144; Dec. Dig. ⊗ 841.]

EmFor other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. BANKRUPTCY \$\infty\$ 188(1)—Liens—Debts of Testator.

The laws of the state where the assets of a bankrupt are control as to the nature and effect of a lien thereon for debts of a testator.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286–289, 291, 293, 294; Dec. Dig. \Longrightarrow 188(1).]

4. BANKRUPTCY \$\infty 188(3) - Title of Trustee - Effect on Liens.

Equitable liens in favor of creditors of a decedent upon land devised by him are not lost by passing of the legal title of the land to trustee in bankruptcy of his devisee, for such property passes in the same plight and condition as that in which the bankrupt holds it, and subject to all equities impressed upon it in the hands of the bankrupt.

[Ed. Note,—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 295; Dec. Dig. € 188(3).]

5. WILLS \$\sim 841-Liens on Land Devised-Waiver.

Nor were such liens waived by creditors of decedent, because the bankrupt widow and devisee mingled proceeds of her husband's life insurance policy with the proceeds of her husband's business, continued by her, and the income from his real estate, and applied them indiscriminately to paying taxes, interest, repairs, etc., drawing checks as executrix, and largely reduced his debts; it not appearing that she was carrying on the business as agent for decedent's creditors, or that they knew she was becoming insolvent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2143, 2144; Dec. Dig. \$\simes 841.]

6. Executors and Administrators = 263-Claims-Waiver of Priority.

Creditors of a decedent whose business has been carried on in the absence of testamentary direction, by his widow, who is executrix and sole beneficiary under the will, will not be deprived of having their claims first paid out of assets of deceased, unless the business has been carried on for such period as reasonably necessary to wind it up and sell it as a going concern for the benefit of all, or unless carried on at the request of decedent's creditors and on their behalf.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 975-1000; Dec. Dig. ⇐=263.]

7. EXECUTORS AND ADMINISTRATORS ← 264(1)—LIENS—WAÎVER OF PRIORITY.

Mere knowledge by creditors of a decedent, who have a lien upon his real estate for their debts, that the estate is carrying on testator's business does not prejudice their status as creditors with respect to priority of their claims.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 997, 1001, 1002–1009, 1011; Dec. Dig. \$₹264(1).]

8. BANKRUPTCY \$\infty\$188(1)-Liens-As Against Trustee-Waiver.

The failure of decedent's creditors to force his widow, who was his sole devisee and executrix, and who became bankrupt after his death, to settle her husband's estate is not in itself sufficient to prevent the enforcement of their liens charged on his lands.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286–289, 291, 293, 294; Dec. Dig. \$\simes 188(1).]

9. WILLS \$\infty 841\to Liabilities of Devisees\to Debts of Testator\to Lien against Devisees.

The lien by New Jersey law upon lands of a decedent for his debts by testamentary direction or by statute arises at his death, and exists irrespective of the legal or equitable proceedings that may have to be instituted to enforce it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2143, 2144; Dec. Dig. ६ ≈841.]

10. BANKRUPTCY \$\infty 200(1)\$—LIENS—FOUR-MONTHS PERIOD.

The four-months period referred to in Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544, has reference to such liens only as are placed on the bankrupt's property during that time by legal process or act of the parties, and not to those attached to the property when it came into the bankrupt's hands.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 289; Dec. Dig. ⊕ 200(1).]

BANKRUPTCY \$\ightharpoonup 214\to Liens\to Creditors of Decedent\to Priorities Obtained by Suit before Bankruptcy.

Institution of suits before bankruptcy by certain creditors of a decedent against a bankrupt devisee to enforce their lien on devised lands, whether founded on the Heirs and Devisees Act (2 Comp. St. N. J. 1910, p. 2739), giving such right of action against devisee, or invoking the general equity powers to enforce an equitable lien, cannot avail to obtain priority over other creditors belonging to the same class, since, even if judgment were rendered before commencement of bankruptcy proceedings, none would obtain priority over the others by first obtaining judgment; hence such suits are properly enjoined.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 320, 324–327, 343, 344; Dec. Dig. €==214.]

12. Bankruptcy ⇐=211—Litigation in Bankruptcy Court—Claims to Bankrupt's Property.

Since the legal title to lands and assets of a bankrupt passes to the trustee, when appointed, the bankruptcy court, and not the state court, is the judicial forum in which to litigate contentions as to such lands and assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. € 211; Courts, Cent. Dig. § 1331.]

13. PAYMENT €==16(1)—DISCHARGE—INTENTION.

As between the parties to an indebtedness, the acceptance of a note or any number of renewals for such indebtedness does not discharge it, in the absence of a clear intention to do so.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 63; Dec. Dig. \$61.]

14. Novation €==12-Burden of Proof.

The burden of proof to show novation is usually on the debtor allegng it.

15. Novation = 12-Burden of Proof.

Showing that creditor surrendered notes and took notes for the same amount from another shifts to the creditor the burden of showing no novation, since notes signed and indorsed are prima facie evidence of a contract only with their maker.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12; Dec. Dig. \$ 12.]

16. NOVATION 5-LIEN-ABANDONMENT.

Where a trust company replaced notes of bankrupt's devisor with notes of bankrupt, and surrendered old notes, marking them "paid," such replacements occurring several times between death of devisor and the bankruptcy, no claim being presented against devisor's estate for the debt, it accepted the bankrupt as debtor in place of devisor, and abandoned its lien as creditor upon lands devised to the bankrupt.

17. Bankruptcy \$\infty 345\to Claim of Mortgagee for Deficiency\to Barred by Order

The mortgagee of the testator of bankrupt devisee is not estopped to assert priority as against creditors of bankrupt of claim of lien upon lands devised to bankrupt for deficiency upon foreclosure because of his failure to respond to referee's order to show cause why property of bankrupt should not be sold free of all incumbrances, such order being prior to foreclosure sale, since at that time mortgagee's only interest in lands affected by the order was the possible one of testator's debt not being satisfied through the foreclosure sale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. \$\sim 345.]

18. Executors and Administrators €=231—Nonpresentation of Claims—Loss of Lien.

Under New Jersey law (Heirs and Devisees Act [2 Comp. St. N. J. 1910, p. 2739]), the failure of a creditor of a decedent to present his claim to decedent's executrix, who is decedent's sole devisee, before entry of decree to bar creditors, does not prevent him from following the real estate in her hands to enforce creditor's lien thereon.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 804, 828, 829; Dec. Dig. \$\simega231.]

19. BANKRUPTCY \$\infty\$=188(3)—Liens—Waiver by Failure to Present Claim. The failure of creditor of a decedent to present his claim to the executrix, who is decedent's sole devisee, before she is adjudged a bankrupt does not prevent him from following the real estate passing to the trustee in bankruptcy, nor does it affect his creditor's lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 295; Dec. Dig. ⊗ 188(3).]

20. BANKRUPTCY \$\infty 211-Claim for Deficiency upon Foreclosure.

Upon the intervention of bankruptcy of the executrix of a decedent, a claim by mortgagee of decedent for deficiency upon foreclosure is to be presented in the bankruptcy court rather than by suit for such deficiency under 3 Comp. St. N. J. 1910, p. 3420, on the obligor's bond.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. ⇐=211.]

21. Bankruptcy \$\infty\$310—Claims—Surrender of Security by Mortgagee. Under Bankruptcy Act, \$ 57, subds. "a," "h" (Comp. St. 1913, \$ 9641), as to allowance of balance of secured claims, when the trustee does not elect to redeem by paying a secured debt, the secured creditor, having the right to sell the security, is not required to elect either to rely on his security or to surrender it and file claim for the whole amount of his debt, but may sell the security and file a claim for the unpaid remainder.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 501-507; Dec. Dig. ⇐⇒310.]

22. Bankruptcy \$\sim 323\$—Claim for Balance after Foreclosure—Value of Security.

Upon claim for balance of secured debt after sale of security, the bankruptcy court, in the absence of a legal rule in the state making the sum for which the property is bought in at a public sale conclusive of its value, is bound to consider the question of value on allegation of inadequate price realized at such a sale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §\$ 503, 505, 513; Dec. Dig. \$\sim 323.]

23. EVIDENCE \$\infty 113(14)\to Value\to Price at Judicial Sale.

In New Jersey and bankruptcy courts therein, the price brought by property at a judicial sale is no criterion whatever of its value.

24. Bankruptcy \$\ightharpoonup 340\top-Proof of Balance of Secured Claim--Proof of Value-Burden of Proof.

On proof of claim, showing that claimant, on sale of security for its debt, bought in the property, claimant has the burden of showing that said property was not of sufficient value to pay the debt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. ⊚ 340.]

 BANKRUPTCY \$\ightharpoonup 340—Proof of Balance of Secured Claim—Proof of Value—Burden of Proof.

The failure of such claimant to meet trustee's evidence that the property was sold for inadequate price raised the presumption that it was worth the amount of the debt, and justified the referee's rejection of its claim, notwithstanding claimant's offer to turn over the purchased property to the trustee on being paid the full amount of his claim; the trustee not being in a position to redeem even if he had authority to do so.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. ६=340.]

26. Bankruptcy €=324-Claims-Interest on Claims of Lienors.

Interest on allowed claims of creditors of one devising all his lands to one becoming bankrupt should be allowed to date of sale of such lands, where the proceeds of such sale more than pay the principal of such debts, and if the proceeds are insufficient to pay the principal and the interest, the claimants should prorate therein.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 511; Dec. Dig. ६ 324.]

27. BANKRUPTCY €=324—Amount of Claims—Interest.

The rule in bankruptcy that interest stops with the filing of the petition has no application to solvent estates.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 511; Dec. Dig. ⋒ 324.]

In Bankruptcy. In the matter of the bankruptcy of Mary E. Mc-Ausland. On petitions to review referee's disposition of fund realized from sale of real estate. Decree ordered in conformity with opinion.

Merritt Lane, of Jersey City, N. J., for trustee.

McDermott & Enright, of Jersey City, N. J., for Lincoln Trust Co. of New Jersey.

Fisk & Fisk, of Jersey City, N. J., for Third Nat. Bank of Jersey

City.

Treacy & Milton, of Jersey City, N. J., for Burke Bros. Co. & Burke Bros.

James A. Gordon, of Jersey City, N. J., for Jaburg Bros.

Collins & Corbin, of Jersey City, N. J., for New Jersey Title Guarantee & Trust Co.

RELLSTAB, District Judge. This is a controversy over the distribution of the proceeds of the trustee's sale of certain lands which were devised to Mary E. McAusland, the bankrupt, by John McAusland, her husband, who died on April 14, 1911. By his last will and testament, probated on April 25, 1911, after directing that all his just debts be paid and appointing his wife sole executrix, he gave to her absolutely all the remainder of his estate. The widow took out

letters testamentary, but, beyond taking a rule to bar creditors and a decree based thereon, took no steps in the administration of the estate; she filed no inventory, made no application for the sale of the testator's real estate to pay his debts, and rendered no account of her stewardship. Under the laws of New Jersey, the deceased's personal representative who is the sole residuary of the estate, is not required to file either an inventory of the personal property or an account of his stewardship. However, a creditor may force such an administration of the estate, if his claim has not been satisfied. 3 N. J. Comp. Stat. p. 3855, §§ 119, 120.

The testator died seised of both real and personal estate. For some years prior, and up to the time of his death, he had carried on a bakery and ice cream business, the first under the name of the City Bakery, and the latter as the Columbia Ice Cream Company. These businesses the widow continued until the commencement of the present bankruptcy proceedings. While carrying on said businesses, she paid a part of her husband's indebtedness, contracted additional debts, only a part of which she paid. Not all of the creditors of the deceased filed claims against his estate, and none took any legal proceedings in the orphans' courts (court of probate, etc.) before the intervention of bankruptcy, to compel the executrix to proceed with the administration of her husband's estate, but about the time the bankruptcy proceedings were begun some of such creditors took legal proceedings to enforce their claims against the assets of the decedent's estate.

The petition in bankruptcy was filed against the widow on the 27th of March, 1913. Between the time of her husband's death and the commencement of said bankruptcy proceedings, the widow sold three of the parcels of real estate of which her husband died seised. The suits begun in the courts of New Jersey against the bankrupt as the beneficiary of her husband's will were by Burke Bros. Company, the Third National Bank of Jersey City, Jaburg Bros., Ambrose L. O'Shea, trustee in bankruptcy of the New York White Cross Milk Company, under the New Jersey act entitled "An act for the relief of creditors against heirs and devisees" (2 N. J. Comp. St. p. 2739, commonly known as the "Heirs and Devisees Act"), and by the Lincoln Trust Company of New Jersey, and Jessena Kerr, to enforce the liens said to arise in favor of creditors, under the will of said testator.

All these suits were enjoined by this court, and the plaintiffs were relegated to the bankruptcy court to establish their claims. The New Jersey Title Guarantee & Trust Company, a creditor of the decedent, who held a mortgage covering one of the decedent's parcels of real estate, was permitted to foreclose and sell such mortgaged real estate. The trustee in bankruptcy, under order of the referee, after notice to the creditors, sold the remaining parcels of real estate free and clear of all the liens which the creditors of the decedent, other than mortgage creditors, claimed they held against such real estate. These sales netted \$15,877.74, and the referee's disposition of this fund is challenged by the present reviews. Broadly stated, the referee decided that the creditors of John McAusland were entitled to be

first paid out of this fund. Specifically he decreed (so far as pertinent to the present reviews) that the following claims had priority:

The Third National Bank of Jersey City	for	\$3,300.00
Jaburg Bros.	"	3,700.00
Burke Bros. & Burke Bros. Company	"	2,242.72
Jessena Kerr	. 44	2,300.00
Ambrose L. O'Shea, trustee of the New		
York White Cross Milk Company,	. "	888.10
Chas. W. Cropper	"	92.00
J. C. Coal Company	"	156.25
Voss Ice Machine Works	"	1,407.50

He disallowed the following claims: Lincoln Trust Company of New Jersey for \$98.75, alleged debt of John McAusland, and for \$3,700, alleged advances for payment of taxes, and the New Jersey Title Guarantee & Trust Company alleged deficiency for \$7,618.30. He also denied interest on the allowed claims, subsequent to the death of John McAusland. The effect of this decision is to practically exclude the holders of the unpaid bills incurred by the bankrupt, while she conducted such business, from receiving anything out of the assets which came into the hands of the trustee. The correctness of this decision of the referee allowing priorities is challenged by the trustee. He and several of the creditors of the decedent also attack the referee's findings applicable to specific claims of such creditors, and the said creditors, who were allowed priorities, attack the said disallowance of interest.

- [1-3] First, as to priority of decedent's creditors: By the laws of New Jersey, a direction by the testator in his will that his debts be paid serves to charge such debts on his realty. Shreve v. Shreve, 17 N. J. Eq. 487. By reason of such charge the creditor obtains an equitable estate or interest in such realty enforceable within 20 years from the testator's death. McKinley v. Coe, 66 N. J. Eq. 77, 57 Atl. 1030. The laws of the state where the assets are control as to the nature and effect of the lien. Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; Hiscock v. Varick Bank of New York, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945. That the personal estate is the primary fund from which the debts of a decedent are to be paid is of no moment on the general question here considered.
- [4, 5] These equitable liens in favor of the creditors of decedent were not lost by the passing of the legal title of the lands affected to the trustee, for such property passed in the same plight and condition as that in which the bankrupt herself held it, and subject to all the equities impressed upon it in the hands of the bankrupt. York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; Bryant v. Swofford Bros., 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997. The trustee does not deny that such an equitable lien or charge upon the realty of the decedent inured to his creditors, but contends that, in this case, by their conduct with relation to the bankrupt's continuing the business of the decedent, they waived their liens, or that they are estopped from claiming any priority over the debts

incurred by the bankrupt. The bankrupt mingled \$5,000 insurance, payable to her on a policy on her husband's life, with the moneys derived from her husband's business continued by her and the income from his real estate, and applied them indiscriminately to the payment of taxes, interest, repairs, business and other debts of hers and her husband's, including the family living expenses. She had several checking accounts with the local banks; one in the name of the City Bakery, another in the name of the Columbia Ice Cream Company, another in the name of the Estate of John McAusland, and a fourth in her own name.

The City Bakery business, during the period it was carried on by her, was apparently run at a loss, approximating \$6,000, but during this period she reduced the debts of such business as they stood at the time of her husband's death approximately \$5,800. The ice cream business was run at a profit, and by the time of the filing of the petition in bankruptcy, the indebtedness of decedent on account of this business had been reduced approximately \$11,000. The profits, however, did not net this sum by about \$3,500. This net reduction of decedent's indebtedness by approximately \$9,300 came from some source outside of these businesses, and the contention of the trustee is that it came principally from the assets furnished by the bankrupt's creditors, and that it would be inequitable to permit the creditors of the decedent, who stood by while all this was being done by the bankrupt, to now appropriate to themelves the fund realized from the sale of the real estate to the exclusion of the other creditors, whose property in part enabled her to pay some of the said \$9,300 to her husband's creditors. The record fails to sustain this contention, or that these creditors had knowledge that one of these businesses was being carried on at a loss, or that decedent's indebtedness was being reduced by moneys contributed by the bankrupt's creditors.

The fact that the checks were made by bankrupt as executrix did not bring home to the creditors of decedent that the payments were from an improper or even suspicious source. If they had been as pressing for the payment of their claims against the decedent as the trustee thinks they should have been, that method of payment would be the regular way to settle their accounts. Nor is that way of paying the indebtedness—old or new—influential on the question whether the bankrupt was carrying on such business as agent or trustee for the creditors of the decedent. The bankrupt was not carrying on the business left her by her husband as the representative of such estate. The will neither authorized nor contemplated the carrying on of such business in that way. It was not done by express request of the creditors, and there is nothing in the record to warrant finding an implied request so to do by the decedent's creditors any more than by the creditors of the bankrupt. In this respect they occupy like positions, and no equity arises in favor of the one as against the other by reason thereof.

Willis v. Sharp, 115 N. Y. 396, 22 N. E. 149, 5 L. R. A. 636, mainly relied upon by the trustee, is a case where the will directed the continuance of the business, and an attempt was made on motion to sub-

ject the assets of the estate to the payment of a debt incurred by the executor in continuing the business in preference to the debts of the testatrix. The other creditors had no notice of such motion, and were not before the court on the hearing thereof. In reversing the lower court, which had granted such priority, the Court of Appeals held that a creditor of the deceased could insist that the estate as it existed at decedent's death be used for the payment of decedent's debts to the exclusion of debts subsequently created by the executrix, unless such creditor, in some way, consents to the continuance of such business by the executrix. How such consent was to be evidenced was not stated, as that question was not before the court. Mere acquiescence is not consent.

In re Levi Estate, 224 Pa. 283, 73 Atl. 334, another case cited by the trustee, presents a contest between the beneficiaries under a will and the creditors who contributed to the capital for continuing decedent's business by the executor with the acquiescence of such beneficiaries. This acquiescence was held to subordinate the interests of the beneficiaries to the claims of such creditors. In that case, however, it was said that the creditors of the decedent, whose claims were based on contracts made with him in his lifetime, stood on a different footing, and that their rights to participate in the distribution and to be first paid the full amount of their claims could be waived only by ex-

press agreement based upon a valid consideration.

Re Millard, Ex parte Yates, 72 L. T., Aug. 17, 1895, Court of Appeals, announces the rule which, in my judgment, should control this Millard in his lifetime had carried on the business of a merchant. By his will he left all his property to his widow, and appointed her sole executrix. He gave no direction to carry on his business, but his widow continued it for about six months, with the written consent and acquiescence of Yates (appellant), a creditor of the testator, when the estate was put in bankruptcy. The court of first instance considered that the business had been carried on for the purpose of properly realizing on the estate with the assent or acquiescence of the creditors of the deceased, and subordinated their claims to those debts incurred in carrying on the business. The Court of Appeals reversed this decision, and held that the business had not been carried on in the interest of the decedent's creditors, but on behalf of the widow and in her own interests, and that the creditors of the testator should be first paid.

The facts of that case are much more favorable for the application of the rule contended for by the trustee than those of the instant case. In that case Yates entered into an agreement with the widow, which recited inter alia that, since the death of her husband, the widow had, with the consent of Yates, continued to carry on the business; that the financial part of the business would not permit of the immediate discharge of the moneys due to Yates by decedent; that to insist upon immediate payment would necessitate the winding up of the business; that Yates agreed to accept payment by installments; that he was to have the right to inspect the accounts of the business and to pass upon the fitness of an assistant manager to be employed to

look after the business; that collateral security was to be given to Yates for present or future trade accounts between him and the widow. The widow signed the agreement personally and as executrix and universal legatee. The agreement for the payment of Yates' debt by installments anticipated that more than six years would elapse before the whole would be paid, but the agreement between them was subject to termination at any time, upon default by the widow of any of such payments or the happening of any one of a number of events—becoming bankrupt, dissatisfaction of the balance sheet on the part of Yates, or inspection of the books, being some of them. On the facts, Rigby, L. J., concluded:

"So far as the appellant is concerned, the agreement amounts to a conditional postponement of his right to sue for the £1,600 in consideration of Mrs. Millard giving her own promissory note for that sum to be a security for the whole indebtedness, both of her husband and of herself. Mrs. Millard is not bound to carry on the business any longer than she thinks fit. She is not made trustee, and no trust is declared of the assets. The conclusion appears to me to be unavoidable that the testator's assets are to be divided amongst his creditors, including the appellant, and nothing will remain for Mrs. Millard's own creditors, whose misfortune it is that they have given credit to a person without any means to pay them. In my judgment the order appealed against them should be discharged, and directions given to the official receiver to divide the assets among the creditors of the deceased. I have already pointed out that the claims of the creditors of the deceased will more than exhaust the assets."

[6] This case, in my judgment, announces the correct principle, viz.: That the creditors of a decedent whose business has been continued by the widow, who is both the executrix and the sole beneficiary under the will, but without testamentary direction to do so, will not be deprived of having their claims first paid out of the assets of the deceased, unless the business has been carried on by the personal representatives for such a period as is reasonably necessary to wind it up, and sell it as a going concern for the benefit of all, or at the request of the old creditors, and on their behalf, that is, by the executrix or beneficiary as the agent or trustee of the old creditors.

[7] The fact that some of the decedent's creditors did business with the bankrupt and received payment on account thereof, as well as on their claims against testator, and that some of the payments were made by her as executrix, does not, in my judgment, change the status of these creditors with respect to the priority of their claims against decedent's property. They exercised no control over the widow, as to how she should conduct her business; for hers it was, subject only to the payment of decedent's debts. That she saw fit to carry her bank account in several banks in different names and to sign some of her checks as executrix was a matter for her decision. So far as the payments on the claims against decedent were concerned, those made as executrix were made in the appropriate way; and so far as the payments on account of the debts incurred in the carrying on of the business after the decedent's death were concerned, while they, of course, suggest and tend to establish that such business was carried on by the widow as executrix, they are not conclusive on that question; but if they were, that does not affect the status of decedent's creditors as to the unpaid claims which they hold against his estate. Mere knowledge on the part of a creditor of the deceased that the estate is carrying on the business, or acquiescence on his part, does not prejudice his status as such creditor. In any new business with the widow, whether individually or as executrix, they occupy the same relation to her and her estate, as do all the other creditors who likewise dealt with her in that capacity. The unpaid debts incurred by her occupy a subordinate position to those contracted with her husband.

That the creditors of the bankrupt, other than those who were also creditors of the decedent, will get nothing, while the latter will share the proceeds derived from the sale of the decedent's real estate, though unfortunate, is not inequitable. What the creditors of the decedent will so receive is not derived from the estate of the bankrupt, but from that of the bankrupt's husband. These creditors will receive nothing from that source on their claim against the bankrupt. As to such claims they stand on the same footing and share the same misfortune as those creditors who have claims only against the bankrupt. They divide the assets of the testator, because they are creditors of such decedent, not because they are also creditors of the bankrupt.

[8] The bankrupt took the testator's lands subject to the payment of his debts, and every one who dealt with the bankrupt knew, or is chargeable with knowing, that such debts were a lien upon such lands, and they cannot complain that such assets are not more than sufficient to pay such liens. The failure of the decedent's creditors to force the bankrupt, as executrix, to settle her husband's estate is not in itself sufficient to prevent the enforcement of their liens against

his lands.

In New Jersey, from a very early period, it has been held that staying the execution after levy, leaving the property in the hands of the judgment debtor to deal with as his own, does not render the execution constructively fraudulent. Caldwell v. Fifield, 24 N. J. Law, 150, 157. In this case C. J. Green said:

"The object of extending indulgence to the debtor is to allow him an opportunity by his own exertions and the prosecution of his business to pay the debt. But if the property of a man in business, whether as a merchant, a manufacturer, or a farmer, be levied upon, he must, of necessity, if permitted to pursue his business to any advantage, deal with the property as his own. Goods must be exchanged, the raw material converted into manufactured articles and sold or bartered, the crops of the farm must be gathered and disposed of, the stock must be fed, the laborers must be paid; every revolving season, if not every successive week, must witness changes in the property levied on destructive of the validity of the lien. If the debtor be permitted to hold and enjoy the property, why should he not be permitted to use it in the only way it can be effectually used to enable him to pay his debts? If the one is consistent with fair dealing, why is the other per se fraudulent?"

There is no charge of actual bad faith on the part of the decedent's creditors in relation to the widow's continuing her husband's business, and there is nothing in the mere fact that they allowed her to so continue for a little less than two years without protest, or that they dealt with her commercially during such period, that justifies the

conclusion that she acted as their agent or trustee. She was hopeful and they were helpful. True, they could have directly forced her to settle her husband's estate, but the creditors of the bankrupt could have done so indirectly. For her to continue her husband's business in the circumstances was neither unnatural nor reprehensible and to penalize the husband's creditors for not compelling her to pay her husband's debts before she contracted any of her own, for the benefit of her creditors, finds no warrant either in principle or precedent.

[9, 10] The further contention of the trustee that there is no lien upon the real estate for the payment of a decedent's debts until suit is brought, and that, inasmuch as the earliest of the suits brought to charge such debts upon the realty was brought within four months of the filing the petition in bankruptcy, there is no lien binding upon the creditors, is equally without merit. The lien upon the lands of a decedent for the payment of his debts arises in two ways: By act of the testator or by statute. In the absence of a positive direction of the testator the statutes alone govern, but where the testator himself directs the payment of debts, the statutes merely co-operate. The statutes operate regardless of whether the decedent died testate or intestate. In each case the lien exists irrespective of the legal or equitable proceedings that may have to be instituted to enforce them. Hence, it is unaffected by the four-months period referred to in the Bankruptcy Act, the antedating of which period is essential to protect a lien placed on the property of the bankrupt by legal proceedings or the act of the parties. That limitation has reference only to liens fastened upon the property within that period, and not to those attached to the property when it came into the hands of the bankrupt. See Metcalf Bros. & Co. v. Barker, 187 U. S. 165, 174, 23 Sup. Ct. 67, 47 L. Ed. 122, and Thompson v. Fairbanks, 196 U. S. 516, 525, 25 Sup. Ct. 306, 49 L. Ed. 577.

Turning now from the broad question as to priorities between the classes of creditors, i. e., those whose debts were incurred by the decedent and those incurred by the widow, either as executrix or sole beneficiary, the contentions affecting only the debts of the decedent will now be considered.

[11] The suits instituted by some of the creditors, whether founded on the Heirs and Devisees Act, supra, or invoking the general equity powers to enforce an equitable lien, cannot avail to obtain priority over the creditors belonging to the same class. Some of these were instituted before the bankruptcy proceedings were begun. Those founded on the Heirs and Devisees Act were to enforce that statute's provision, fastening the decedent's debts upon the lands devised to the bankrupt, and still held by her. The others were to enforce equitable liens upon such lands arising from the testator's directions.

[12] Both remedies were available to all the decedent's creditors, and none would have obtained priority over the others by first obtaining a judgment, even if such judgment had been rendered before the commencement of bankruptcy proceedings. The legal title to the lands as assets to be affected by such suits was in the bankrupt, subject to the payment of such debts. The filing of the petition in bank-

ruptcy in no way changed this situation; but as the legal title to such lands, etc., would pass to the trustee in bankruptcy, when appointed, the bankruptcy court, and not the state court, would be the judicial forum in which to litigate the respective contentions with respect to such lands and assets. Thomas v. Woods, 173 Fed. 585, 590, 97 C. C. A. 535, 26 L. R. A. (N. S.) 1180, 19 Ann. Cas. 1080. The institution of said creditors' suits in the state courts gave plaintiffs therein no additional rights whatever; and, as they had not proceeded to judgment, they were properly enjoined. That judgment would have eventually followed, if the suits had not been restrained, makes no difference. As between the creditors of the decedent the institution of suits effected no priority.

The trustee further contends that some of the decedent's creditors abandoned their claims against the decedent by substituting the widow as their debtor, and some of said creditors make a like contention as to the claims of the Lincoln Trust Company. The referee disallowed the latter's claim on this ground, from which decision it appeals. As to the trustee's contention, it is deemed sufficient to say that the facts do not warrant the application of the doctrine of novation to any cred-

itor save the Lincoln Trust Company.

[13-16] The claim of the Lincoln Trust Company here drawn in question is founded on five promissory notes, all dated subsequently to testator's decease, aggregating \$9,875, signed by Mary E. McAusland to the order of "Columbia Ice Cream Company," and indorsed, "Columbia Ice Cream Company, Mary E. McAusland, Proprietress." These took the place of notes originally signed by John McAusland, outstanding at the time of his death, to the order of the "Columbia Ice Cream Company," and indorsed, "Columbia Ice Cream Company, John McAusland, Proprietor." As between the parties to the original indebtedness, the acceptance of a note or any number of renewals for such indebtedness does not discharge it, in the absence of a clear intention so to do. This matter of intention is the controlling factor, and is usually a question to be determined by the facts of each particular case. While the burden of proof to show novation is usually on the debtor alleging it, in the present instance, that burden has been shifted to the claimant, inasmuch as the notes so signed and indorsed by the bankrupt are prima facie evidence of a contract only with her. The trust company contends that these notes of the bankrupt were but a continuance of the testator's indebtedness; that they were replacements, so called because under the laws of New Jersey a trust company cannot discount commercial paper. As each of these notes of the decedent came due a note, in the form signed and indorsed by the bankrupt as aforesaid, was executed and purchased by the trust company. The proceeds were credited to the account of the Columbia Ice Cream Company, the business of which was then carried on by the bankrupt, and the amount of testator's notes so replaced was debited The old notes were stamped "paid," and, subseto said account. quently, when the account was balanced, were, with other vouchers and passbooks, turned over to bankrupt. Replacements of this character occurred several times between the death of John McAusland and the

filing of the petition in bankruptcy; the notes underlying the present claim being those last executed by the bankrupt.

In explanation of why these replacements were made and how the old notes were stamped "paid" and returned to the bankrupt, Edwin M. Farrier, the president of the trust company, testified that shortly after John McAusland's death, the bankrupt called on him with reference to the decedent's indebtedness, and in response to her inquiry what the bank intended to do regarding it, he told her that:

"A. * * It was not the time to do anything just yet; that the bank had no disposition to crowd her, and that the matter could be worked out—words to that effect. Q. Was anything then said about extending the time for paying these obligations? A. Yes. Q. What did you say about that? A. To the best of my recollection, it was that the time of payment be extended; that we had no disposition to crowd her. Q. Nothing more specific than that? A. No, sir."

Nothing was said by him indicating that the new notes were taken as collateral security for those of the testator, or that his notes were to be retained as evidence of his indebtedness to the trust company, nor anything indicating the latter's intention to hold the decedent's estate for the payment of said indebtedness. Nor was anything done from which it could be inferred that the estate of the testator was still to be looked to for the payment of said notes. Much, however was done tending to support a contrary understanding, viz. the testator's notes were stamped "paid" and returned to the bankrupt; the respective amounts of such notes were debited to the account increased by crediting the proceeds of the new notes made by her, and no claim was ever presented to, or filed with, the executrix of her husband's estate. The trust company knew that she claimed to be the owner and was exercising the power of proprietress over the business theretofore carried on by her husband. The trust company had theretofore loaned the testator money while conducting that business. By his last will the widow was now the owner and desirous of continuing it. She, with reference to his estate, except as to personal liabilities for his indebtedness, was in his place. She was given all he had, subject to the payment of his debts, and upon giving the notes to the trust company she became as personally liable for their payment as her husband had been on the old notes. From all the evidence, bearing upon the relationship existing between this creditor and the bankrupt, that began with the interview referred to, it is clear that it accepted her in place of her husband for this indebtedness. The argument that it is not to be assumed that a creditor intends to surrender a security for his claim and rely solely upon the personal responsibility of another has no force in the face of the facts of the instant case.

Whether the trust company knew that the lands of the decedent were subject to a lien in favor of his creditors, as distinguished from a liability to be sold to pay the same, is not disclosed. But assuming that it had such knowledge, there is nothing in the circumstances of its taking new notes from the bankrupt, when read in the light shed thereon by the interview referred to and its subsequent conduct in relation to the old notes to the decedent's estate and the business venture of the bankrupt, that negatives the idea that it had abandoned its

claims against the testator, and was looking solely to the bankrupt for the payment of such indebtedness.

The trust company's attitude toward the bankrupt was one of lieniency and helpfulness, but it was toward her individually as owner of the property, and not as executrix acting in a representative capacity in the interests of her husband's estate. The trust company did nothing to preserve its claims against the testator's estate, or even to indicate that it still looked to it for the payment of said debt. It treated her as owner of his estate and accepted her individual responsibility in place of the deceased for such indebtedness. In respect to the consequences of its attitude in relation to such indebtedness, it is in the same situation as those who dealt with the bankrupt while she was carrying on her business. It, like they, must look to the bankrupt's estate for the payment of the debts which she individually contracted or assumed. The prima facie case made by the new notes, which on their face show only individual liability on the part of the bankrupt, has not been overcome by the testimony; in fact it has been strengthened thereby. The trust company is therefore excluded from the class of creditors having priority, and must take its place with those who have only the assets of the bankrupt to look to.

The trust company's additional appeal from the referee's decision, denying its claim to be subrogated to the lien for taxes said to have been paid from moneys borrowed from it by the bankrupt for such purpose, is likewise not sustained, as there is no evidence that any part of the moneys thus borrowed were used for such purpose.

challenges the decision of the referee disallowing its claim for deficiency resulting from the foreclosure sale of one of the testator's premises mortgaged to it. It claims a right to participate in the fund under consideration. Claimant was the holder of the bond of John McAusland for \$20,000, secured by a mortgage covering No. 90 Montgomery street, one of the premises of which he dies seised. Those premises were sold to the claimant January 22, 1914, in proceedings to foreclose said mortgage begun October 13, 1913. The sale did not net sufficient to pay claimant's decree by the sum of \$7,618.30.

The referee concluded that this claim was disentitled to any standing against the bankrupt's estate, giving as his reasons that the title company was estopped from asserting any priority because of its failure to respond to the referee's order to show cause why the property of the bankrupt should not be sold free, clear, and discharged of all incumbrances thereon; that by its purchase of the mortgaged premises it obtained property of greater value than the amount of its mortgage, interest, and cost, and that its claim for deficiency under the New Jersey Statutes could not be against Mary E. McAusland's estate in bankruptcy, but solely against John McAusland's estate, and enforceable only by an action against his personal representative founded on his bond; and that as this was not done, such claim had no standing whatever in the bankruptcy proceedings.

The referee's order to show cause, which was not responded to by

this claimant, is dated July 7, 1913, and is prior to the date of sale of the mortgaged premises. Its only interest in the sale of the testator's lands affected by said order was the possible one of its debt not being satisfied through the sale of said mortgaged premises. At the date of said order its claim for deficiency had but a potential existence, and no estoppel occurred by its failure to respond to such order. It did respond to an order subsequently made by the referee on July 14, 1914, directly challenging its right to participate in the bankrupt's funds by reason of said claim for deficiency, and it is the referee's decision in that order, and not the one mentioned by the referee, that is attacked by this appeal; and as to that, it is under no disability to prosecute a review.

As to the referee's further reason that the claim for deficiency could only be enforced against the personal representative of John McAusland, deceased, etc., and the additional contentions of the trustee that claimant's failure to file a claim with the executrix of said decedent, and to surrender its security and file a claim for the whole amount of the bond with the referee, estops it from claiming anything from the estate in bankruptcy: At the time of the sale of the mortgaged premises a decree to bar the creditors of John McAusland from any action against the executrix had been entered in the probate court, and the legal title to all the property of the decedent, which came to her by the will of her husband, and undisposed of by her, had passed to the trustee.

[18, 19] The failure of a creditor of the decedent to present a claim to the executrix before the entry of the decree to bar creditors, or before she is adjudged a bankrupt, would not prevent such creditor from following the real estate thus in her hands, or that had passed to the trustee. The right to proceed under the Heirs and Devisees Act, supra, or to enforce the equitable liens arising under the testator's will, was unaffected by such decree, or the passing of the legal title to the trustee in the course of bankruptcy proceedings. The method of procedure and the forum in which to bring such proceedings, however, was changed by the filing of the petition in bankruptcy. From that time on the enforcement of such charge upon said land could be secured only in the bankruptcy courts, and no suit was necessary for such purpose. Those creditors who began suits to enforce such charge in the New Jersey courts, as already noted, were restrained from continuing such proceedings, and required to prove their rights to such charges before the referee, and the creditors who did not so sue, are not to be prejudiced for not endeavoring to do what they would not have been permitted to accomplish. To hold otherwise would be to make a farce of legal proceedings.

[20] If the deficiency had arisen before the intervention of bankruptcy proceedings, in order to recover the same, a suit on the bond would have been necessary under the New Jersey statute, approved March 12, 1880, entitled:

[&]quot;An act concerning proceedings on bonds and mortgages given for the same indebtedness and the foreclosure and sale of mortgaged premises thereunder." 3 N. J. Comp. Stat. p. 3420.

The filing of the petition in bankruptcy, however, created a situation not contemplated by that statute, nor controlled by state legislation. Upon the appointment of a trustee in such proceedings, the legal title to the property at one time owned by the decedent, and subsequently by his testamentary beneficiary, passed to said trustee; and as such property was in his possession, it could only be administered by him in the bankruptcy courts. The real estate thus passing to the trustee, however, as already observed, was subject to said equitable liens in favor of decedent's creditors, and such liens were enforceable in the said court.

Upon the presentation of the claims of decedent's creditors seeking to enforce them against said real estate or the proceeds thereof, the referee obtained jurisdiction to determine the status and merits of such claims. Under the state statute last mentioned, to recover deficiency arising on the sale of mortgaged premises, a suit on the obligors' bond would have to be brought within six months after the Upon the recovery of judgment for such deficiency the sale was opened, and the judgment debtor, by paying the full amount of such mortgage debt and costs within six months after such judgment was rendered, could redeem said premises. Upon the intervention of bankruptcy proceedings the presenting of the claim for deficiency in the bankruptcy court takes the place of the suit required by the New Jersey statute, and as the one under consideration was presented within six months after such sale, the claimant is not only entitled, but constrained, if he insists upon a recovery, to have his claim for deficiency adjudicated in the bankruptcy court.

As to the objections which go to the merits of this claim:

[21] First. It is contended that the mortgage creditor was required to elect either to rely on his security, or to surrender it, and file his claim for the whole amount of the debt. Under section 57, subsections "a" and "h," of the Bankruptcy Act, as construed by the courts, when the trustee does not elect to redeem by paying the debt, a secured creditor, having the right to sell the security, is not required, in the first instance, to so elect, but he may sell the security and file a claim for the unpaid remainder of his debt. In re Peacock (C. C.) 178 Fed. 851, 24 Am. Bankr. Rep. 159; British & American Mortgage Co. v. Stuart, 210 Fed. 425, 127 C. C. A. 157, 31 Am. Bankr. Rep. 544. See, also, the following text-books on Bankruptcy: Collier (10th Ed.) 57e3, p. 726; Black, p. 1194; Loveland, p. 697; and Remington, p. 621. This was the course pursued by this claimant. Its mortgage was foreclosed and the proceeds of the sale credited on account of the bond and the claim filed for the remainder.

[22, 23] Second. As to the value of the property bought in by claimant in enforcing its security. In the absence of a legal rule in the state making the sum for which the property is bought in at a public sale conclusive as to its value, the bankruptcy court, on allegation of inadequate price realized at such a sale is by duty bound to consider the question of value. In re Davis (3 C. C. A.) 174 Fed. 556, 98 C. C. A. 338; In re Dix (D. C.) 176 Fed. 582; In re Peacock (C. C.) 178 Fed. 851, 860; In re Graves (D. C.) 182 Fed. 443.

There is no such rule in New Jersey, but, on the contrary, the price brought by property at such a sale is no criterion whatever of its value. Martinett v. Maczkewcz, 59 N. J. Law, 11, 35 Atl. 662; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618, affirming Id., 82 N. J. Eq. 364, 91 Atl. 1069.

[24] The proof of claim in the present instance showing that claimant on a sale of the property mortgaged as security for its debt bought in the property, the burden is on it to show that said property was of insufficient value to pay its debts. The only effort made by claimant to discharge such burden was a showing that the highest bid obtained on a public sale of such property was \$14,000. There was but one other bid, and that was for \$12,000. But that, as was held in Martinett v. Maczkewcz, supra, is not even admissible as evidence of value. In that case the trial court refused to admit such evidence. On error it was said by Chief Justice Beasley, 59 N. J. Law, 14, 35 Atl. 663:

"In inquiries of this nature it has been customary to show the market value of the property if it has a fixed rate of that kind, and, if it has no such estimation, to prove its value by the opinion of experts and by an exposition of the state and condition of the things sold. In such an inquisition the price obtained at a sheriff's sale would seem to be wholly valueless. When a willing seller and a willing buyer agree and fix the price of an article, it is obvious that it is reasonable to infer that such estimation approximates closely to the real value of such article; but in an official sale by auction the owner has no voice in the affair, and each bidder is striving to obtain the thing sold, not at its actual worth, but at a bargain. It is vain to deny, for all experience attests the fact, that, as a general thing, the attendants at a public auction of personal property are there with the expectation of acquiring the articles purchased much below their cost in the market. It is deemed that, as criteria of real value, such transactions can have no effect except to mislead."

This was quoted with approval and applied by V. C. Walker (now Chancellor) in Holcombe v. Trenton White City Co., supra; and, as his opinion was adopted as that of the Court of Errors and Appeals in affirming the latter decision, it must be accepted as the settled rule in New Jersey that the price which a property brings at sheriff's sale is at least not conclusive as to the value, notwithstanding some earlier cases seemingly adopted a different rule. Hiscock v. Varick Bank, supra, enunciates no contrary doctrine. In that case Mr. Chief Justice Fuller said (206 U. S. 39, 27 Sup. Ct. 684, 51 L. Ed. 945):

"The trustee did not offer to prove * * * that the policies had a greater value than was realized at the sale."

The inference is, therefore, that, in that learned justice's opinion, the question of value is one that may arise whenever a deficiency on sale is sought to be recovered. In the present case the trustee proved that the mortgaged premises were fully worth all of the mortgagee's debt, principal, interest, and costs, and the mortgagee offered no contrary evidence, but relied upon the fact that the property was struck off at a bid less than two-thirds of the value put on it by Wolbert, the real estate expert, which, according to the cited New Jersey Case, is not even admissible as evidence of value. In re Davis, supra, to a like contention that Hiscock v. Barick Bank was authority for a

contrary view, Judge McPherson speaking for the Court of Appeals said (174 Fed. 561, 98 C. C. A. 343):

"In that case insurance policies were pledged as collateral security, under an agreement which authorized the pledgee to sell without notice and to buy at his own sale; the pledgor expressly agreeing to 'remain liable for any deficiency arising upon such sale.' The securities were, accordingly bid in by the pledgee at a bona fide sale, credit was given for the price, such price being found by the Supreme Court to be adequate, and proof of the balance of the debt was allowed against the bankrupt estate. There is no suggestion in the case that any such question as is now presented was raised at any stage of the proceedings, or was considered by the Supreme Court, and, in view of the pledgor's express agreement to be liable for any deficiency arising upon the sale, it is difficult to see how the question could possibly have been involved."

But, if the law were otherwise, and the burden of proof were upon the trustee or objecting creditors to show that such price was inadequate, such burden has been fully met by the evidence introduced to sustain their objection to this claim.

Frederick C. Wolbert, a real estate broker and auctioneer called by the trustee as an expert on the values of real estate in the vicinity of the mortgaged premises, and who had acted as one of the official appraisers of the bankrupt's estate in 1913, testified on October 8, 1914, before the referee that, in his opinion, such property was worth \$23,000. Daniel E. Evarts, the first vice president of the claimant, testified that after the sale the building had been insured by it for \$15,000. In response to questions propounded by the counsel for the trustee, with reference to this insurance and the value of the land where such building stood, he said:

"Q. Did you insure that building, Mr. Evarts, for more than what you thought it was worth? A. No; we got to insure it for 80 per cent. Q. What did you consider that lot worth? A. It is a pretty hard proposition now; you would have to give me something easier than that. Q. Do you consider it worth at least \$5,000? A. Oh, yes; no question about that. Q. Do you consider it worth \$10,000? A. That I am not prepared to say."

[25] If these premises were of less value than that testified to by Wolbert or indicated by the testimony of Evarts, the claimant could have introduced evidence showing what the market value was. This failure so to do raised the presumption that the property was well worth the amount of the claimant's debt and justified the referee in so holding and rejecting its claim. The offer of the claimant to turn over the purchased property to the trustee on being paid the full amount of his claim is immaterial. The trustee is not in a position to redeem, assuming that he has authority so to do. See In re Graves, supra.

[26, 27] The only other question that needs to be considered on these reviews is whether the creditors given priority are entitled to interest on their respective claims. The referee held that they were entitled to interest only to the time of the death of John McAusland, basing his conclusion on what he understood to be the law and practise of the orphans' courts throughout the state. He cited no authorities, and the record fails to show what the practise in such courts is on that matter. On behalf of the creditors, it is objected that there is no such

law and practise. If these claims, under consideration, were strictly against the assets of the bankrupt, interest would be allowable only up to the time of filing the petition in bankruptcy. See Bankruptcy Act, 63a(1); Comp. St. 1913, § 9647. Sexton v. Dreyfus, 219 U. S. 339, 31 Sup. Ct. 256, 55 L. Ed. 244; Board of County Commissioners v. Hurley, 169 Fed. 92, 96, 94 C. C. A. 362; In re Chandler, 184 Fed. 887, 107 C. C. A. 209.

These claims, however, as noted, are not against the bankrupt, but against her deceased husband's estate, and chargeable against the property she took as his devisee. The proceeds derived from the sale made by the trustee of said decedent's real estate is more than sufficient to pay the principal of his unpaid debts. The rule in bankruptcy that interest stops with the filing of the petition has no application to solvent estates (Johnson v. Norris, 190 Fed. 459, 111 C. C. A. 291, L. R. A. 1915B, 884), and no good reason appears why the interest on the decedent's indebtedness should stop either at the time of the death of John McAusland or upon the filing of the petition in bankruptcy. Before the filing of said petition the bankrupt enjoyed the use of such real estate, using some of its income in the payment of his and her debts. Since that event said income has been taken by the receiver or trustee. In my opinion, the interest should be allowed until the time of the sale of such property. If the proceeds derived from such sale should prove insufficient to pay the principal and interest of said claims, they should prorate therein.

The result is that the referee's findings brought up on these petitions for review are affirmed, save as to question of interest. A de-

cree in conformity to this opinion may be entered.

DAVIS v. GATES.

In re GATES.

(District Court, M. D. Pennsylvania. June 8, 1916.)

No. 180.

1. BANKRUPTCY \$= 292-Suit by Trustee-Jurisdiction.

Under Bankruptcy Act July 1, 1898, c. 541, § 70e, 30 Stat. 565 (Comp. St. 1913, § 9654), and section 23b, as amended by Act June 25, 1910, c. 412, § 7, 36 Stat. 840 (Comp. St. 1913, § 9607), a District Court has jurisdiction of a suit by a trustee to recover property fraudulently transferred by the bankrupt without the consent of the defendant. Such a suit is also cognizable in equity.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 410, 413, 415, 416; Dec. Dig. ⇒292.]

2. Fraudulent Conveyances \$\iff 155\$, 269(1)—Elements of Fraud—Intent.

To justify the setting aside of a deed for fraud, there must have been fraud on the part of the grantor, participated or acquiesced in by the grantee, which must be not only proved, but particularly alleged.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 493, 789-794; Dec. Dig. €=155, 269(1).]

3. EQUITY \$\infty 288-Pleading-Amendment to Meet Evidence.

Where evidence has been fully taken without objection on an issue not made by the pleadings, complainant may be permitted to amend his bill to meet the evidence and present such issue.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 547; Dec. Dig. ©=288.]

4. BANKBUPTCY 284-FRAUDULENT CONVEYANCE-SUIT TO RECOVER PROPERTY.

It is to be assumed, in the absence of proof to the contrary, that a trustee in bankruptcy has been injured by a conveyance made by the bankrupt in fraud of his creditors, and it is unnecessary for the trustee to obtain judgment as a condition to maintaining a suit for recovery of the property.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. 284.]

5. Fraudulent Conveyances €==299(1)—Suit to Set Aside—Evidence of Fraud.

In a suit to set aside a fraudulent conveyance, where the fraud must necessarily be shown largely or entirely by circumstantial evidence, such evidence must be considered in its entirety, without giving undue importance to isolated facts.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 876; Dec. Dig. \$\sime 299(1).]

6. Fraudulent Conveyances €==299(13)—Recovery of Property by Trustee
—Evidence.

Evidence considered, and *held* sufficient to establish that a conveyance of property by a bankrupt and his mother was without consideration, and made solely for the fraudulent purpose of covering and protecting the property from present and future creditors, to which purpose the grantee was a party, and that the property was recoverable by the bankrupt's trustee as a part of his estate.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 890; Dec. Dig. \$299(13).]

7. Fraudulent Conveyances \$\iff 69(1)\$—Grounds of Invalidity—Intent to Defraud Subsequent Creditors.

A voluntary conveyance is fraudulent and voidable as to subsequent creditors, where it appears that the grantor intended to withdraw the property from the reach of such creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 178-180; Dec. Dig. ⇐=69(1).]

8. WILLS \$\infty 634(14)\$\to\$Vested Remainders.

Under a will giving to the two sons of testator a life interest in real estate, with remainder to his grandchildren, "not only those now born, but who shall be hereafter born," to be equally divided among the grandchildren living at the death of the survivor of the two sons, bankrupt, who was a grandchild living at the time of the death of the testator, took a vested interest, which passed to his trustee in bankruptcy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1502; Dec. Dig. &=634(14).]

In Equity. Suit by B. W. Davis, trustee of the estate of Charles B. Gates, bankrupt, against Loretta Gates. Decree for complainant.

Clarence D. Coughlin and G. Fred Lazarus, both of Wilkes-Barre, Pa., for plaintiff.

Thomas D. Shea, of Nanticoke, Pa., and Frank McCormick, of Wilkes-Barre, Pa., for defendant.

Em For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 235 F.—13

BRADFORD, District Judge. [1] The bill in this case was filed October 28, 1913, by B. W. Davis, trustee of the estate of Charles B. Gates, a bankrupt, and seeks to have a certain deed of real estate bearing date February 1, 1912, executed by Charles B. Gates, prior to his bankruptcy, to Loretta Gates, the defendant, declared fraudulent as against his creditors and set aside and annulled, and to have the defendant ordered and decreed, among other things, to execute and deliver to the plaintiff a deed of conveyance of the real estate, so far as undisposed of, fraudulently transferred to her as alleged, and have an accounting by her to the plaintiff for all moneys received by her from the sale of any portion or portions of the real estate so transferred to her by the bankrupt. In the answer as amended the jurisdiction of this court over this proceeding is challenged on the ground that the deed in question was executed more than four months prior to the filing of the petition in bankruptcy and the defendant has not "consented in any form or manner to the bringing of this action." This position is untenable. The bill is founded on section 70a, section 70e and section 23b of the Bankruptcy Act (Comp. St. 1913, §§ 9607, 9654). Section 70a provides that the trustee upon his appointment and qualification shall be vested with the title of the bankrupt as of the date of the adjudication to "(4) property transferred by him in fraud of his creditors." Section 70e is as follows:

"e. The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction,"

Section 23b is as follows:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e, and section seventy, subdivision e."

Section 23b as originally enacted concluded with the words "unless by consent of the proposed defendant." The words "except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e," were added by way of amendment February 5, 1903. But it was not until 1910 that the further words "and section seventy, subdivision e," were added. This suit is not under section 60b or section 67e, and therefore, had it been brought prior to the amendment of 1910, it could not have been maintained without the consent of the defendant. Having been instituted after that amendment, however, it not only appears from the face of the statute, but is to be gathered from the cases, that consent by the defendant was not necessary to the maintenance of the suit. But were it otherwise, the defendant clearly has consented. The bill was filed

October 28, 1913, and she, without objecting in any manner, appeared generally November 13, 1913, and about the same time through her solicitor entered into a stipulation for an extension of time for filing her answer, and thereafter filed the same November 17, 1913. All this was done by her without objection or any manifestation of dissent on her part. She must, therefore, under the authorities, be held to have consented to the bringing of this suit against her. She cannot avail herself of her objection made for the first time February 18, 1915. Having consented, it was then too late to object.

An objection has been taken to the jurisdiction of this court over this suit on the ground that there is a complete and adequate remedy at law; but, in view of the character of the suit and the nature of the

relief sought, this contention is clearly without merit.

[2, 3] It is further contended by the defendant that the bill cannot be sustained for the reason that she is not charged in the pleadings to have been a participant in the fraud alleged against the bankrupt, Charles B. Gates, her son. The bankrupt became such September 23, 1913, on his own petition, and the deed assailed as fraudulent was executed either in February or in May, 1912. Under these circumstances it is undoubtedly true that if the defendant accepted the deed from him for a valuable and adequate consideration moving from her and was not a party to and was wholly innocent of any fraud intended or practised by him against his creditors, then or thereafter existing, it would be necessary to dismiss the bill. The bill alleges that "the conveyance aforesaid of the bankrupt to the defendant was voluntary and was without consideration"; that at that time "the bankrupt was engaged in or was about to engage in a hazardous business"; that the plaintiff verily believed and expected to be able to prove that the defendant "is not an innocent purchaser for value of said estate of Charles B. Gates, bankrupt, and that the transfer of said interest unto the defendant by the bankrupt was fraudulent and was made with an intent to hinder, delay and defraud the creditors of the said Charles B. Gates, then existing, as well also as all subsequent creditors"; and that the deed in question transferred "all of the bankrupt's right, title, and interest in all of the property, real or otherwise, situated in Luzerne County, said district, devised and bequeathed and which the said bankrupt inherited in and under the wills of his grandfather, John R. Gates, and his grandmother, Mary A. Gates." But while the bill charges fraud against the bankrupt, it nowhere alleges that the conveyance was procured or received by the defendant with an intent or understanding on her part that creditors should thereby be defrauded. To justify the setting aside of the deed there must have been fraud on the part of the grantor participated or acquiesced in by the grantee. Gottlieb v. Thatcher, 151 U. S. 271, 14 Sup. Ct. 319, 38 L. Ed. 157; Horbach v. Hill, 112 U. S. 144, 148, 5 Sup. Ct. 81, 28 L. Ed. 670; Jones v. Simpson, 116 U. S. 609, 6 Sup. Ct. 538, 29 L. Ed. 742; Lloyd v. Williams, 21 Pa. 327; Reehling v. Byers, 94 Pa. 316; Knower v. Cadden Clothing Co., 57 Conn. 202, 17 Atl. 580. Fraud is not to be presumed. Not only must it be satisfactorily proved, but particularly alleged. Not having been charged against the defendant, on the pleadings as they now stand there could be no decree against her. Notwithstanding the omission to plead fraud on her part no exception or objection was during the production of evidence taken or made by her on that ground, and both parties have gone into evidence on the subject of the existence or non-existence of fraud as fully to all intents and purposes as if fraud had been properly charged against her; and if the proofs clearly show fraud on her part in the transaction the exercise of sound judicial discretion should require that leave be granted the plaintiff to so amend the bill as to make it harmonize with the case as made on the evidence, to the end that a decree may be made in accordance with the merits.

The broad question involved is whether on the evidence and the principles of equity as administered by this court and by the courts of Pennsylvania the deed bearing date February 1, 1912, should be permitted to stand as against the trustee in bankruptcy. But aside from this central question a number of points have been raised in the case, to some of which reference has been or will be made.

[4] It is urged in behalf of the defendant that no decree can be made against her as it has not been affirmatively shown that, if she was guilty of fraud, injury has thereby resulted to the plaintiff or any creditor or creditors represented by him. It is a general rule that a decree setting aside a fraudulent conveyance will not be made at the instance of those who have suffered or will suffer no injury from the fraud. But the cases establishing the rule have no application here. The plaintiff is trustee in bankruptcy of the grantor in the deed, and an essential ground or condition of the adjudication is the existence of insolvency on the part of the bankrupt. Section 1a, cl. 15 (Comp. St. 1913, § 9585), defines insolvency as follows:

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

It is, therefore, to be assumed in the absence of proof to the contrary that the trustee as representing creditors has been injured by a conveyance executed by the bankrupt in fraud of his creditors. It is not necessary that the extent to which he has been so injured should be equal to the entire value of the property conveyed. Section 70a provides that a trustee upon his appointment and qualification shall be vested by operation of law with the title of the bankrupt, subject to certain exceptions not pertinent in this connection, to "(4) property transferred by him in fraud of his creditors"; and section 70e provides that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder," etc. Power is thus conferred upon a trustee to recover all the property transferred in fraud of creditors, although such recovery may result in the possession by the trustee of property in excess of the entire indebtedness of the bankrupt. It is manifestly impracticable in all cases to determine in advance the exact amount or proportion of the property fraudulently transferred, or its value, it is necessary should be received by a trustee to insure the payment in full of the bankrupt's indebtedness; and further, if the result of the recovery by a trustee would be to put in his possession assets more than sufficient to insure such payment in full, any surplus would be turned over under the direction of the court to the transferce or otherwise as justice might require.

The position taken by the defendant that it was necessary that the plaintiff before bringing suit to set aside the alleged fraudulent transfer should have recovered judgment, issued execution thereon and had it returned unsatisfied, is palpably unsound, since the provisions of the bankruptcy act and their operation are such as to exclude the possibility of obtaining judgment and return of execution as against the bankrupt.

The defendant invokes for her protection the long established rule that a sworn answer responsive to the allegations of the bill can be overcome only by the testimony of two opposing witnesses or of one witness and corroborating circumstances having probative force equal at least to the testimony of another witness. How far this rule can here be applied in view of the character of the pleadings is somewhat problematical. The answer is not and, of course, cannot be responsive to any charge of fraud made in the bill against the defendant; for the bill, as already said, contains no such charge. But though not strictly responsive to the bill the defendant has made allegations in her answer, original and as amended, tending to show good faith on her part in the transaction. In the answer as originally filed it is alleged that "the said deed was obtained for property for a good and valuable consideration," and in her answer as first amended that she was an innocent purchaser for value and in good faith of a contingent interest of the bankrupt in the property described or referred to in the bill, and in her answer as further amended that she denies that the deed in question was without consideration. In the peculiar situation created by the omission of the plaintiff to charge fraud against the defendant equity obviously requires that the same force should be accorded to the above statements of the defendant as if precisely the opposite had been alleged in the bill. Those statements, therefore, must be taken as true unless refuted by the testimony of two witnesses or of one witness and corroborating circumstances as above mentioned. The proof of fraud is not restricted to direct and positive evidence of the existence of the fraudulent intent, for the essence of fraud is secrecy and concealment and those meditating it do not proclaim their purpose from the housetop. To establish the secret intent it is necessary largely to rely upon circumstantial evidence, which frequently carries with it greater probative force than the direct testimony of many witnesses. Witnesses may agree upon a false story; but circumstances do not. To ask a witness in this case the bald guestion, "Had the defendant a fraudulent intent in accepting the deed from her son?" would be improper and inadmissible. It is at once necessary and sufficient to prove facts and circumstances from which the fraudulent intent is clearly to be inferred. More than two witnesses have testified for the plaintiff as to facts tending to show fraud on the part of the defendant, and in addition thereto there is documentary evidence strongly pointing in the same direction. Thus there are not only two witnesses but corroborating circumstances in favor of the plaintiff, and the rule as to the effect of a sworn and responsive answer has been fully satisfied, if the evidence adduced by the plaintiff be sufficient to show that the deed in question was fraudulent as against the creditors of the bankrupt.

No statute of limitations bars this suit either directly or by analogy, nor has there been any laches on the part of the plaintiff; for within three weeks after his appointment and qualification as trustee the bill was filed.

Did the defendant or not intend or understand that the transfer to her should be merely colorable and that her son, the bankrupt, should in fraud of his creditors, notwithstanding the deed, have the benefit and enjoyment of the property covered by it? Or did she or not intend or understand that he should execute the deed as a means to effectuate a fraud upon his creditors then or thereafter existing?

[5] To reach a satisfactory conclusion on the questions of fraud involved in this case a comprehensive view should be taken of the evidence, direct and circumstantial, in its totality, and undue importance should not be given to any detached or isolated item of proof. In Montgomery Web Co. v. Dienelt, 133 Pa. 585, 19 Atl. 428, 19 Am. St. Rep. 663, the court reversed a judgment for error in a charge to a jury. Mr. Justice Mitchell in delivering the opinion said:

"Fraud, as has so often been said, can rarely be proved by direct and positive testimony, and great liberality is always allowed in the introduction of evidence having a tendency to show it. * * * Defendants had to get their testimony from the other side, and from the circumstances, and were not able to make positive and direct proof of the fraudulent intent, but had to rely upon circumstances pointing thereto. In his charge, the learned judge took these up seriatim, and disposed of them summarily. * * * The substantial defect of the charge is in its treatment of the items of evidence, one by one, without at any time directing the view of the jury to their united force. There probably never was a case of circumstantial evidence that could not be blown to the winds by taking up each item separately, and dismissing it with the conclusion that it does not prove the case. The cumulative force of many separate matters, each perhaps slight, as in the familiar bundle of twigs, constitutes the strength of circumstantial proof."

[6] A careful and protracted examination of the evidence has satisfied me beyond any reasonable doubt that the deed from the bankrupt to the defendant bearing date February 1, 1912, was executed by the former with intent to defraud his creditors existing at or after the time of its execution; that it was without consideration to support it; that the defendant fully and knowingly participated in and was a party to the fraudulent scheme; and that the plaintiff is, after so amending his bill as properly to charge fraud against the defendant, entitled to a decree. From the time of his birth until and including the final hearing in this case the bankrupt always lived with his mother and other members of his family, including father, brothers and sisters, in the "Gates Homestead," in Kingston, Luzerne County, Penn-

sylvania. He attained his majority May 29, 1911, and entered into co-partnership February 29, 1912, with William N. Bryden in the business of contracting for and building houses under the firm name of Bryden & Gates. The partnership continued until March 7, 1913, when it was dissolved by mutual consent. Within three months thereafter Bryden went into voluntary bankruptcy, and September 23, 1913, Gates also became a voluntary bankrupt. The deed to the defendant states the consideration therefor as "One hundred dollars and other valuable consideration," and covers lands in Luzerne County in which the bankrupt claimed an interest or share equal to that of each of his brothers and sisters under the wills of his paternal grandfather and grandmother. Two material questions in the case are, was there any real consideration for the transfer, and if so, what? and, when was the deed executed? It is contended for the defendant that there was a valuable consideration consisting of \$6,000 loaned by the defendant to the bankrupt before the deed was executed, and that it was executed before the bankrupt entered the firm of Bryden & Gates. The aim of the defendant is to show that she in good faith paid a substantial and adequate money consideration for a transfer of the property to her before any creditors of that firm could have been in existence as such.

As witnesses the bankrupt and the defendant do not commend themselves to this court. Their testimony discloses such evasiveness, rashness of statement, and inconsistencies and improbabilities as not only to deprive it of weight, but strongly to tend to establish the plaintiff's case even in the absence of opposing evidence. By way of illustration reference may be made to the bankrupt's testimony as to plaintiff's exhibit No. 41, which is a petition to the Orphans' Court of Luzerne County by the guardian of the bankrupt and his sister Emily, setting forth that they were entitled respectively to two equal undivided fifth parts or shares in a portion of the lands and premises in that county belonging to the Gates estate, and praying for leave to sell the same to the Delaware, Lackawanna & Western Railroad Company for the purchase money therein mentioned. At the foot of this petition the defendant and other members of the family signed and sealed a declaration that they believed the statements of the petition to be true. It was offered in evidence by the plaintiff as an admission by the defendant of the bankrupt's interest in such lands and premises and as constituting a link in the plaintiff's chain of proof. The signature purporting to be that of the defendant was subsequently admitted by her counsel to be her genuine signature. With respect to the signatures on that exhibit the bankrupt testified as follows:

"Q. Now, I will show you complainant's exhibit No. 41, and show you page seven thereof, and I ask you whose signature is that? A. It says Loretta Gates. I don't know whether she signed it or not. Q. Whose handwriting is that, Mr. Gates? A. I don't know. The Court: Q. Don't you know the handwriting of your mother? A. No, I don't. Mr. Hourigan: Q. Did you ever see her write? A. I have seen her write, but I could not distinguish—Q. How many times have you seen your mother write? A. I don't know just how many times. Q. A hundred? A. I won't say. I don't know. Q. Two hundred? A. I won't say, I don't know. Q. Will you tell me whether you have seen your mother write once or one thousand times? A. I won't say

how many times I have seen her write. Q. Can you tell us whether it was once or a thousand times? A. No; I can't. Q. You don't know; you have no idea on that subject? A. No. Q. Whose signature is that first one? A. It says Frank R. Gates; but I don't know whether- Q. That is your father? A. My father's name is there. Q. Is that his signature? A. I won't say, I don't know. Q. You don't know? A. No. Q. Whose is the third? A. It says John W. Gates, but I don't know whether he wrote that or not. Q. who is John W. Gates? A. My brother. Q. And you don't know whether that is your brother's signature or not? A. No; I don't. Q. Whose is the fourth name on there? A. Abram N. Gates. Q. Whose signature is that? A. His name is there, too, but I don't know whether he wrote that or not. Q. Is it his signature? A. I would not swear to it. Q. Whose is the last signature on that page? A. Mary A. Gates. Q. Who is that? A. Sister of mine. Q. Is that her signature? A. I don't know. I would not swear to it. Q. Then you can't say whether any signature on page seven of this exhibit is in the handwriting of any of your family? A. That I don't know. * * * Mr. Shea: Q. Do you believe that is your mother's handwriting? A. No. Q. That is all we want to know. Do you know it is your mother's handwriting: just look at it? A. No."

This testimony is on a par with that given on the same subject by Frank R. Gates, the bankrupt's father, as follows:

"Q. I show you complainant's exhibit No. 41, page seven thereof, and I show you the second signature on that page: whose handwriting is that? A. I can't say. Q. Do you know? A. I don't. It don't look like a woman's writing, I don't know. Q. Whose is the first? A. That is mine. Q. You wrote that? A. Yes, sir. Q. Whose is the third? A. I can't say about that. It has been gone so long I can't say. I don't get no letters from him or anything. Q. Who is the John W. Gates there? A. Why, my son. Q. The fourth on there, who is that? A. Well, it looks a little like his handwriting, and it doesn't. Q. Like whose handwriting? A. Like Abe's. Q. Is it Abe's or not? A. Well, that I can't say. It looks something like it, and it doesn't. Q. Whose is the last on that page? A. That is Mary's. Q. Is that her signature? A. That is her signature. Q. Who is Mary? A. Why, my daughter. Q. Then on that page you can identify but two signatures? A. Yes, sir. Q. Yours and Mary's? A. No, no; my wife's and son's here, them two. Q. Oh, that is your wife's handwriting, is it? A. Well, I can't identify that. It looks like it and it doesn't look like it. Q. What will you say; is that your wife's handwriting, or not your wife's handwriting? A. Well, I could not say it is her handwriting. The Court: Q. Well, to the best of your knowledge? A. Well, I don't think it is."

On the subject of consideration for the conveyance in question the testimony of the defendant before the referee in bankruptcy, which has been introduced into this case, is in part as follows:

"Q. You recite in this deed the consideration as having been \$100.00 and other valuable consideration, was that true? A. \$6,000. Q. You say in the deed \$100.00 and other valuable consideration? A. The other valuable consideration would amount to \$6,000.00. * * * Q. It wasn't true then that it was \$100.00? A. No; it was for more than \$100.00. Q. Why was that figure \$100.00 put in there, do you know? A. I don't really know, because I don't know anything about law. * * * Q. You can't explain why \$100.00 was put in there? A. He [William H. Hines] drew it in his office. Q. You never told him what he was to put in there as consideration, did you? A. No. Q. Did you ever discuss the subject of consideration with him? A. I did, about \$6,000.00. Q. When did you discuss that? A. In January [1912]. Q. Did you tell him to put in \$6,000.00? A. I think I did. Q. But you don't know why it was changed? A. No. Q. Did any money pass at the time this deed was drawn? A. Only the money I gave to him to get it recorded. * * * Q. The \$100.00 wasn't paid over at that time either, at the time the deed was drawn? A. No. * * * Q. How long before this deed was drawn

had you paid the last money to your son, Charles Gates? A. I don't know as I could tell. Q. Was it a year? A. Oh, no. Q. Was it before he became of age? A. I gave him money before and after he became of age, for years, I gave him money right along for his schooling and traveling expenses, and for clothing. * * * O. When did your son Charles B. Gates become of age, if you know? A. Four years ago last May. Q. That would be May 29, 1911, wouldn't it? A. Yes. O. After he became of age what moneys did you give Charles? A. Right along, all the time I gave him money. Q. Then after he became of age, did you give him money? A. I couldn't tell you just when but I gave him money every month or something like that, whenever he asked me for it, I didn't give it to him, remember, I only loaned it to him. Q. When after he became of age did you loan him the first money to your knowledge? A. I couldn't tell you because I loaned him money all the time. Q. In what amounts? A. Sometimes I give him \$100.00, sometimes \$50.00, and sometimes 825.00, whatever he would ask for. Q. That is after he became of age you loaned him those various amounts? A. Yes. Q. Prior to the time he became of age did you loan him any money? A. I did. Q. What amount of money did von loan him then? A. You have the orders there, look at them. Q. That money was given through orders, was it, before and after he became of age? A. Some cash, some registered letters, and some orders. * * * Q. Mrs. Gates, you say that just prior to February when this deed was drawn you had a conversation with Senator Hines? A. I did in January, I told you. Q. Concerning the drawing of this deed? A. Concerning the drawing of that deed. Q. What did you tell Senator Hines at that time? A. I said I thought I needed my money back and I should have some of the money I loaned my son. Q. What did he say? A. He said he thought it was the right thing that son. Q. What did he say? A. He said he thought it was the right thing that I should do that. Q. That was the first time you took it up with the Senator, the question of Charles' paying back the money he borrowed? A. In January, yes. Q. That was the first time, was it? A. No, we spoke about it once or twice before that. Q. How long before that? A. Two or three months before that. * * * Q. Would you say it was in July? A. No, I think about October or November. * * * Q. What did you say at that time? A. I told him about Charles, the money I advanced him, and he said, 'I think you ought to have Charles do something in regards to getting your money back.' * * * Q. That is just prior to the drawing of this deed, October or November, just prior to the drawing of this deed, you mean? A. We didn't talk about the deed then, not until January. * * * Q. Did you lend any money to Charles B. Gates, your son, just prior to the time this deed was drawn? A. I did. * * * Q. How much did you lend him in January, 1912? A. I couldn't tell you that. Q. Was it \$100.00? A. Yes, \$200.00 or \$300.00. * * * I didn't give him \$100.00 at a time, maybe \$25.00. \$50.00 or \$10.00. Q. Did you lend him any money in the preceding month of December, 1912 [1911]? A. Yes, sir; I did. Q. How much do you think you loaned him then? A. I would think I loaned him about \$200.00 or \$300.00. Q. For what purpose did you loan him this money in December and January? A. Because he took a trip and went to the city. Q. He needed money, did he? A. Yes, he said he did. He borrowed it of me with the intention of paying it back. Q. He didn't have any of his own at that time that he could use? A. No, not that I know of. Q. Not a cent that he could use? A. No, not a cent. Q. Did he borrow any money in November, 1911? A. He borrowed money all times of the year. I couldn't tell you when. Q. Did he borrow \$700 subsequent to the time you talked to Senator Hines about his paying back? A. Yes, more than that. Q. When did you first talk with Charles about his making this deed? A. About the first of January, somewheres in January, about making out this deed, but I talked to him before that about trying to pay me back some way, and then in January we talked the whole thing over about his transferring the property over. Q. What did you say when you first talked to him about transferring all his property to you? A. I said I wanted my money back. I thought he ought to try and pay me in some way, and he said, 'I have no money, but I will transfer my property to you, we will have Mr. Hines come over,' and he did. * * * Q. Then you talked with Senator Hines about this several months before you talked to Charles? A Two or three months. * * * Q. You first talked with

Charles B. Gates about this transferring of his interest in January you say, just prior to making of this deed? A. No, two or three months before that. * Q. What did Charles have to say to you in respect to the transferring of that estate? A. He said, 'I have not the money, but will transfer my property to you.' * * * Q. The \$6,000.00 which you speak of as being the consideration in this deed was ascertained in what manner? In the money I loaned him. Q. How did you fix the amount as \$6,000.00? A. I made an estimate of it. I knew how much I let him have. Q. How much of that \$6,000.00 was advanced during the fall of 1911? A. I can't answer that question. Q. About how much? A. I can't answer that exactly because I don't know. Q. Was it \$700.00? A. Yes; it was more than that. Q. Was it \$800.00? A. I won't answer a question that I don't understand. Q. That would appear by reference to the orders would it pot? would appear by reference to the orders, would it not? A. I should think some of it would, yes, but I gave him money by cash, I didn't give everything by orders, if I had money in the house I would give it to him when he would ask me, or not give it to him, loan it to him. Q. How much do you suppose you gave him in cash in the fall, as much as \$100.00? A. Yes, a couple thousand dollars. Q. In the fall of 1911? A. Not all in just the fall of 1911, I gave it to him right along, he had no income of any kind only what I gave him or lent him. Q. How much cash did you give him subsequent to the time he became of age? A. I couldn't exactly tell that. Q. Could you tell me about how much? A. I might have given him \$2,000 or \$3,000. Q. You figured up that all the money which you had given him approximated \$6,000.00, did you? A. Yes, I did. Q. You arrived at that conclusion with Charles B. Gates, your son, did you? A. Yes. Q. He was willing it should be \$6,000.00? A. Yes, he estimated it to be about \$6,000.00. We took a rough estimate and I knew it was about that much. Q. You took the orders? A. No, I didn't have them. Q. Did Charles B. Gates have the orders? A. No, the bank had them. Q. How did you arrive at the sum of \$6,000.00? A. I estimated it at that much. Q. Did you or Charles estimate it at that much? A. We both knew. * * * Q. Part of that \$6,000.00 was made up in cash, part in orders? A. Part in orders and part in cash. * * * Q. When did you first begin to advance this money to Charles B. Gates making up this figure \$6,000.00? A. When he went to school. Q. How old was he at that time? A. I think he was about nineteen. Q. About when to your knowledge was it? A. I think he was about nineteen, I couldn't tell exactly that. Q. Where was he when you advanced him that money? A. When he went off to school. I sent him to Mercersburg Academy that cost me about \$800.00, and he went to Pierce Business College and Wood's Business College in Philadelphia, and to the Academy and Business College in Wilkes-Barre. Q. What did it cost you at those two business colleges? A. \$600 or \$800. Q. To those business colleges? A. Yes. Q. Then where did he go to? A. Wilkes-Barre Institute. Q. How long did he go there? A. A year. Q. Where did he go after he went to the Academy a year? A. Mercersburg. Q. How long was he at Mercersburg? A. One year. Q. After that year where did he go? A. Pierce's Business College in Philadelphia. Q. How long? A. A term. Q. A winter term? A. Yes. Q. Did he go to school subsequent to the time he became of age? A. He did. Q. Where to? A. Pierce's Business College. Q. He went in the fall, did he, after he became of age? A. Yes, in the fall, I think in September. Q. The fall of 1911? A. Yes, I think it was, I won't be sure about that. * * * Q. He spent four years at school for which you paid? A. Six years in school I paid. Q. Did you send the other children to school? A. No; only him. Q. Did the other children go to Wyoming Seminary? Q. How many children have you, Mrs. Gates? A. Five. No. All living? A. Yes. Q. All boys? A. Three boys, two girls. Q. Charles B. Gates, the bankrupt in this case, was the youngest boy? A. He was. Q. Did you educate or advance moneys to any of your other children? A. I did not. Q. Charles B. Gates was schooled and advanced money for traveling purposes? A. Yes, sir; with the intention of giving it back. Q. And the other children never got such money? A. No."

The bankrupt seems to have been the principal if not sole recipient of his mother's bounty. She states that while she educated and ad-

vanced money to the bankrupt for traveling and other expenses, she did not educate or advance money to any of her other children. All of the children lived with her in their family home save that possibly one of her sons was absent for a while, and there is no suggestion of any difficulty or friction between the defendant and any of the children. Nothing appears either by any statement on her part or from any other source to explain what, in the absence of a desire on her part to protect her son against creditors, would have been, had it occurred, an unnatural piece of favoritism towards the bankrupt. The story told by the defendant on the subject of consideration is too unnatural and improbable for credence. The known rules regulating human conduct forbid its acceptance. On her own showing the bankrupt had received his education at Mercersburg Academy, Pierce's Business College, Wood's Business College and Wilkes-Barre Institute, if not at other institutions of learning, and according to her statement she was clear in her understanding and intention that all moneys passing from her to the bankrupt before as well as after he became of age and prior to the execution of the deed were not and should not be considered gifts to her son, but merely loans, to be repaid to Under these circumstances why should she not have taken receipts from him? And if they were taken, why were they not produced by her? She states that the \$6,000 mentioned in the deed as consideration was paid to the bankrupt "part in orders and part in cash." Where are the orders? Why were they not produced and offered in evidence? The bankrupt although living with the defendant and present in court during the whole or larger portion of the trial was not called nor did he attempt to corroborate the defendant's story in any respect, nor did any other person.

Under the circumstances and in view of the relationship between the defendant and the bankrupt there is a prima facie presumption that whatever money may have been handed or paid to the bankrupt was by way of gift and not loan, and hence incapable of serving as consid-

eration to support the deed.

The bankrupt attained his majority May 29, 1911, as before stated, and it appears not only from the documentary evidence, but from his testimony, and is not disputed, that he received June 16, 1911, from his guardian \$4,753.62 in cash, being proceeds of sale of a portion of his interest in certain coal lands to the Delaware, Lackawanna & Western Railroad Company. This occurred only seven and a half months prior to the date borne by the deed in controversy. There is no evidence that during that period the bankrupt lost, squandered or otherwise disposed of the money thus received from his guardian. The evidence does not disclose what became of it. Yet the defendant testified in effect that during that period she gave money to the bankrupt "right along, he had no income of any kind only what I gave him or lent him"; that after he became of age and before the execution of the deed she "might have given him \$2,000 or \$3,000"; that in December, 1911, and again in January, 1912, she loaned him "\$200.00 or \$300.00"; that she loaned him those sums "because he took a trip and went to the city"; that he said he needed the money;

that he hadn't any money of his own that she knew of,—"not a cent"; that in letting him have this money she did not give him so much as \$100 at a time, but "maybe \$25.00, \$50.00 or \$10.00." That the defendant should for the purpose of enabling her son to take one trip to the city have loaned him in December and January from \$400 to \$600, or from \$200 to \$300, in various and scattered sums of \$25, \$50 and \$10 she does not attempt to explain. But, aside from this inexplicable action on her part, the bankrupt, although knowing he had received from his guardian since coming of age the sum of \$4,753.62, vouchsafed no explanation whatsoever of what had become of that sum, and did not attempt to corroborate the defendant in any particular with respect to her alleged loans to him. Knowing the facts he sat speechless in open court when, if the defendant had been testifying truly, considerations of honor, gratitude and affection should have compelled him, by his oath, to defend and uphold his mother. And the defendant necessarily knowing that her favored son knew of the fact of loans or no loans, omitted to call him as a witness on the vital point and presumably did not dare to take that step. Under the circumstances this failure to insist upon testimony from him amounts to a confession of fraud on her part.

Again, the defendant testified that prior to the execution of the deed in controversy she told the bankrupt, "I wanted my money back. I thought he ought to try and pay me in some way," and he said, "I have no money, but I will transfer my property to you." If this were a correct statement by the defendant of what was said by her and her son on that occasion can there be any reasonable question that he would not have corroborated her? But further, if her object was, as she states, to get her "money back," why not secure its repayment by a mortgage? That would have been the direct and straightforward course to pursue. She and the bankrupt fixed the amount of the consideration to be inserted in the deed at \$6,000 on the estimated amount of "the money I loaned him." She does not suggest or intimate that the amount so alleged to have been fixed by estimate represented or was intended to represent the value of the property to be transferred to her by her son. If this sum of \$6,000 was agreed upon as the amount of money loaned by her to him the question recurs, why not secure its payment by mortgage? If her real intention had been to secure the repayment of money loaned to the bankrupt that would have been the obvious and natural course to pursue. But she did not follow it, but on the contrary took a deed of conveyance stating a misleading and deceptive consideration. What possible explanation consistent with fair dealing can be given of this course? The defendant in her testimony admits that the deed contained an untrue statement of consideration, and that she does not know why the sum of \$100 was mentioned, and avers that she thinks she told Hines, her lawver, to insert \$6,000 as the consideration, and that she does not know why it was changed from \$6,000 to \$100. In Moore v. Roe, 35 N. J. Eq. 90, which in some of its features was strikingly similar to the case now before this court, a transfer by a son to his mother of all

his property was set aside as having been executed in fraud of a creditor. The Vice Chancellor in delivering the opinion of the court said:

"When the conveyance was made, the true amount of William's indebtedness to his mother was not ascertained, as in a genuine bargain it would have been; nor was the price or value of the farm considered and settled, as it would have been if the transaction had been in reality what it purported to be. The indebtedness was arrived at in a proximate way. * * * transaction cannot, I think, be reasonably taken to have been a bona fide sale and purchase. * * * If no intention had been entertained to hinder or delay the complainant, the mother's claim, if just, would naturally and properly have been secured by a mortgage giving her a prior lien on the land to the extent of her debt, and leaving the balance of the son's estate therein to be resorted to by his creditors. The course actually taken was a deceptive and embarrassing one, calculated to mislead and impede the creditor, who was known to both parties to the deed to be prosecuting his claim. It is not difficult for parties taking such a course to deny the existence of an intention to hinder, delay or defraud, and so far to persuade themselves that their only purpose was to secure a debt due the grantee, as to make their denial without willful perjury, but the unavoidable inferences from their acts will countervail their denial.

But the circumstantial evidence of fraud on the part of the bankrupt and the defendant does not stop here. The deed, although bearing date February 1, 1912, was not recorded until May 13 of the same year. The firm of Bryden & Gates began its existence, as before stated, February 29, 1912, after the expressed date but before the recording of the deed. By way of explanation of the discrepancy between its date and the time it was recorded the defendant testified that the bankrupt brought the deed in question to her home on the day on which it was drawn up and told her he would take it back and get it recorded, and that she said "No, I wish my son Abram to see it," and on the following morning gave it to him to read over. She then proceeded as follows:

"Q. Go on and tell the history of that deed? A. I gave it back to Charles and said, 'Take it right over to Mr. Hines and have it recorded,' which he didn't. Instead of taking it over, he laid it in his drawer and I thought it was recorded, I didn't know anything about it until Mr. Hines said one day, 'Mrs. Gates, that deed isn't recorded.' I said, 'It must be, I gave it to Charles;' he said, 'It isn't,' and when Charles came in I said, 'What did you do with that deed, Charles?' He said, 'I forgot it. It is up in my drawer,' and I said to him, 'Take it right over,' and he did. Q. How long was that? A. About in May, I think, the last of May, about the middle of May. Mr. Hines called my attention to it. He was up in the Court House looking after some of my business and discovered it. * * * Q. Then your son took the deed to Mr. Hines, did he? A. Yes, I scolded him when he came in. I gaid, 'You were very careless, Charles,' and he said, 'Well, I forgot it, Mother.' And I made him take it right away."

To say the least this is an improbable explanation. That after all her solicitude on the subject of securing the repayment of the money alleged to have been loaned by her to her son, she should not have sooner ascertained from him, living as he was with her, whether the deed had been recorded in accordance with her express request, is somewhat remarkable. There was no corroboration by Hines. In fact he died before the trial. There was not a word of corroboration from the bankrupt although he testified as to other matters during the trial, and knew the facts. She made no attempt to examine him in that

behalf. The bankrupt has nowhere stated that the deed was executed prior to May. Nor was there a word of corroboration from her son Abram to whom she states she gave the deed for his perusal on the day after she says she received it. Her failure to call him as a witness is wholly unaccounted for. Only one inference can be drawn from this circumstance, namely, that the deed had not then been executed and was not executed until sometime in May and several months after the business of Bryden & Gates had been launched. And the conclusion thus reached on this point is in accordance with the evidence, not only of the officer before whom the deed was acknowledged, but of several other witnesses. Bryden testifies in substance that he was first informed on a Saturday in May, 1912, by the bankrupt that he had transferred his property to his mother; that on that day he drove the bankrupt from the firm office of Bryden & Gates in Kingston across the river to Wilkes-Barre and went with him to the Savoy building in that city, where "he told me he wanted to see Hines, who he told me was his attorney at that time"; that the witness waited outside for a while and when the bankrupt came out "he pulled a paper out from his pocket at that time and showed it to me, telling me then that he had transferred the property to his mother, and I remarked then that he was a little bit late and he said, 'Oh, I guess not'"; that the witness told the bankrupt that "it was going to hurt our credit, and I thought it was pretty late any way and it could not do him any good and might do the firm a lot of harm"; that the bankrupt told the witness at the time he showed the paper that "it was an assignment of his property to his mother"; and that the bankrupt had before that time spoken of assigning his property to his mother, stating that "he had everything to lose and I had nothing." John T. Evans, engaged in the business of plumbing and heating, testified in substance that he did business with Bryden & Gates and that he met the bankrupt May 10, 1912, and gave him a statement of the witness's account against him; that "when I took this statement over he seemed to fly off again and he told me at that time that he was going to transfer his property, his real estate and all his belongings to his mother"; and that the bankrupt said "he had an experience with Brown and Timberman, I think the name is, the people he was in business with before, and he said that he didn't want to get in bad any more." Joseph Moore, a United States Commissioner, before whom the deed in question was acknowledged, testified in substance that he first saw the deed in question in the Savoy building; that the writing above the signature to the acknowledgment was not in his handwriting; that the acknowledgment had been filled out before the paper was brought in; that he "had no reason to suspect there was anything wrong with it"; that it was late in the spring of 1912 and pretty warm weather, and the witness was sitting at his desk in his shirt sleeves and, he thinks, with the window open; and that the acknowledgment, he thinks, was taken "in the very latter part of April or along in May, and I think it was on a Saturday." The bankrupt has not denied nor was he called upon by the defendant to deny the truth or accuracy of any portion of the testimony just referred to on the part of Bryden, Evans and Moore.

There are certain circumstantial facts in evidence in connection with an intervention by the bankrupt some ten months after the execution of the deed in question in a suit involving title to real estate in Luzerne County, to which that deed related, devised by his grandmother, Mary Gates, which, in my opinion, show that not only the bankrupt but the defendant as well recognized that the former had not by that deed parted with any interest he may have had in the property to which it related and that it was a mere pretense and cover employed to keep it from his creditors. It is in evidence, and is not disputed, that after the execution of the deed in question no reconveyance was ever made by the defendant, directly or indirectly, to the bankrupt of any portion of the property covered by it. The suit referred to was an action of assumpsit in the Court of Common Pleas for Luzerne County, in 1913, between Fred B. Davis and W. M. Vanhorn. Davis was a purchaser from a devisee under the will of Mary Gates. The devise was to Mary G. Myers for life and thereafter to her heirs, and should she die without leaving any children, with remainder over to her grandchildren; and the question of law involved was whether the devisee took a fee simple or only a life estate. If the devisee took the latter the remainder over would or might have enured to the benefit of the bankrupt and his brothers and sisters. If on the contrary the devisee took a fee simple the bankrupt and his brothers and sisters would take nothing so far as the particular lot of land in that suit was concerned. Davis sued for the recovery of the unpaid balance of purchase money which Vanhorn had contracted to pay if the plaintiff tendered him a good title in fee; and the court having found that the fee was vested in the plaintiff entered judgment against Vanhorn March 17, 1913. On March 20, 1913, Hines as attorney for John W. Gates, Mary A. Gates, Abram N. Gates, Charles B. Gates (the bankrupt), and Myron Strickland, guardian of Emily J. Gates, presented a petition that they be allowed to intervene in the suit, stating under oath that he believed that they "are seized as devisees of an estate in fee simple in said house and lot * * * and the above named parties will be bound by the judgment of the court in said case stated. and now desire to be made parties," etc. Whereupon, the court granted them leave to intervene on the ground that "the said parties have rights which will be adjudged by the judgment entered in the above case." The bankrupt both personally and through Hines as his attorney took, but in vain, active steps on several occasions on behalf of himself and the other children of the defendant to set aside or reverse the judgment rendered for Davis. If the deed in question had been valid there would have been no interest left in the bankrupt, and there could have been no reason whatever on his part to intervene. attitude and action in and toward that litigation amounted to the clearest recognition by him and Hines that the deed in question was a nullity or at least voidable. Now, during the whole period covered by the suit of Davis v. Vanhorn, Hines was attorney for the defendant. She states, "Mr. Hines has always been our attorney." There can be little or no doubt that the defendant knew of the attitude of the bankrupt in that suit and took a similar view of the deed in question.

If not as matter of law chargeable with the knowledge of Hines, her attorney, as to the position assumed by her son, her examination as a witness coupled with her omission to adduce available evidence to the contrary is sufficient to establish knowledge on her part of the position taken by the bankrupt. She testifies as follows:

"Q. Do you recall the time that there was some litigation about the interest which Mary Myers had in some real estate near your home? A. No. I can't tell the time. Q. Do you remember whether there was such litigation? A. Yes. * * * Q. Who was your counsel at the time of that litigation? A. Mr. Hines has always been our attorney. * * * * Q. You remember that case went to the Supreme Court? A. Yes. Q. And Mr. Hines went down to Philadelphia with it? A. Yes, I think he did. Q. And your son Charles went down with him; didn't he? (Objected to.) Q. Who accompanied him? A. I could not say that. * * * Q. Now, I call your attention to the case of Fred W. Davis versus W. M. Vanhorn, in which case John W. Gates, Mary A. Gates, Abram N. Gates, Charles B. Gates and Myron Strickland, Guardian for Emily J. Gates, were interveners? A. I can't remember anything about it. Q. Do you recollect such a case? A. Well, it slips from my memory. Q. It involved the property next door to you, didn't it? A. I think it did. Q. Who was John W. Gates? A. That is my son. * * * Q. Who was Mary A. Gates? A. That is my daughter. Q. Who was Abram N. Gates? A. My son. Q. Who was Charles B. Gates? A. That is my son. Q. Who was Emily J. Gates? A. That is my daughter. * * * Q. Was there any conversation in your house relative to that law suit? A. No. * * * Q. Did you have any conversation at any time with any person concerning that law suit? A. I never remember that."

Here as on other points the story told by the defendant is so improbable as not to merit acceptance. That Hines while attorney for the defendant should have falsely or mistakenly asserted under oath that the bankrupt had an interest in the land, the title to which was in litigation, which if the deed in question was valid had passed to and was owned by her, or that he, notwithstanding his professional relationship to her, should have concealed from her the position assumed by her son in that suit with respect to the rights of property, which if the deed were valid were vested in her, is not readily to be believed. Nor is it to be credited that among the members of a united and harmonious family the action of the bankrupt and of the family attorney in behalf of all the children was not discussed or mentioned during the course of the suit. The defendant is not corroborated either by the bankrupt or by any of the other children. Not one of them was produced as a witness on the point and this omission is wholly unexplained. The defendant as well as the bankrupt must be held to have recognized the ineffectiveness of the deed and that it did not confer upon the former any valid title.

It appears from the testimony of Bryden, and is not denied either by the bankrupt or the defendant, that Bryden and the bankrupt had conferences with the defendant after the formation of the partnership and before the execution of the deed in question, touching the business and affairs of the former. And it also appears that the bankrupt had charge of the books of the firm, and Bryden of the outside work. No balance was ever struck on the books and they are mutilated and unintelligible.

Neither Bryden nor the bankrupt was able to extract from the books the slightest information as to the solvency or insolvency of the firm or the condition of its business at any particular date; nor does the evidence clearly disclose just when the bankrupt or Bryden & Gates became insolvent. Nor is it material that the precise date of the occurrence of insolvency should be determined, or whether it happened before or only after the execution of the deed in question. It is sufficient that the bankrupt became insolvent prior to the bringing of this suit.

The evidence has fully satisfied me that the deed in question was executed, not February 1, 1912, but May 11, 1912; that it was fraudulently dated back of the formation of the partnership of Bryden & Gates in order to ante-date the existence of any firm indebtedness; that it was executed without any consideration moving from the defendant, and with intent to delay and defraud creditors of the bankrupt whether then or subsequently existing; and further, that the defendant was fully cognizant of and a party to this fraudulent scheme and contrivance.

[7] The defendant insists that the plaintiff failed to prove that the deed in question was "fraudulently made with the dishonest intent to defraud the then existing creditors of the said Charles B. Gates." But fraud meditated against subsequent creditors is of the same quality as that meditated against existing creditors, and if operating to defeat, hinder or delay subsequent creditors by covering and concealing from them property really belonging to the debtor, will receive equal condemnation and correction at the hands of a court

of equity.

In Thomson v. Dougherty, 12 Serg. & R. (Pa.) 448, it was said that if a man "is not indebted and make a voluntary conveyance to a child, without particular evidence or badge of fraud to defeat subsequent creditors, that would be good; But if there be any mark of fraud, or intention to defeat subsequent creditors, that will make it * * * But the being indebted is not the only badge of fraud; the transaction may be chargeable with such circumstances, as will raise the presumption of fraud." In Harlan v. Maglaughlin, 90 Pa. 293, it was recognized that a voluntary conveyance will not stand as against subsequent creditors where it appears that the grantor intended to withdraw his property from the reach of such creditors. So in Horbach v. Hill, 112 U. S. 144, 149, 5 Sup. Ct. 81, 83 (28 L. Ed. 670), it was declared that "a voluntary conveyance is good as against subsequent creditors, unless executed as a cover for future schemes of fraud." And in Graham v. Railroad Co., 102 U. S. 148, 153, 26 L. Ed. 106, it was said by Mr. Justice Bradley that "it is true that if a debtor dispose of his property, with intent to defraud those to whom he expects to become immediately or soon indebted, this may be a fraud against them, which they may have a right to unravel." Nor will the payment by a fraudulent grantee of a valuable or sufficient consideration protect the conveyance as against creditors. In Jones v. Simpson, 116 U. S. 609, 614, 6 Sup. Ct. 538, 541 (29 L. Ed. 742), it was declared that the payment of a sufficient consideration by a vendee would protect him, however fraudulent the intent of the vendor, "unless it appears affirmatively, from all the circumstances, that he purchased in bad faith. And such bad faith may exist where the vendee purchases with knowledge of the fraudulent intent of the vendor, or under such circumstances as should put him on inquiry as to the object for which the vendor sells." In Blennerhassett v. Sherman, 105 U. S. 100, 117, 26 L. Ed. 1080, the court said:

"It is not enough, in order to support a settlement against creditors, that it be made for a valuable consideration. It must be also bona fide. If it be made with intent to hinder, delay, or defraud them, it is void as against them, although there may be in the strictest sense a valuable or even an adequate consideration."

May in his work on Fraudulent Conveyances, p. 67, says:

"Where the contrivance or fraudulent intention appears there is no need to shew that there were creditors existing at the time; it is enough if any creditor, whether existing before or after the transaction, is or may be defeated."

[8] It is contended that the bankrupt had no title or interest in or to the lands and premises to which the deed in question relates, which could pass to his trustee in bankruptcy. After an examination of the wills of Mary Gates and John R. Gates, his grandparents, I do not think this position can be maintained. In the will of the former, dated October 4, 1889, the testatrix, who died April 27, 1890, provided, among other things, as follows:

"My residence that I now occupy, with all the things therein belonging, it is my wish and will, shall remain in possession of my husband, John R. Gates, during his lifetime. * * * After the death of my husband, John R. Gates, the property that I now occupy as my residence, I will and bequeath the same to my son, Frank, for his use during his lifetime. And the property adjoining on the southwesterly side of my residence, after the death of my husband, John R. Gates, I will and bequeath the same to my son, William R. Gates, for his use during his lifetime, and after the death of my sons, Frank and William, said properties to go to my grandchildren, their heirs and assigns forever."

John R. Gates, who died June 6, 1894, in and by his will dated March 21, 1889, provided, among other things, as follows:

"Fifth. I give, devise and bequeath unto my wife, Mary Gates, and my two sons, William R. and Frank R. Gates, share and share alike, during their natural lives, the use of the rent or royalty to be divided [derived?] from the five tenements with the lots attached I own on Plymouth Road in Kingston Borough, the house and lot on Careytown Road, and the rental coming from the Delaware, Lackawanna and Western Railroad Company on account of my lease of the coal under or upon a piece of land on the flats in Plymouth Township; said buildings to be kept in repair out of the rentals therefrom and all taxes, repairs, and insurance on said real estate to be paid out of the receipts therefrom before any division is made of the proceeds thereof. After the decease of my said wife, said rents and coal royalties shall be divided equally between my said sons William R. and Frank R., subject to above payments, during their natural lives. After the decease of either of my said sons, his share of said rents and royalties shall be paid to my grandchildren, share and share alike, subject to above payments, during the natural life of the survivors [survivor?] of my said sons. Sixth. I give, devise and bequeath unto my wife, Mary Gates, one third the net income, after taxes and all charges are paid, of the surface during her natural life, of the piece of land containing about fifteen (15) acres which I own on the flats in Plymouth Township, and the piece of land on the flats in Kingston Township, containing about nineteen (19) acres. Seventh, Subject to my wife's rights therein I give, devise and bequeath unto my son, William R. Gates, the use during his natural life of the surface of the piece of land which I own on the flats in Plymouth Township, containing about fifteen (15) acres, he to pay all charges and taxes against the same. Eighth. Subject to my wife's rights therein, I give, devise and bequeath unto my son, Frank R. Gates, the use during his natural life of the surface of the piece of land which I now own on the flats in Kingstown Township containing about nineteen (19) acres, he to pay all taxes and charges against the same. * * * Tenth. Subject to the life interest heretofore given, I give, devise and bequeath unto my grandchildren, not only those now born, but who shall be hereafter born, their heirs or assigns, share and share alike, the following real estate: First, the five tenements, with lots attached, on Plymouth Road in Kingston Borough. Second, the house and lot on the Careytown Road in Wilkes-Barre, but with no right to the coal thereunder, it having been heretofore devised to my wife and sons. Third, the surface of the tract of about fifteen (15) acres of land on the flats in Plymouth Township. Fourth, the surface of the tract of about nineteen (19) acres of land on the flats in Kingstown Township, said above devised lands and tenements to be equally divided among my grandchildren living at the death of my two sons or the survivor of them."

William R. Gates, son of the testator, died before the execution of the deed in question, but Frank R. Gates, his other son, is still living. Under the will of his grandmother it is clear that the bankrupt took a vested interest which, so far as not validly aliened, passed to his trustee in bankruptcy. And under the will of his grandfather I think he took an interest, subject to be defeated by the happening of the contingency of his dying before the death of the survivor of his uncle William R. Gates and his father Frank R. Gates. The gift to the bankrupt of the interest or estate does not consist in the direction for an equal division among his grandchildren living at the death of the survivor of the two sons of the testator, but on the devise of the real estate "unto my grandchildren, not only those now born, but who shall be hereafter born, their heirs or assigns." The contingency here relates, not to the person, for the bankrupt was on the death of the testator ascertained as one of the grandchildren and belonging to the class of persons who were to take, but to the event, the happening of which would defeat the gift already made. In the case of In re Twaddell, 110 Fed. 145, I had occasion to examine with much care the subject of the vesting of contingent interests in trustees in bankruptcy, and I am satisfied that under the Pennsylvania decisions and for the reasons given in that case, which related to Pennsylvania real estate, the contention now made by the defendant is without merit.

Much evidence has been adduced by each of the parties touching the value of the lands and premises of which the deed in question covered the bankrupt's share, in order to determine the value of that share. It is unnecessary, I think, to discuss or consider that evidence in this suit, as the plaintiff on an amendment of the bill properly charging fraud as against the defendant will be entitled to a reconveyance from her to him of that share or so much as has not been disposed of by her, whatever may be its value.

The evidence shows that in the summer of 1913 a portion of the Gates estate in Luzerne County was sold and conveyed to the Wilkes-Barre Connecting Railway Company for \$60,000; and that in the adjustment of the shares as between the defendant and her children it was agreed that the life interest of the former should be treated as

of the same value as the share of one of her children. The \$60,000 being divided into equal parts, each child other than the bankrupt received \$10,000 and the defendant received the remaining \$20,000, of which \$10,000 represented her own share as agreed upon, and \$10,000 the proportionate share of the bankrupt claimed by her under the conveyance in question. The conveyance having been fraudulent as against the bankrupt's creditors, the plaintiff will on properly amending the bill as above stated be entitled to recover from the defendant in addition to such of the real estate covered by the deed in question as remains undisposed of, the sum of \$10,000, together with legal interest thereon from the first day of August, 1913, the date of the conveyance to the Wilkes-Barre Connecting Railway Company, until the same be paid.

Leave is hereby granted to the plaintiff to amend his bill within thirty days from the date of this opinion so as properly to charge fraud against the defendant in accordance with the evidence, and upon the submission to this court and filing of such amendment a decree for the plaintiff in accordance with this opinion may be prepared and submitted.

JACKSON et al. v. CRAVENS et al.

(District Court, S. D. Florida. March 23, 1916.)

1. COURTS ♦==508(1)—FEDERAL COURTS—SUIT TO ENJOIN ENFORCEMENT OF STATE STATUTE.

A federal court organized under Act March 4, 1914, c. 160, 37 Stat. 1013, for the purpose of hearing a suit for an injunction to restrain enforcement of a state statute as in violation of the Constitution of the United States, will not undertake, on an application for a preliminary injunction, to determine the validity of the statute under the state Constitution, or objections to its validity on other grounds not connected with the federal question, which alone gives the court jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1418; Dec. Dig. \$508(1); Injunction, Cent. Dig. § 72.]

2. Commerce ← 50 — Constitutional Law ← 240(1) — Inspection ← 2 — Powers of State to Make Regulations—Constitutionality of Statute—Inspection of Naval Stores.

Act Fla. June 5, 1915 (Laws 1915, c. 6878), which provides for the inspection of naval stores in accordance with a fixed standard by inspectors appointed by the state, for which fees are charged, and prohibiting the sale in the state or shipment out of the state of uninspected stores, except where, after demand, inspection has not been made within 20 days, is not an interference with interstate or foreign commerce, nor does it deny to owners or shippers the equal protection of the laws, but is within the police powers of the state, and valid.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 48–53; Dec. Dig. \$\sim 50; Constitutional Law, Cent. Dig. §§ 688, 693, 697, 698; Dec. Dig. \$\sim 240(1); Inspection, Cent. Dig. § 2; Dec. Dig. \$\sim 2.]

In Equity. Suit by J. W. Jackson and others against E. S. Cravens, Supervising Inspector of Naval Stores, or purporting to be Supervising Inspector, and others. On application for preliminary injunction. Denied.

C. M. Cooper, Chas. P. Cooper, and J. J. G. Cooper, all of Jacksonville, Fla., for complainants.

Thos. F. West, Atty. Gen., Watson & Pasco, of Pensacola, Fla., and John C. Cooper & Son, of Jacksonville, Fla., for defendants.

Before WALKER, Circuit Judge, and CALL and SPEER, District Judges.

SPEER, District Judge. The theory of this bill is that the legislation of the state of Florida assailed is not a legitimate exercise of the police power of the state, and is not a bona fide law for the inspection of naval stores; also, that it is an arbitrary discrimination between the producers who ship to points outside the state, or who shall sell directly to the consumer. It is insisted that it is the purpose of the statute to interfere with commerce between the state of Florida and other states of the United States and with foreign nations. All of this is alleged to be violative of the Constitution of the United States, as expressed, not only in the commerce clause, but also in the fourteenth amendment. It is also alleged that the system of inspection provided is inoperative, imperfect, burdensome, and costly, and that it is violative of the several clauses of the Constitution of Florida mentioned in the bill. An injunction is sought against the inspection and prosecuting officers of the state, including the Attorney General.

[1] In so far as the alleged imperfection and ineffectiveness of the measure may be involved, and particularly in so far as the inspection law of the state is declared to be violative of the Constitution of the state, this court has no proper concern, at this stage of the case. This is not a controversy between citizens of different states, but between citizens of Florida and other citizens of the same state. Our jurisdiction is based upon the question: Is this legislation violative of the relating provisions of the Constitution of the United States? It is a serious demand upon a court of the United States when it is required that it shall declare an act of a state Legislature unconstitutional. All legislation is presumed to be constitutional, and to hold it unconstitutional, the court must resolve every reasonable doubt in favor of constitutionality. Recent legislation of Congress has, indeed, thrown a stronger contravallation around state than exists around national legislation. One judge of a District Court of the United States, in a proper case, may hold an act of Congress invalid; but three judges must now constitute a court with jurisdiction to hold a state law invalid. One of these must be a Circuit Justice, or a Circuit Judge. See Act March 4, 1914, 37 Stat. at Large 1013. This court was organized under the provisions of this statute.

The general jurisdiction of the appropriate United States court to hold a state law or state action violative of the Constitution of the United States has long been settled. It was restated in a recent carefully considered case. Ex parte Young, 209 U. S. 149, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, opinion by Mr. Justice Peckham. There the Attorney General of a state had disregarded the order of the Circuit Court of the United States, and after hearing was held in contempt. His application for habeas cor-

pus was denied, and the denial was affirmed by the Supreme Court. Said the learned Justice, delivering the opinion:

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the federal Constitution, may be enjoined by a federal court of equity from such action."

In Western Union Telegraph Co. v. P. R. Andrews, 216 U. S. 165-167, 30 Sup. Ct. 286, 54 L. Ed. 430, the doctrine was reasserted, and a number of prosecuting attorneys were enjoined from enforcing an act of a state in violation of the national Constitution. It will, however, be difficult to cite a case where, on an application for preliminary injunction, a court of the United States devoid of original jurisdiction, save for the federal question involved, will undertake to test the validity or effectiveness of state legislation, in the light of the state Constitution, or review in any way the discretion of the state Legislature as expressed in the enactment. Said Mr. Justice Brewer, for the Court, in Michigan Central R. R. Co. v. Powers, 201 U. S. 291, 26 Sup. Ct. 461, 50 L. Ed. 744:

"If conflict with the state Constitution is the sole ground of attack, the Supreme Court of the state has a final authority"—citing Merchants' Bank v. Penn., 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236.

The learned justice continues:

"Undoubtedly a federal court has jurisdiction, and when the question is properly presented it may often become its duty to pass upon the alleged conflict between a statute and the state Constitution, even before the question has been considered by the state tribunals. All objections to the validity of the act, whether springing out of the state or of the federal Constitution, may be presented in a single suit and called for consideration and determination. At the same time federal courts will be reluctant to adjudge a state statute to be in conflict with the state Constitution before that question has been considered by the state tribunals."

In Coulter v. Louisville & Nashville R. R., 196 U. S. 609, 25 Sup. Ct. 344, 49 L. Ed. 615, it is stated by Mr. Justice Holmes, for the court:

"But the supposed infringement of the Fourteenth Amendment is the only ground on which the railroad company could come into the Circuit Court, and if that ground fails, and obviously fails, the court should be very cautious, at least, in interfering with the state's administration of its taxes upon other considerations which would not have given it jurisdiction."

In both of these cases it will be observed that interference with the state law was refused, the federal question being negatived.

A different conclusion may have been induced by a line of decisions beginning with Horner v. U. S., 143 U. S. 570, 12 Sup. Ct. 522, 36 L. Ed. 266, where the Supreme Court held:

"Where the constitutionality of an act of Congress was drawn in question, and an appeal lay directly to the Supreme Court from the Circuit Court, ander paragraph 5 of the act of March 3, 1891, the Supreme Court acquired jurisdiction of the entire case, and of all questions involved in it, and not merely of the question of constitutionality."

That rule, however, defines the power of the Supreme Court, the court of final jurisdiction in equity. This being, as appears from the act of Congress approved March 4, 1914, supra, a court assembled for a specific duty, it would seem that, ordinarily, our jurisdiction is restricted to that duty. This view will relieve the court, at least on this preliminary application, from passing upon the multitude of averments in the bill as to the alleged ineffectiveness and injurious character of the legislation assailed, and the relating arguments in the elaborate

[2] That the production of spirits of turpentine and rosin, commercially termed naval stores, is a vastly important enterprise of the state of Florida, may be gathered as well from the bill, the answer, and the affidavits. It may be gathered, also, that the animating, pecuniary consideration, which is the inspiration of this litigation, is the profit which may inure from handling this great product. Anterior to the enactment of this legislation, the product had been generally transported to ports of other states, principally to Savannah, in the state of Georgia. It now largely moves to Florida ports, and the warehousemen, factors, inspectors, and others handling it there are measurably advantaged. The profits of the Savannah interests may be in some degree diverted; but is this result, however regrettable, one in which the court can have proper concern? The question with us is: Is this a valid inspection law of a product of the state of Florida, in the power of the state to enact and enforce without disregard of the Constitution of the United States? The law itself, in its entirety, is written in the margin.¹ It will be seen that, with an important reservation in favor of the producer, it definitely provides for inspection, a standard for such inspection, and officials to make it. The standard itself conforms to that fixed by the United States government. The act forbids the sale in the state, or shipment out of the state, of the uninspected product, with the above referred to proviso that, if the goods are not inspected within 20 days after his demand on the inspector, the producer is given the option to ship his product anywhere without inspection.

The court must presume that the state Legislature in the enactment of this law had a beneficial purpose. This may have been to build up or increase the reputation of the product, that it might also benefit the people of the state, not only the producers, but those at the ports of the state who deal in naval stores. Such purpose cannot be criticised. Was such legislation within the police or inspection power of the state? On this subject, fortunately, there is a great wealth of para-

mount authority.

brief for the plaintiffs.

Perhaps the latest precedent is Sligh v. Kirkwood, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835. This involved a police statute by which it was made a crime to ship immature citrus fruits from the state. It also was a Florida case. It forbade such shipment under any circumstances. The act was assailed for violation of the national Constitution. The court held:

"We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the state of Florida. It was competent for

¹ See note at end of case.

the Legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market. The shipment of fruits, so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the state."

Then follows the general proposition:

"The protection of the state's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose."

It would seem that the state has the equivalent right to forbid the injurious sale of adulterated turpentine or inferior rosin. It follows that, to determine the grade and the degree of purity, it may provide for inspection.

In Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, it was declared by the Supreme Court that the fourteenth amendment and no other amendment was designed to interfere with the power of the state, among other things, "to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."

In the case of Turner v. Maryland, 107 U. S. 38, 2 Sup. Ct. 44, 27 L. Ed. 370, it was enacted that:

"After the passage of this act, it shall not be lawful to carry out of this state any hogsheads of tobacco raised in this state, except in hogsheads which shall have been inspected, passed and marked agreeably to the provisions of this act."

It also provided for shipment to a state warehouse in Baltimore. There was a penalty of \$300 for the violation. In case, however, the producer packed his tobacco in the neighborhood where grown, and marked his name in full, and his place of residence thereon, and paid the charge of "outage" and storage, he might ship it, although it may not have been sent to the state warehouse for inspection. The legislation, assailed as violative of the Constitution, was pronounced valid. The charge for "outage" was held an inspection charge, and Mr. Justice Blatchford, rendering the opinion for the court, quotes the language of Chief Justice Marshall in the leading case of Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23. There the great Chief Justice, after remarking that power to regulate commerce was not the source from which the right to pass inspection laws was derived, declared:

"The object of inspection laws is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government, all of which can be most advantageously exercised by the states themselves."

In Patapsco Guano Co. v. North Carolina Board of Agriculture, 171 U. S. 345, 18 Sup. Ct. 862, 43 L. Ed. 191, the Supreme Court, Mr.

Chief Justice Fuller rendering the opinion, called attention to section 10, art. 1, of the Constitution itself. This reads:

"No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

Thus the organic law expressly recognizes the inspection power of the state. The Chief Justice also quotes, in that case, the opinion of Mr. Justice Bradley, delivered on circuit, in Neilson v. Garza, 2 Woods, 287, Fed. Cas. No. 10,091, where the latter declared that:

"The right to make inspection laws is not granted to Congress, but is reserved to the states."

This, however, is subject to the paramount right of Congress to regulate commerce with foreign nations and among the states. In the case then before the court, fertilizer and fertilizing material was the subject of inspection. There all of the material was shipped into the state, and the court upheld the inspection law, and declared that the effect on interstate commerce "is indirect and incidental." The opinion ends with the quotation:

"The Constitution of the United States does not secure to any one the privilege of defrauding the public."

In Pittsburgh & Southern Coal Co. v. Louisiana, 156 U. S. 590, 15 Sup. Ct. 459, 39 L. Ed. 544, where coal and coke boat gaugers had been provided by the statute, and it was made compulsory upon persons dealing in these articles in a barge to have the same inspected and gauged, it was held to be not a regulation of commerce, nor, although it related solely to shipments by water, did it discriminate unconstitutionally between the coal of Pennsylvania and the coal of Alabama coming into Louisiana by rail.

In McLean v. Denver & Rio Grande R. R., 203 U. S. 38, 27 Sup. Ct. 1, 51 L. Ed. 78, after announcing the general proposition stated by Chief Justice Marshall, supra, it was held that:

"An act of the territory which made it an offense for a railroad company to receive for shipment beyond the limits of the territory hides which had not been inspected is not unconstitutional, as unwarranted regulation of, or burden on, interstate commerce."

Here the inspection statute of Florida not only (to quote the language of Chief Justice Marshall, supra) "acts upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepares it for that purpose" (for all the turpentine and rosin which may be shipped from Florida directly in interstate commerce will not be inspected at all because the inspector fails to appear within 20 days after notice), but the act precludes any one from the privilege of defrauding the public by the adulteration of the product, or by misrepresentation as to its purity and value, and by lawless and ruinous combinations in restraint of the trade, made possible in the past, because the industry had no genuine and effective protection. That this danger threatened is easily demonstrable. It has been encountered elsewhere. It was real, not imaginary. The recorded cases and judgments disclose that the industry demanded the protection of local government. See American Naval Stores Co. Case (C. C.) 172

Fed. 455; Nash v. U. S., 229 U. S. 380, 33 Sup. Ct. 780, 57 L. Ed. 1232.

That the compulsory inspection of naval stores by state officers imposes the burden of inspection charges upon the producers is not at all unreasonable. This, too, was within the power of the Legislature. That power was fully sustained in Lindsay & Phelps Co. v. John H. Mullen and State of Minnesota, 176 U. S. 126, 20 Sup. Ct. 325, 44 L. Ed. 400. There Minnesota had provided that the various surveyors general should have a lien upon logs floated on the rivers and collected in certain chartered booms. There also many of the logs came from other states. A lot of logs were seized for fees aggregating \$10,000 or more. There, as here, it was claimed that the statute burdened interstate commerce, and with more reason, because much floatage of logs was from other states. But it was held that the statute of Minnesota. requiring all logs running out of a boom to be surveyed, inspected and scaled, was compulsory, that the legislation was within the power of the state, and also that, where citizens of other states used the booms chartered by Minnesota, their logs were liable for the fees of state officials, inspecting the same. A fortiori must such charges be upheld where the complaint is made by citizens and corporations of the state allowing them.

The same principle was announced in the case of Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 25 Sup. Ct. 552, 49 L. Ed. 925. There, too, it was held that, even though the law in question might be inadequate to accomplish the purpose designed, it affords for that reason no federal question upon which to hold that the exercise of the police power of the state was unauthorized. This, the court declared, must be measured by the right of the state to control or regulate domestic products.

The complaint that the act unlawfully discriminates and denies equal protection of the laws, in violation of the fourteenth amendment, is equally unfounded. It operates uniformly on all producers of naval stores in the state of Florida. That it may affect producers or dealers in other states does not matter. In the case of Missouri ex rel. Bowman v. Lewis et al., 101 U. S. 22, 25 L. Ed. 989, the Supreme Court declared:

"The fourteenth amendment does not profess to secure to all persons of the United States the benefit of the same laws, and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line."

A case illuminative of this question is that of Davis v. State, 68 Ala. 64, 44 Am. Rep. 128.

"It has never been seriously questioned," said that renowned court, "that the jus disponendi is not an absolutely unqualified and indispensable right attaching to property, but is subject to such regulations not inconsistent with the Constitution, as, in the judgment of the law-making powers, the interests of society and good government may require."

In that case the prohibition was against transferring or moving seed cotton between sunset of one day and sunrise of the succeeding day. In the cotton states the significance of this law may possibly be understood.

"Its primary object," said the court, with courteous moderation, "is not to interfere with the right of property, or its vendable character; its object is to regulate traffic in the staple agricultural product of the state, so as to prevent a prevalent evil, which, in the opinion of the law-making power, may have done much to demoralize agricultural labor and destroy the legitimate profits of the agricultural pursuit, to the public detriment, at least within the specified territory. This the Legislature had the power to do."

In Barbier v. Connelly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, the court states that while "class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

In Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145, Mr. Justice Field, for the court, observed:

"The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair the equal rights which all claim in the enforcement of the laws."

In the case before the court, in view of these authorities and many others, it seems indisputable that all persons engaged in the business in Florida have the same rights, privileges, and liabilities, and are subject to such an uniform inspection law, as is a valid exercise of the police power.

Nor has the state of Georgia failed to avail itself of this power. In 27 sections of its Code, from sections 1815 to 1841, inclusive, it has provided an inspection law not less stringent and not less costly than the Florida law before the court. Section 1815 is typical of the others:

"Sec. 1815. Supervising inspector, appointment, and qualification. The Governor shall appoint a competent person, who shall be a citizen of the state of Georgia, to be the supervising inspector of naval stores for the state of Georgia, and who shall be skilled in the inspection of and familiar with the grades of naval stores and competent to detect adulteration thereof. No person shall be appointed supervising inspector of naval stores who is a producer, factor, or buyer of or dealer in naval stores, or employed by or connected in business with any such producer, factor, buyer, or dealer in naval stores." Park's Annotated Code of Georgia.

It follows that we must conclude, upon all the grounds assigned in plaintiffs' bill, there is, in this legislation, no violation of the Constitution of the United States, or any provision thereof. For the reasons herein previously stated, we pretermit for the present determination of objections to the effectiveness of the inspection machinery provided by the state statute, the legality of appointment of officials thereunder, and also all objections arising under the Florida Constitution. It does not appear that these have been raised, or at least determined, by the courts of the state. This is simply a motion for preliminary injunction, and our decision here does not finally dispose of the cause. There are no averments which give us primary jurisdiction save those assigning violation of the national Constitution, and these we determine adversely to the plaintiffs. Said Mr. Justice Miller, for the court, in Pelton v. National Bank, 101 U. S. 144, 25 L. Ed. 901:

"It is an appropriate duty, which this court is called upon to perform very often, to protect rights founded on the Constitution, laws, and treaties of the United States, when those rights are invaded by state authority. But it is a very different thing for this court to declare that an act of a state Legislature, passed with the usual forms necessary to its validity, is void because that legislation is violative of the Constitution of the state. It has long been recognized in this court that the highest court of the state is the one to which such question properly belongs; and though the courts of the United States, when exercising a concurrent jurisdiction, must decide it for themselves, if it has not previously been considered by the state court, it would be indelicate to make such a decision in advance of the state courts, unless the case imperatively demanded it."

This case presents no such imperative demand. See Cummings v. National Bank, 101 U. S. 155, 25 L. Ed. 903; Hills v. Exchange Bank, 105 U. S. 319, 26 L. Ed. 1052. The Circuit and District Courts, quite

properly, have not departed from this rule.

In Western Union Tel. Co. v. Poe (C. C.) 61 Fed. 469, the court delayed the decision on such a question four months, with the hope that the state Supreme Court might decide it; and in Western Union Tel. Co. v. Poe (C. C.) 64 Fed. 11, the court reversed its own ruling, made, however, before final judgment, when the state Supreme Court had

taken a contrary view.

This principle would seem stronger in its application to this court, organized solely to test the validity of such legislation, primarily, at least, in the light afforded by the Constitution of the United States. It would seem, indeed, a grave incursion upon the authority of state legislation and government, should we, when the averment of our primary and constitutional jurisdiction is discredited, then undertake to criticise the efficiency of a state inspection enactment, inquire into the title of its officials under state law, and determine constitutionality in view of the state Constitution, which state courts have not passed upon. We would, in the case before us, thus engender confusion in the orderly development of a mighty and vital resource of the commonwealth, perhaps bring ruin and dismay to those engaged in it, and divert elsewhere the great profits to its people which will doubtless flow from the exploitation of those vast pine forests extending in "boundless contiguity of shade" from the Georgia line to the ultimate point of the Peninsular state.

The application for preliminary injunction is denied, and a decree may be taken accordingly.

NOTE.

Laws of Florida, Chapter 6878—(No. 72).

An act to appoint naval stores inspectors, to prescribe their duties and fix their compensation; to prevent and prohibit adulteration of spirits of turpentine and naval stores, and to provide for the appointment and duties and compensation of a supervising inspector of naval stores, and to prescribe forfeitures and penalties for violating, and methods for the enforcement of the provisions of this act.

Be it enacted by the Legislature of the state of Florida: * *

Sec. 7. That upon the passage and approval of this act the Governor shall appoint a supervising inspector of naval stores, one or more inspectors of naval stores at large, and shall appoint in each port in this state to which naval stores are or may be consigned for sale or shipment, a sufficient num-

ber of competent inspectors for the business at such port. The supervising inspector, inspector of naval stores at large, and inspectors of naval stores, shall be subject to removal by the Governor at any time for cause; and he shall have power at any time to fill vacancies in said offices. A person in order to be eligible to appointment to any of said offices must be a citizen of the state of Florida, must be skilled in the inspection of and familiar with the grades of naval stores, and competent to detect adulterations thereof. No person shall be appointed an inspector, inspector at large, or supervising inspector of naval stores, who at the time of his appointment is a producer or factor, or buyer of, or dealer in naval stores, or employed by or connected in business with any producer, factor, buyer or dealer; and it shall be unlawful and a cause for removal from office for any inspector, inspector at large, or supervising inspector of naval stores, during his term of office, to become a producer, factor, buyer of, or dealer in naval stores, or to be employed by or connected in business with any such producer, factor, buyer or dealer.

The supervising inspector of naval stores of the state of Florida shall have general supervision and direction of all inspectors of naval stores, including the inspector of naval stores at large, and it shall be his duty to see that they fairly and honestly perform all the duties imposed upon them and in the manner provided by law, and to report to the Governor any delinquencies or irregularity of any such inspector, and shall have power to suspend any inspector for falsely grading or branding turpentine or rosin, and for failure or neglect to perform the duties imposed on him by the provisions of this act, and to investigate complaints made by producers or others, or the conduct of any such inspector in the discharge by him of the duties of his The supervising inspector of naval stores shall also have supervision of all naval stores plants, yards, warehouses and other places where naval stores are kept or stored, and it shall be his duty to see that no adulteration of naval stores is permitted in this state, and to collect evidence of any adulteration which may come to his knowledge or be reported to him whenever the same may occur in this state; and to prosecute, or cause to be prosecuted all persons violating the laws of this state in regard to the inspection. marking, branding, or adulteration of naval stores. Said supervising inspector shall also perform such other duties as may be conferred upon him by law, but he shall not perform the duties of an inspector except when necessary to determine the correctness of any inspection made by an inspector. The supervising inspector of naval stores shall visit every yard where naval stores are stored for sale in the state at least six times each year, and shall thoroughly inspect said yards and examine the books and records of the local inspectors.

The inspectors of naval stores shall have power to make inspections of naval stores at the respective ports for which they are appointed, but the inspector of naval stores at large shall have the power to make inspections at any point in the state. The compensation of the inspector of naval stores at large shall be the same for the like service as that hereinafter provided for inspectors of naval stores at ports. The supervisor of naval stores inspectors shall have his office in port of this state receiving the largest amount of naval stores for sale or shipment. * * *

Sec. 10. The supervising inspector of naval stores shall receive as compensation for his services one-half cent for each barrel of rosin or spirits of turpentine which may be inspected under the laws of this state; said fee shall be paid equally by the buyer and seller of such naval stores. In case of naval stores shipped in packages or receptacles other than barrels, his compensation shall be reckoned upon a basis of barrels or fractions thereof in the same manner as is provided for the payment of fees of inspectors under like conditions. The supervising inspector of naval stores shall have the right to recover from any person or corporations liable therefor the fees allowed him under this act in an action of assumpsit, or any other appropriate proceedings in any of the courts of this state having jurisdiction thereof.

Sec. 11. That any person who shall knowingly have in his possession any spirits of turpentine or wood spirits of turpentine for sale, consignment or

shipment which shall be in any manner adulterated without being marked on the outside of the barrel with the words and in the manner required by this act, shall forfeit the same to the state of Florida. Upon sworn information thereof from any person, it shall be the duty of the state attorney for the circuit in which such property subject to forfeiture under this section may be found, to proceed forthwith to have the same forfeited and sold in the following manner: He shall file with the circuit court in the jurisdiction in which said property is found an information in the name of the state of Florida, setting forth the property whereof forfeiture is claimed, the owner thereof, or the person in whose possession the same is found, and the grounds of forfeiture; upon the filing of such information a summons ad respondendum and a writ of attachment, returnable to the rule day not less than ten days from the issuance thereof, shall be thereupon issued without bond or affidavit; such summons and writ of attachment shall be served in the manner provided for services of summons ad respondendum and writs of attachment in civil actions at law, the said writ of attachment shall be levied upon the property which it is sought to forfeit. Thereafter the case shall proceed in the same manner as a civil action at law. In case of attachment, and in the event the property shall be adjudged to be forfeited, the same shall be sold as is provided in the case of sales under execution. Any person claiming to own the property attached, or his agent or attorney, may in such proceeding intervene and defend the said proceeding as in case of attachments. All such proceedings shall be governed in other respects by the rules of pleading and practice applicable to suits at law in cases of attachment. proceeds arising from said sales shall be paid into the registry of the court. to be paid by the clerk under the order of the court as follows, to wit: Onehalf to the informant, to be paid upon the certificate of the state attorney that the person claiming the same is entitled thereto as the informer, upon whose information said action was begun, and the remainder to be paid to the county treasurer of the county in which the conviction is had as a part of the fine and forfeiture fund. Neither the supervising inspector nor any other inspector shall be permitted to receive any part of the proceeds of any such forfeiture; and if the information be given by any such inspector, the entire proceeds shall be paid into said fine and forfeiture fund. The penalties, punishments and other provisions of this act, and the enforcement of the same, shall be deemed several, and the enforcement of one shall not preclude or affect the enforcement of any other.

Sec. 12. It shall be the duty of any inspector upon notice given, to attend at such time and place at or near the port for which he is appointed, as he may be required, for the purpose of gauging spirits of turpentine and grading and weighing rosin, and to ascertain the true amount and quality thereof, and to mark the same by branding, or in some other durable manner, on each barrel, receptacle or package, and to issue at once in triplicate, sworn certificates of inspection, the original to be furnished to the producer or shipper; and the triplicates to the buyer or factor and the supervising inspector of naval stores; and the person or persons, firm or corporation, for whom such inspection is made, shall be at liberty to appeal to the supervising inspector to establish the incorrectness of such inspection. If any such article be fraudulently mixed, it shall be condemned by the inspector and sold as provided by section 11 of this act.

It shall be unlawful for any person to pack with rosin any substance other than pine rosin. And it shall be unlawful for any person to knowingly sell or offer for sale, any rosin containing other substance than pure rosin, or to so pack rosin that the package will appear to contain a higher grade of rosin than its true contents. Any one violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not more than \$100.00 or imprisoned in the county jail not more than three months:

Sec. 13. It shall be unlawful for a person other than a licensed state inspector to measure and inspect any naval stores in this state. Any person not a licensed inspector in accordance with the provisions of this act, who shall perform the duties of inspector of naval stores, shall be guilty of a misde-

meanor, and upon conviction thereof shall be fined not more than \$100.00 or imprisoned in the county jail not more than three months, or be punished by

both such fine and imprisonment in the discretion of the court.

Sec. 14. It shall be unlawful for any person to sell in, or ship from this state, any spirits of turpentine or rosin in barrels or bulk of one hundred pounds or more, unless the same shall have been inspected and branded by an inspector duly appointed and qualified under the provisions of this act: Provided, the inspector under the provisions of this act. shall inspect such spirits of turpentine or rosin in barrels or bulk of one hundred pounds or more within twenty days from the date of notice to such inspector of the desire of such person desiring to sell in or ship from this state spirits of turpentine or rosin in barrels or bulk of one hundred pounds or more; such notice to said inspector shall be given by registered mail, and the receipt of such registered mail shall be evidence of the giving of such notice: Provided, further, that no inspection of rosin shall be required at any place other than a port oftener than every twenty days, and any person, firm or corporation who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than \$500.00, or by imprisonment in the county jail for not more than three months, or by both such fine and imprisonment, at the discretion of the court: Provided, however that nothing herein shall be deemed to make it unlawful for a producer to make a shipment or shipments of uninspected spirits of turpentine or rosin from the place of production to a port or ports in this state for which inspectors have been appointed.

Sec. 15. The inspection, grading and branding, or marking of the quality of rosin and turpentine as aforesaid, shall be according to the standard rosin and turpentine types and such types shall conform as nearly as possible to New York standard rosin and turpentine types; but in the event the Department of Agriculture of the United States shall hereafter establish rosin and turpentine types, then the inspection, grading and branding, or marking of the quality of rosin and turpentine, under this act, shall be according to such rosin and turpentine types so established by said Department of Agri-

culture of the United States.

Sec. 16. An inspector of naval stores shall receive for his services in inspecting rosin including weighing, inspection and cooperage, six cents per barrel, and for inspecting turpentine, including gauging, inspection, bunging and cooperage nine cents per barrel, and no more, to be paid by the owner or party for whom the inspection is made. When any such rosin or turpentine shall be in any receptacle or package other than a barrel, the inspector for inspecting the same shall receive for his services per barrel or fraction thereof of the contents of such receptacle or package, the same fee or amount of compensation hereinbefore allowed for inspecting each barrel. An inspector shall not be obliged to inspect any article or quantity until the fee thereof shall have first been paid. * *

Sec. 20. That every person who produces, manufactures, consigns, sells, or keeps for sale, and every manufacturer, producer of, or dealer or factor in naval stores in the state of Florida shall post and keep posted a written or printed copy of this act in a public place at the still location, warehouse, yards, or other place where he shall manufacture, store or keep naval stores, and it shall be the duty of the secretary of the state to cause a sufficient number of copies of this act to be printed for public distribution, and for the purposes aforesaid. Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than \$300.00, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment in the discretion of the court.

Sec. 21. This act shall take effect upon its passage and approval by the Governor or upon becoming a law without his approval.

Approved June 5, 1915.

WOLCOTT V. NATIONAL ELECTRIC SIGNALING CO.

(District Court. D. Massachusetts. June 7, 1916.)

No. 374.

1. DISCOVERY \$==13-IN EQUITY-MATTERS AS TO WHICH DISCOVERY MAY BE OBTAINED.

In a suit in equity in a federal court to enjoin the prosecution of an action at law, complainant is not entitled to discovery from defendant as to facts equally within his own knowledge and which are material in the action at law.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 14; Dec. Dig. ا.13 شنگ

2. Courts \$\infty\$ 351—Federal Courts—Construction of Equity Rule. Equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), which permits discovery by means of interrogatories in a pending suit, while it changes the procedure, does not alter the substantive rules governing discovery in equity, nor give any right to discovery which did not previously exist.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. **€**==351.1

3. Courts \$\infty 351-Federal Courts-Construction of Equity Rule.

While equity rule 58 is not intended to permit either party to obtain disclosure of facts or documents material only to the case of the other, as to facts or documents material as well to the support as to the defense of the cause, it permits either party to interrogate.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. **€**351.1

4. Courts €=351—Federal Courts—Construction of Equity Rule.

The discovery intended by equity rule 58, like that in equity in general, is of the ultimate facts only, material to the support or defense of the cause, and not of mere evidence, or of facts tending to prove the nature of the case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. **€**==351.1

5. Courts \$\isim 351-In Equity-Matters as to Which Discovery may be OBTAINED.

Where one party to a suit in equity alleges facts as the basis of his cause of action or defense, the other party is not entitled, by means of interrogatories under equity rule 58, to compel him to testify as to such facts in advance of the hearing.

[Ed. Note,—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. **€**⇒351.1

In Equity. Suit by Darwin S. Wolcott against the National Electric Signaling Company, in which R. A. Fessenden, intervened. On motion by Fessenden to strike out interrogatories filed by Wolcott. Motion allowed.

Weil & Thorp, of Pittsburgh, Pa., and William G. Thompson, of Boston, Mass., for plaintiff.

Choate, Hall & Stewart and Brandeis, Dunbar & Nutter, all of Boston, Mass., for defendant.

Browne & Woodworth and George K. Woodworth, all of Boston, Mass., for intervener.

DODGE, Circuit Judge. The questions to be here considered arise under an intervening petition filed by Wolcott against Fessenden June 3, 1914. A motion to dismiss it was overruled October 20, 1915. The opinion herein of that date sets forth in substance the petitioner's allegations and the relief prayed for. 228 Fed. 811. Reference may be also made here, as it was in that opinion, to the decision of the Court of Appeals for this Circuit (National Electric Signaling Co. v. Fessenden, 207 Fed. 915, 125 C. C. A. 363) in the previous suit at law.

Wolcott is also plaintiff in the bill in equity against the above-named defendant company whereby these proceedings in equity were begun. Fessenden, against whom he brings this intervening petition, was allowed to become also a party complainant in the original suit by a decree herein on November 1, 1912.

His motion to dismiss Wolcott's petition having been overruled as above, Fessenden answered it October 25, 1915. Wolcott then filed these interrogatories to him November 15, 1915, and his present objections and motion to strike them out were filed November 30, 1915.

Wolcott's petition asks for relief as follows: An injunction forbidding Fessenden (1) to prosecute further his suit at law against the defendant company; or (2) to bring any other action against it upon the contracts therein involved; and (3) that all rights under said contracts of all parties therein concerned be determined by this court (i.

e., in the present suit in equity).

Exhibit E annexed to Wolcott's petition is a copy of a letter dated September 12, 1908, addressed to Col. John Firth, and signed by Hay Walker, Jr., and by Fessenden. This document was Exhibit C in the suit at law, and is printed in full at 207 Fed. 919, 125 C. C. A. 363. Fessenden claimed in his suit at law that it sets forth the terms of an agreement with the defendant company modifying a former contract or former contracts between the same parties, wherein he and Wolcott were parties of the first part. The Court of Appeals has held that any claims under it must be made by Fessenden and Wolcott jointly, and this court has held, in overruling the above motion to dismiss, that Wolcott's rights are involved in Fessenden's suit at law upon said agreement.

In his suit at law Fessenden contended and introduced evidence tending to show that, as he now alleges in paragraph 5 of his answer to this petition, he acted in Wolcott's behalf and by Wolcott's authority in entering into said agreement; also that Wolcott thereafter ratified and approved it. His answer denies, in the same paragraph, allegations in Wolcott's petition that, if said agreement was made as Fessenden claims, it was made without Wolcott's consent or approval, and allegations that assertions by Fessenden that he communicated said agreement to Wolcott after it was signed and Wolcott consented thereto are falsely made.

Fessenden further contended upon the evidence in the suit at law that, as he now also alleges in paragraph 5 of his answer, in December, 1908, a modification of some of the terms of said agreement E

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was agreed to by him, that in so agreeing he acted by Wolcott's authority, and that Wolcott thereafter ratified and approved what was thus done. His answer to this petition denies, also in paragraph 5, allegations in paragraph 7 of the petition that no such modification was ever made by Wolcott's authority or consented to or approved by him. Fessenden's declaration at law did not expressly allege any such agreement in December, 1908 (see 207 Fed. 924, 125 C. C. A. 363); but since the case was remanded he has so alleged it in an amended declaration (see paragraph 7 of the petition).

Whether or not Wolcott ever authorized, consented to, approved, or ratified the above agreements claimed to have been made on his behalf by Fessenden is therefore at issue between the parties. Wolcott alleges the negative as the principal ground for the relief he asks, and further that he neither desires, approves, nor consents to the attempt made by Fessenden to enforce any such agreements on his account, that he objects to any action or proceedings in that direction, and that the course taken by Fessenden tends to his injury and damage, all of which, so far as material, Fessenden denies.

Wolcott's interrogatories are 56 in number. Nos. 1–25, inclusive, and 32–44, inclusive, relate to the issues above indicated in substance, among the various issues which the pleadings raise. These interrogatories will be first considered.

Interrogatories 1-25 (except 1-3, inclusive, which are merely introductory) are said in the brief on Wolcott's behalf to relate to the question whether Fessenden's act in entering into the alleged contract E was previously authorized by or subsequently ratified by Wolcott. They call upon Fessenden to state upon oath in advance of the hearing (4) whether it is true that in executing Exhibit E he did not act for Wolcott; (5) if not true, under what authority he did act; (6) if under oral statements or instructions, what they were in full; (7) when each statement was made; (8) where; (9) to whom; (10) who was present when each was made: (11) if he acted under any written instrument, document or communication by or on behalf of Wolcott, what it was; (12) annexing copies, if in his possession, or otherwise making "reasonable discovery thereof"; (13) whether it is true that he had no communication with Wolcott between September 11, 1908, and January 1, 1912; (14) if not, when he had such communication; (15) where; (16) annexing, if in writing, each writing or a copy, or otherwise making "reasonable discovery thereof"; (17) whether anything was said in any of them about the "matters set forth in the intervening petition herein"; (18) what; (19) by whom; (20) whether it is true that he had no communication with Wolcott in or before September, 1908, about any action to be taken by him on Wolcott's behalf in executing Exhibit E or any similar agreement; (21) if not, when he had such communications; (22) what they were in substance: (23) whether it is true that he had no such communication with Wolcott after September, 1908; (24) if not, when he had such communications; (25) what they were in substance.

Interrogatories 32-44 are similar in character, and relate, as is said in the brief on Wolcott's behalf, to the subject of the authority, if any, from Wolcott, under which Fessenden undertook to bind Wolcott

to the alleged modification of December, 1908.

[1] Among the objections specified in the motion to strike out, that numbered 2 may be first considered. It is that the above interrogatories relate to facts and documents clearly available to both parties. That such is the fact is obvious; what passed between Wolcott and Fessenden, orally or in writing, is clearly within the knowledge of both so far as appears. No document is alleged to be within Fessenden's exclusive control, nor any fact inquired about to be within his exclusive knowledge. That a bill in equity is not maintainable for the discovery of that regarding which the plaintiff has the same means of information as the defendant is apparently conceded on Wolcott's behalf; and I think rightly, at least when, as here, the suit is to be in a federal court, is not one wherein discovery alone is sought, and is brought for the purpose of withdrawing from a court of law matters of strict legal cognizance. See Brown v. Swann, 10 Pet. 497, 9 L. Ed. 508, and the comments thereon in Colgate v. Compagnie, etc. (C. C.) 23 Fed. 82, 84, 85. There are also strong grounds for believing that the above result must follow from the normal and natural meaning of the term "discovery" (whatever it may have been made to include for the purposes of statutes enacted in other jurisdictions), and that it is essential to discovery properly so called that there be something exclusively or peculiarly within the knowledge or control of the party required to disclose or produce it. See Rosenberger v. Shubert (C. C.) 182 Fed. 411, 418, where reference is made to definitions; The Eros, 224 Fed. 194. No doubt in most cases such exclusive or peculiar knowledge or control would be presumable from the fact that disclosure was being sought from an opposite party. Here the pleadings have made it clear that no such situation exists.

[2] It is contended, however, that no such limitation applies to discovery sought, as by these interrogatories, under rule 58 of the new Equity Rules (198 Fed. xxxiv, 115 C. C. A. xxxiv), but, on the contrary, is negatived by the language of the rule itself, as well as by the authorized interpretation of rules or statutes providing for inter-

rogatories in other jurisdictions.

But, so far as its nature and scope are concerned, I see no reason for regarding the "discovery" to which the title and terms of rule 58 refer as in any respect different from the discovery previously obtainable, though by different methods, according to the principles of equity jurisprudence as recognized in the federal courts. It is the practice only of those courts, in equity cases, with which the new rules purport to deal or could deal. Rule 58 is understood to deal with discovery when sought in a pending equity suit praying relief, by a party to the suit, and for the purposes of the suit. Under the former rules (41–44) the only discovery obtainable in such cases was that to be had by the party bringing the bill, or a cross-bill, and by interrogatories in the bill or cross-bill. The present rule 58 permits either party to obtain it from the other, and by interrogatories independent of the pleadings. The discovery so obtainable is to be of facts or documents material to the support or defense of the cause; but as to such facts

or documents it is still only discovery in equity as formerly understood which is obtainable. The procedure has been altered, but not the substantive rules applying to discovery, nor is any right to discovery given by the new rule which did not formerly exist. This view is understood to have been taken by Judge Brown in a recent case in the Rhode Island district (Speidel Co. v. Barstow Co., 232 Fed. 617), in an opinion dated April 18, 1916. See, also, J. H. Day Co. v. Mountain City Co., 225 Fed. 622, 623.

As to the authorized interpretation of rules or statutes providing for interrogatories between parties in other jurisdictions, I am unable to regard them, speaking generally, as sufficient to affect the conclusions above indicated. In other jurisdictions the limits of discovery obtainable by interrogatories, whether at law or in equity, or under systems not preserving that distinction between the two which the federal courts are required to observe, have been very generally enlarged by statute, as they have not been by any federal statute. It could not be said of the new rules, as was said of Rev. Laws Mass. c. 173, § 57, in Gunn v. N. Y., etc., R. R., 171 Mass. 417, 420, 50 N. E. 1031, 1032, that the discovery provided for is not necessarily "limited to cases in which it would be granted in equity." That the new rules have enlarged the meaning of the term as contended, I am not prepared to believe.

I therefore regard the above objection (2) as well taken.

[3] Objection 1 is that disclosure of facts and documents material to the defense of Wolcott's case is sought, not of facts material to its

support.

While rule 58 is not understood as it do permit either party to obtain disclosure of facts or documents material only to the case of the other, as to facts or documents material as well to the support as to the defense, I think it permits either party to interrogate (but subject to the above limitations, if I am right in holding that they apply generally to all discovery under the rule). Such facts or documents the interrogated party cannot refuse to disclose merely because they are also material on his behalf. Indianapolis Gas Co. v. Indianapolis (C. C.) 90 Fed. 196; J. H. Day Co. v. Mountain City Co., 225 Fed. 622. Of the facts and documents here inquired about as above, many, if not all, if material to the defense, might also be regarded as material to the support of Wolcott's case.

[4] Objection 3, which is that disclosure of evidence instead of facts is sought, and objection 4, that disclosure of Fessenden's entire case to Wolcott before the latter has made out a prima facie case

would result, seem to me objections of greater weight.

The disclosure intended by rule 58 is to be, in my opinion, of the ultimate facts only, material to the support or defense of the cause (see rules 25, 30), and not of mere evidence, or of facts tending to prove the nature of the case or the facts upon which it is based. This is a limitation always understood as applying to discovery in equity, and I find no reason to suppose that it has been removed by rule 58. Bispham, Principles of Equity, § 561. And see, since the adoption of the new rules, P. M. Co. v. Ajax, etc., Co., 216 Fed. 634, 636;

Blast Furnace, etc., Co. v. Worth, 221 Fed. 430; J. H. Day, etc., Co. v. Mountain City Co., 225 Fed. 622, 624.

By these interrogatories Wolcott, having full knowledge as above shown, from the proceedings in the suit at law and the pleadings in the present case, what the ultimate facts are which Fessenden asserts as the basis of the recovery sought by him from the defendant company, bases the present suit upon a denial that those facts are what Fessenden asserts them to be. He then begins his interrogatories with an inquiry whether the truth about them is not the contrary of what Fessenden has asserted as above. Anticipating the negative answer which Fessenden, if compelled to answer, must give, or admit that such assertions are false, he follows this with questions such as he might thereupon put to Fessenden in cross-examination, were Fessenden testifying, at the trial either of the suit at law or of the present case, in support of the facts he has asserted as entitling him therein to recover or defend.

[5] This I cannot regard otherwise than as an attempt to compel a sworn statement by Fessenden, before the trial, of the evidence upon which he expects to rely and of facts which, according to Fessenden, tend to establish the facts upon which his case is based. Such an attempt seems to me forbidden by the above limitations upon the scope of discovery in equity. Fessenden has the right, of which he cannot justly be deprived, to give his own testimony in person before the court which is to pass upon his claim, or in the present suit his defense. If he so gives his testimony in defense, he has a right to give it after, and not before, Wolcott's testimony has been laid before the court. A construction of rule 58 which would deprive him of said rights seems to me a construction to be avoided. I am unable to believe rule 58 intended to afford a means of such deprivation, or that its use for such a purpose can rightly be permitted. It was because of the similar limitation upon the right of inquiry contained in Pub. Stats. Mass. c. 167, §§ 49-56, that the court in Davis v. Mills, 163 Mass. 481, 40 N. E. 852, held the defendant, sued on an alleged oral contract whose existence he denied, not entitled to require the plaintiff, by interrogatories before the trial, to repeat the conversation wherein the alleged contract was claimed to have been made.

Admiralty rules 27, 32 (29 Sup. Ct. xlii), permit either party to interrogate the other before trial, though the term "discovery" is not used. Rule 32 permits a defendant to interrogate "touching any matters charged in the libel or touching any matters of defense set up in the answer." With regard to such interrogatories I have held that, though they are not confined within the limits imposed in the state practice, they are not to be used for the purpose of cross-examining regarding the truth of allegations made in the opposite party's pleadings. The Baker Palmer, 172 Fed. 154, 155. And see Erie, etc., Co. v. Great Lakes, etc., Co., 184 Fed. 349. Such cross-examination is here evidently the main purpose of the interrogatories under consideration; it is not merely an incidental result of interrogatories otherwise proper. In my opinion objections 3 and 4 are well taken.

Objection 5 relates to the remaining interrogatories, 26-31 and 45-

56, inclusive, and is that they "seek disclosure of matters outside the issues raised by the pleadings." They inquire as to the facts concerning the making of Exhibit E and the alleged agreement modifying it in December, 1908, but without raising the question of Fessenden's authority to act for Wolcott therein. The latter question is said, on Fessenden's behalf, to be the sole issue raised by the pleadings. This can hardly be said, whether or not it is the sole issue properly raised, because the petition alleges and the answer denies that Fessenden's assertions regarding the making and modification of Exhibit E are untrue. But the above interrogatories also amount to a cross-examination of Fessenden upon his assertions above referred to, and seem to me open to the objections 3 and 4 above held valid, like the interrogatories first considered and for similar reasons.

As to the suggestions that a main purpose of rule 58 is to shorten trials by obtaining admissions which may render evidence in court unnecessary, this consideration seems to me in any case subordinate to those which have prevented me from considering these interrogatories proper under the rule. I am also unable to believe that the trial of such a case as this would be either shortened or simplified by having Fessenden's testimony before the court in two separate forms, such as would result from requiring answers to these 56 interrogatories.

The motion to strike out is therefore allowed as to all the interrogatories.

ALLEN v. WALKER & GIBSON.

(District Court, N. D. New York. August 17, 1916.)

1. TRADE-MARKS AND TRADE-NAMES \$= 34-Assignment-Validity.

A trade-mark cannot be assigned, disconnected from the business and good will with which it has been connected.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 38; Dec. Dig. ⇐ 34.]

2. Trade-Marks and Trade-Names @==33-Assignment-Validity.

The owner of a business and trade-mark connected therewith made an assignment of the trade-mark alone to his wife, who at once assigned it to a corporation, at the same time that her husband transferred to the corporation the business and good will, and as part of the same transaction. Held, that the transfers, taken together, were sufficient to vest the corporation with title to the trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 37; Dec. Dig. ← 33.]

3. Trade-Marks and Trade-Names 4-3(1), 59(5)—Validity of Trade-Mark
—Arbitrary Name—Infringement.

The word "Cedarine" held an arbitrary word, and valid as a trade-mark for a furniture polish; also held infringed by the name "O-Cedar," applied to a similar and competing article.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4, 71; Dec. Dig. ६=3(1), 59(5).]

4. TRADE-MARKS AND TRADE-NAMES 57-INFRINGEMENT.

It is not necessary, to constitute infringement of a trade-mark, that the similarity should be such as to deceive a cautious purchaser; but it is sufficient if it would deceive the ordinary unwary purchaser.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 65; Dec. Dig. ६ 57.]

o. Trade-Marks and Trade-Names \$==11-Validity.

Complainant obtained a patent for a furniture polish, and about the same time registered the word "Cedarine" as a trade-mark for a furniture polish. He never made nor sold the patented composition to any extent, but made a different polish, which for many years was sold under the name "Cedarine" as a trade-mark, and which was never marked as patented, although in one pamphlet, issued some years afterward to advertise Cedarine, he made the statement incidentally that it was patented. Held, that he was not concluded by such single statement, and that the trade-mark, not having been applied to the patented article, but to a different one, did not become open to the public on the expiration of the patent.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 15; Dec. Dig. &==11.]

6. TRADE-MARKS AND TRADE-NAMES 5-86-SUIT FOR INFRINGEMENT.

A complainant, who commenced suit for infringement of his trade-mark within two years after he had knowledge of the infringement, so far as appeared, *held* not barred by laches of the right to an injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 95; Dec. Dig. ⊗ S6.]

7. TRADE-MARKS AND TRADE-NAMES \$\iiii 45\to Limitation by Foreign Registration.

That complainant, in order to obtain registration of the arbitrary word "Cedarine" as a trade-mark in Great Britain, was required to, and did, disclaim any right to the exclusive use of the word "Cedar," does not affect his rights, nor limit the scope of his trade-mark in the United States.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 53, 59; Dec. Dig. € 45.]

8. TRADE-MARKS AND TRADE-NAMES \$\sim 85(1)\$—Infringement—Right to Relief in Equity.

A complainant *held* not chargeable with fraudulent conduct or false representations on his label, which deprived him of the right to relief in equity against infringement of his trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. ⇐ 85(1).]

9. TRADE-MARKS AND TRADE-NAMES ⊕98—SUIT FOR INFRINGEMENT—RIGHT TO ACCOUNTING.

Defendants, who without misrepresentations sold an article under trade-mark which infringed that of complainant for two years before the commencement of suit, under such circumstances that their sales should have been known to complainant, and without notice of infringement, should not be required to account for profits or damages.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. € 98.]

In Equity. Suit by George H. Allen against Walker & Gibson. On final hearing. Decree for complainant.

Suit in equity to restrain alleged infringement of complainant's registered trade-mark "Cedarine" by the use by defendant of the name "O-Cedar" and for an accounting. The goods dealt in and sold by each party, and to which such names respectively are applied, are similar in character; both being a furniture polish.

Martin & Jones, of Utica, N. Y., for complainant.

Rosendale, Hessberg, Dugan & Haines, of Albany, N. Y. (Charles W. Hills, of Chicago, Ill., and Albert Hessberg, of Albany, N. Y., of counsel), for defendant.

RAY, District Judge. In 1886 the complainant, George H. Allen, of Clinton, N. Y., began the business of manufacturing and selling a furniture polish at that place, and he placed on the bottles and containers a label with certain descriptive words and the trade-mark or name "Cedarine." So far as appears, he was the first to coin and use this word "Cedarine." He built up quite an extensive business, and became quite widely and extensively known as "Cedarine Allen," a name which he adopted and used in various ways in such business and in advertising, and in which he seems to take pride. June 7, 1887, on his application, there was registered and issued to said George H. Allen a trade-mark. In his statement and declaration he said:

"My trade-mark consists of the word 'Cedarine.' This has generally been arranged or inclosed within a diamond-shaped figure, which in turn is surrounded by a larger figure of similar shape; the sides of these figures being arranged parallel with each other."

He also describes the use and placing of certain words between the lines of these figures, but says:

"These words are printed in small type, while the word 'Cedarine' is formed of large letters, to make it prominent."

He makes other remarks, and says:

"The essential feature of which [trade-mark] is the arbitrary word 'Cedarine,'"

He also says therein:

"This trade-mark I have used continuously in my business since November 1, 1886. The class of merchandise to which this trade-mark is appropriated is polishes, and the particular description of goods comprised in said class on which I use it is furniture and plano polish. It is my practice to apply my trade-mark to the bottles, boxes, or packages containing the polish by means of suitable labels on which it is painted. The word and trade-mark are sometimes also blown into the bottles containing the polish."

In 1891 Allen incorporated this business in the state of New York under the name "Cedarine Manufacturing Company," with an authorized capital stock of \$25,000. Allen was manager of the business of this corporation until 1897, when a corporation was organized under the laws of the state of Michigan, at Hastings, in that state, under the name Cedarine Manufacturing Company, and this corporation took over a furniture manufacturing plant at that place, and this corporation took orders for furniture polish bearing the name "Cedarine"; but the goods were manufactured and put up for market at Clinton, N. Y. At about this time all the stockholders of the New York corporation turned over their stock therein to complainant, and he in their behalf, as well as his own, assigned the furniture polish business at Clinton, N. Y., including the good will, to said Michigan corporation. March 28, 1898, the Michigan corporation transferred the

said trade-mark, and also all the property at Clinton, N. Y., connected with the manufacture of Cedarine, to the complainant here.

In May or June, 1898, Allen returned to Clinton, N. Y., where until October of that year he conducted this furniture polish business, using the trade-mark name "Cedarine." At this time the business was again incorporated under the laws of the state of New York, but under the name "Cedarine Allen Company." When the Michigan corporation went out of business, March 28, 1898, a written transfer to George H. Allen of the business and this trade-mark was executed and signed by "George H. Allen, Secy." He was the secretary of that corporation, and while the defendant here vigorously attacks this transfer, I think it was sufficient under all the circumstances to transfer to Allen, not only the business, but the trade-mark, and that he again became its owner. It does not appear that there was any formal dissolution of this Michigan corporation, and defendant contends that it went out of business and abandoned to the public all its rights to this trade-mark; but I do not think this contention is sustained. These transactions were somewhat informal, but there is no evidence to question or dispute the statement of the complainant, or the plaintiff's exhibits, bearing on this question of the ownership of

At the time of the incorporation in October, 1908, Allen transferred to his wife this registered trade-mark by an instrument in writing, but which does not in terms include the good will of the business. This certificate of incorporation stated:

"The object and nature of the business for which this corporation is to be formed is the manufacture and sale of Cedarine furniture polish, and other polishes, liquid glue, furniture, and advertising novelties."

M. E. Allen subscribed for 19,760 shares of stock in this Cedarine Allen corporation, and in consideration of \$50,000 of the stock she assigned to such corporation this registered trade-mark No. 14,482. Allen himself subscribed for 20,000 shares of the stock and conveyed the business to the new corporation. The transfer from George H. Allen to M. E. Allen reads as follows:

"Whereas, I, George H. Allen, of Clinton, county of Oneida, and state of New York, did obtain letters patent of the United States for the registration of a certain trade-mark for furniture polish, which letters patent are No. 14,482, and bear date the 7th day of June, 1887; and

"Whereas, I, the said George H. Allen, am now the sole owner of said letters patent and of all rights under the same; and

"Whereas, M. E. Allen, of Clinton, county of Oneida, and state of New York, is desirous of acquiring the entire interest in the same:

"Now, therefore, to all whom it may concern, be it known that for and in consideration of the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, and in consideration of natural love and affection, I, the said George H. Allen, have sold, assigned, and transferred, and by these presents do sell, assign, and transfer, unto the said M. E. Allen all my right, title, and interest in and to the said trade-mark for furniture polish, and in and to the letters patent therefor aforesaid, the same to be held and enjoyed by the said M. E. Allen for her own use and behoof, and for the use and behoof of her legal representatives, to the full end of the term for which said letters patent are granted, as fully and entirely as the same would have been held and enjoyed by me, had this assignment and sale not been made.
"In testimony whereof, I have hereunto set my hand and affixed my seal at

Clinton, in the county of Oneida, and state of New York, this 19th day of October, A. D. 1898.

"In the presence of
"J. T. List.
"D. W. Allen."

Geo. H. Allen. [L. S.]

The transfer from M. E. Allen to the Cedarine Allen Company reads as follows:

"Whereas, George H. Allen, of Clinton, county of Oneida, and state of New York, did obtain letters patent of the United States for the registration of a certain trade-mark for furniture polish, which letters patent are numbered 14.482 and bear date the 7th day of June. 1887: and

bered 14,482 and bear date the 7th day of June, 1887; and "Whereas, the said George H. Allen, by a due and proper instrument in writing has sold and assigned his said patent, and his rights in, to, and under the same, unto Mary E. Allen, of Clinton, county of Oneida, and state of

New York; and

"Whereas, I, the said Mary E. Allen, am now the sale owner of said patent

and all rights under the same; and

"Whereas, the Cedarine Allen Company, of Clinton, county of Oneida, and state of New York, is desirous of acquiring the entire interest in the same:

"Now, therefore, to all to whom it may concern, be it known that for and in consideration of the sum of \$50,000 to me in hand paid, the receipt of which is hereby acknowledged, I, the said Mary E. Allen, have sold, assigned, and transferred, and by these presents do sell, assign, and transfer, unto the said Cedarine Allen Company my entire right, title, and interest in and to the said trade-mark for furniture polish, and in and to the letters patent therefor aforesaid, the same to be held and enjoyed by the said Cedarine Allen Company for its own use and behoof, and for the use and behoof of its legal representatives, to the full end of the term for which said letters patent are granted, as fully and entirely as the same would have been held and enjoyed by me, had this assignment and sale not been made.

"In witness whereof, I have hereunto set my hand and affixed my seal at Clinton, in the county of Oneida, and state of New York, this 24th day of October, 1898.

"In the presence of

"Katie Smyth. "D. W. Allen."

M. E. Allen. [L. S.]

The transfer from George H. Allen to the Cedarine Allen Company reads as follows:

"Know all men by these presents, that I, George H. Allen, of Clinton, county of Oneida, and state of New York, in consideration of the sum of \$7,385 to me in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the assuming of obligations of the business of Cedarine Allen by the Cedarine Allen Company, have sold, transferred, assigned, and set over, and hereby do sell, transfer, assign, and set over unto the Cedarine Allen Company, of Clinton, N. Y., all my right, title, and interest in, to, and under all the accounts appearing on my books to my credit as Cedarine Allen; also all stock furniture, and machinery now at my place of business in Clinton, N. Y., as specified in the schedule hereto annexed and made a part hereof; also the good will of the business conducted by me under the name of Cedarine Allen, to have and to hold the same unto the said Cedarine Allen Company, its successors and assigns, as fully as I would own, hold, and enjoy the same, had these presents not been made.

"In witness whereof, I have hereunto set my hand and seal at Clinton, N. Y., this 24th day of October, 1898. Geo. H. Allen.

"State of New York, County of Oneida-ss.:

"On this 29th day of October, 1898, before me personally appeared George H. Allen, to me known to be the same person who executed the foregoing assignment, and duly acknowledged that he executed the same.

"H. W. Mahan, "Notary Public, Oneida County, N. Y."

[1] I think this trade-mark was effectively transferred to the Cedarine Allen Company. The defendant contends the trade-mark could not be transferred independently of the business, and that its transfer to M. E. Allen, and by her to Cedarine Allen Company, George H. Allen transferring the business direct to that company for another consideration, carried no interest in or ownership of the trade-mark. I think it well settled that the assignment of a trade-mark, disconnected from the business and good will with which it has been connected and used, cannot be made. Paul on Trade-Marks, par. 97, p. 162, and paragraph 117, p. 228; Crossman v. Griggs, 186 Mass. 275, 71 N. E. 560; Falk v. American West Indies Co., 180 N. Y. 445, 73 N. E. 239, 1 L. R. A. (N. S.) 704, 105 Am. St. Rep. 778, 2 Ann. Cas. 216; Lea v. N. H. S. M. Co. (C. C.) 139 Fed. 732; Bulte v. Igleheart, 137 Fed. 492, 70 C. C. A. 76; Carroll v. Duluth, etc. (C. C.) 232 Fed. 675; The Law of Trade-Marks, Hazeltine, 218.

[2] But here, in the manner described, both the trade-mark and the business and good will were transferred to the Cedarine Allen Company, and it seems to have been all a part of one transaction and that the trade-mark was transferred "in connection with" the business and the good will thereof and that such was the intent and purpose. The Cedarine Allen Company assumed ownership and applied for and obtained a new trade-mark registration, both in the United States and in England. When Allen transferred the business to the corporation, he passed title to the trade-mark, even if he did not lawfully assign it to M. E. Allen. In Congress & Empire Spring Co. v. High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82, it was held that the name "Congress" as a valid trade-mark on water of a particular spring passed with the purchase of the spring, without any special mention of either the good will or trade-mark. See Kidd v. Johnson, 100 U. S. 617, 620, 25 L. Ed. 769; Peck Bros. & Co. v. Peck Bros., 113 Fed. 291, 298, 51 C. C. A. 251, 62 L. R. A. 81; Brown Chemical Co. v. Meyer, 139 U. S. 540, 547, 548, 11 Sup. Ct. 625, 35 L. Ed. 247; Richmond Nervine Co. v. Richmond, 159 U. S. 293, 300, 16 Sup. Ct. 30, 40 L. Ed. 155.

April 20, 1905, the Cedarine Allen Company filed an application for the registration of the trade-mark "Cedarine," and it was registered in the United States August 22, 1905. July 29, 1899, the Cedarine Allen Company filed an application in Great Britain for the registration of the trade-mark "Cedarine," and it was registered September 13, 1899, on the applicant filing a disclaimer, viz., "No claim is made to the exclusive use of the word 'Cedar.'" The statement and declaration for this trade-mark, in the United States was as follows:

"To All Whom It May Concern:

"Be it known that the Cedarine Allen Company, a corporation duly organized under the laws of the state of New York, and located in the village of Clinton, county of Oneida, in said state, and doing business in said village and elsewhere, has adopted for its use a trade-mark, of which the following is a full, clear, and exact description.

"The trade-mark consists of the word 'Cedarine.'

"This trade-mark has been continuously used by said corporation and those from whom it derived its title since January 1, 1887.
"The class of merchandise to which this trade-mark is appropriated is

cleaning and polishing preparations, and the particular description of goods comprised in said class upon which the said trade-mark is used is furniture polish. It is usually displayed on cans, kegs, bottles, and other receptacles for containing the goods, by placing thereon a printed label on which the described trade-mark is shown, although it may be stenciled or printed or otherwise affixed to any receptacle containing the goods, or it may be placed on tags attached to receptacles containing the goods.

Cedarine Allen Co.,

"By Geo. H. Allen, Vice-Pres.

"Declaration.

"State of New York, County of Oneida-ss.:

"E. D. Hunter, being duly sworn, deposes and says that she is the secretary and treasurer of the Cedarine Allen Company, the applicant named in the foregoing statement; that she believes the foregoing statement is true; that she believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of her knowledge and belief, has the right to use said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several states of the United States, and particularly between New York and New Jersey and Pennsylvania, and between the United States and foreign nations, and particularly with the Dominion of Canada; and that the description, drawing, and specimens presented truly represent the trade-mark sought to be registered.

E. D. Hunter.

"Subscribed and sworn to before me, a notary public, this 12th day of May,

1905.

"[L. S.]

James H. Merwin, "Notary Public, Oneida Co., N. Y."

The Cedarine Allen Company continued business until September, 1911, when its assets were sold at auction to said George H. Allen, and a written transfer was given of the assets, and December 6, 1911, a formal written transfer of the trade-mark was made to complainant. The Cedarine Allen Company then ceased to do business and closed it up, but Allen has continued the business and the use of the trade-mark. From 1886 down to 1905 no one, except this plaintiff and such corporations, in which Allen was majority stockholder, used the word "Cedarine" on or in connection with furniture polish.

[3] The complainant, and these corporations with which he was connected in business as stockholder and officer, have spent considerable sums of money, running into thousands of dollars, in advertising this Cedarine furniture polish yearly in a great extent of territory, some years more and some years less, and have done quite a large business in Cedarine, varying in amount from year to year. I discover no substantial evidence of intent to abandon the trade-mark, and I see no reason to question its validity. The word "Cedarine" seems to be an arbitrary word. It is not found in the dictionary. We have "cedar," name of a tree, and "cedarn," compound of "cedar" and "n" for "en" meaning "of cedar; made of cedar." The word "Cedarine" had no meaning until complainant coined the word and gave it a meaning. Through and by the use of it this word came to signify his furniture polish.

Does the word "O-Cedar" infringe?

In the compound of complainant, forming his "Cedarine Stove Polish," there can be no substantial doubt that he uses cedar oil in small quantities as one of the ingredients. Many witnesses who know speak on this subject to the effect that cedar oil is always put in. I think the furniture polish would be just as good, and serve all the purposes of a furniture polish, if no cedar oil were used in compounding it. But this may not be so, and the odor of cedar may not be immaterial.

[4] In law the trade-marks are the same if, when applied to the same class and kind of goods, they so clearly resemble each other as to deceive the ordinary purchaser, who gives such attention to the same as the ordinary purchaser usually gives, and cause such purchaser to purchase the one thing, supposing it to be the other. It is not necessary that the similarity must be such as to deceive and mislead the cautious purchaser. It is sufficient to show the similarity is such as to deceive the ordinary and unwary purchaser. The evidence in this case shows that, with both "Cedarine" and "O-Cedar" placed on the market, persons calling for "Cedarine" are given "O-Cedar" and told by the seller that it is the same. "Cedar" is what gives the name its sound, whether we call for "Cedarine" or "O-Cedar." There is no evidence that the manufacturer of O-Cedar, by its salesmen or otherwise, has instructed or authorized those who deal in O-Cedar to pass it off as Cedarine, or inform purchasers that it is the same as Cedarine; but it is shown that the dealers understood it to be the same, and so inform purchasers, who accept it for Cedarine. Therefore purchasers get O-Cedar when they call for Cedarine, and the complainant loses the sale of Cedarine, and his business is injured.

O-Cedar is made and put on the market by the Channel Chemical Company, of Chicago, Ill., and it is evident that company is participating more or less in the defense. The defendant is a dealer, a seller, and has agents out covering a large part of the state of New York, and extends its business into Pennsylvania and a part of New England. It is evident that selling this furniture polish, made by this complainant, under the name and with the trade-mark thereon, "Cedarine," brought it into general notoriety under that name, and it would quite naturally be known as a cedar furniture polish. With this condition existing, for a rival in the business of manufacturing and selling furniture polish to adopt and use the name "O-Cedar" would excite suspicion, to say the least, that the intent and purpose was to get as close as possible to the name already in use without adopting it absolutely, and appropriate the benefits of the existing name and advertising done and some of the established trade. The word "Cedarine" is not descriptive of the complainant's goods, nor is "O-Cedar" descriptive of the furniture polish sold by the defendant and made by Channel Manufacturing Company. The words give no reasonably accurate or distinct knowledge as to the character and composition of either compound. Keasbey et al. v. Brooklyn Chemical Works, 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623.

In American L. P. Co. v. Gottlieb & Sons (C. C.) 181 Fed. 178, "Knox-all" was held to infringe "Beats-all." In Stephano v. Satmatopoulos et al. (D. C) 199 Fed. 451, "Radames" was held to infringe "Rameses." In this last case Lacombe, C. J., said:

"The only question is: Will confusion be likely to result from the use of the name defendants have chosen?" He then referred to the fact that both words are pronounced with the emphasis on the first syllable and said:

"Assuming that a person, even of average intelligence, who has smoked a cigarette given him by a friend and found it pleasing, is informed that it is the 'Ram'-es-es' brand, it seems a not unreasonable supposition that he might accept from a dealer a box which he is assured is of the 'Rad'-am-es' brand, believing it to be the same! To me, at least, this seems so likely to occur that infringement of complainants' trade-mark seems obvious."

Here consumers have used "Cedarine" furniture polish, and are pleased with it, and desire to purchase it, and call for it. They are given "O-Cedar." "Cedar" is the controlling word, as the name strikes the eye in both names when seen, as it is when it strikes the ear when pronounced. It seems to me very clear that confusion is not only liable to arise, but would arise. It is self-evident. Take the first case cited "Knox-all" versus "Beats-all." The general idea is the same, although there is no similarity in sound and appearance between "knox" and "beats," and Judge Learned Hand said:

"The second and third objections I shall consider together. I have no difficulty in finding that the phrase 'Knox-all' is an infringement of the phrase 'Beats-all.' There is no such limitation as the defendant puts upon the infringement of a trade-mark; i. e., that the similarity must go only to the eye and ear. The question cannot be treated in any such technical manner, for always the substantial question is whether the defendant is likely to steal the complainant's trade by the use of the trade-mark in question. I am quite satisfied in this case that there is such similarity between the two phrases as would readily lead in the mind of customers to confusion; a case in point is the infringement of 'Keepclean' by 'Sta-Kleen.' Florence Manufacturing Company v. J. C. Dowd & Co. (C. C. A.) 178 Fed. 73. There are many other decisions in the books which show that it is not alone similarity to the ear or eye which constitutes infringement."

In Northwestern C. M. Co. v. Mauser & Cressman (C. C.) 162 Fed. 1004, "Ceresota" was held to infringe "Cressota." In Stamford, etc., v. Thatcher, etc. (D. C.) 200 Fed. 324, "Messmate" was held to infringe "Shipmate." There is no similarity in either appearance or sound between "ship" and "mess," but the controlling word in the name is "mate," as here it is "cedar." In Elliott Varnish Co. v. Sears, Roebuck & Co. (D. C.) 221 Fed. 797, "Roof Leak" is held to be infringed by "Never Leak." In this case the idea conveyed is not the same, but "leak" is the controlling word, as there is no similarity in appearance or sound between "roof" and "never."

"Cottoleo" was held to infringe "Cottolene" in N. K. Fairbanks Co. v. Central L. Co. (C. C.) 64 Fed. 133, as applied to a substitute for lard; "Chefolene" was held to infringe "Cottolene," as applied to such substitute, in N. K. Fairbanks Co. v. Ogden Packing & Provision Co. (D. C.) 220 Fed. 1002. In Lambert Pharmacal Co. v. Bolton Corporation (D. C.) 219 Fed. 325, "Listogen" is held to infringe "Listerine"; and in W. A. Gaines & Co. v. Turner-Looker, 204 Fed. 553, 123 C. C. A. 79, the words "Golden Heritage" are held to infringe the word "Hermitage." Many other cases might be cited, showing clearly that under the authorities "O-Cedar" is a clear infringement of "Cedarine."

[5] The defendant urges the defense of laches, and also claims that the complainant patented his furniture varnish and gave to it this

name "Cedarine," by which the patented article came to be generally and universally known; that the patent expired prior to the commencement of this action, and that the name and trade-mark went with the patented compound, to which the name was applied to the public. The complainant contends that his statement, made by him at one time, to the effect that he "invented" the furniture polish which he had put on the market, and had sold and was selling as "Cedarine," and to which he had given that name, was a mistake or error made in the zeal of advertising, and that in fact his patented compound was not his "Cedarine," but a different compound or composition, and that "Cedarine" was never patented. In 1900 the complainant put out an advertising pamphlet, called "A Commercial Pilgrim, or Around the World with Cedarine Allen." It contains over 115 pages of printed matter copiously illustrated, and is filled with extravagant and untrue statements, not intended or calculated to deceive, however, but evidently designed to attract attention to Allen and to his furniture polish. This pamphlet contains the following:

"This need of money to the party interested is always felt to be a nuisance, but it's a good thing. It was the connecting link in my case that brought together a world's need and its remedy.

"Needing the money most urgently, and my job not satisfying the need, I invented Cedarine furniture polish which was what the world was groping in

darkness for, and didn't know it.

"Ordinarily it would be a piece of egotism for a man to write in such a strain as the above. But what can a fellow do? There's the world's need, there's Cedarine furniture polish, and I invented it. But I don't want to boast. I merely want to state the simple facts.

"I know that a sweet modesty should permeate my being, and that I should clothe myself in all humility, when I consider that the inspiration of Cedarine furniture polish came to me (and that I got it patented). It might

have come to some one else.

"From the coasts of Maine to the Keys of Florida, from Puget Sound to Mexico, and in all the land between, furniture dealers to whom I had intrusted the vending of the precious stuff (I sold it to them at a stipulated price per gross) came to know it and to know me.

"But in later life, as I traveled up and down the land, calling upon the trade and speaking in gentle praise of my Cedarine furniture polish, they got

to calling me 'Cedarine-Cedarine Allen.' I've often wondered why."

Prior to this, and May 21, 1889, Allen had applied for and obtained letters patent No. 403,715, with a single claim, viz.:

"The herein described composition of matter to be used for furniture polish." consisting of oil of cedar, linseed oil, and turpentine in substantially the proportions specified."

Originally in the specifications Allen stated that his application was for the combination of the aromatic oil of cedar with a suitable vehicle to render the compound aromatic and serve as a moth preventive. Such a claim was rejected, and the patent was cut down and limited to the claim above quoted. The compound or composition actually made and sold by Allen is not linseed oil, but a petroleum product, and that which Allen has put up, compounded, and sold for years, and since the patent issued, as and under the name of "Cedarine," is not the patented article or compound. In short, even if Allen intended, at the time of obtaining his patent and registering his trade-

mark, to make and sell the patented composition of matter as "Cedarine," he never did, and the name "Cedarine" became attached to a different product or composition. For this reason I am of the opinion this trade-mark did not go to the public with the expiration of the patent on a composition of matter to which the name never in fact attached. There is no evidence that the patented compound was ever manufactured and put on the market, to any extent at least, and several witnesses testified it was not. True, the patent issued May 21, 1887, No. 403,715, and the registration of the trade-mark was effected June 26, 1887, and the statement in the pamphlet quoted was made and published to the world in 1900, about three years later; but Allen was not then making or selling the patented article, but the compound to which the name "Cedarine" actually attached. I do not think Allen can be or should be concluded by that random statement in the pamphlet under such circumstances. It does not appear that Allen ever marked the "Cedarine" actually put on the market and sold as such "Patented," or claimed that it was patented, except once, as set forth in the pamphlet. This case is not, therefore, like or within Horlick's Food Co. v. Elgin Milkine Co., 120 Fed. 264, 56 C. C. A. 544, or Yale & Towne Mfg. Co. v. Ford, 203 Fed. 707, 122 C. C. A. 12. where it was held:

"Where the maker of a patented article marked it as patented, and also designated it by an arbitrary name by which it became known to the public, on the expiration of the patent other manufacturers, having the right to make the article, had also the right to use the name, provided they took proper care to prevent their product from being confused with that of the original maker."

There can be no quarrel with the well-established principle that where a person invents a machine or a composition of matter, and makes it and puts it on the market, marked "Patented," and attaches thereto a trade-name, and goes to the extent of registering this name as his trade-mark, and it is used solely for that patented article or composition, and the name becomes inseparably connected with such patented thing, so as to indicate a patented article or thing, on the expiration of the patent it becomes public property, and the public may also use the name in connection with that article, which it is free to make and sell. But here the complainant, so far as appears, and there is substantial evidence he did not, did not make or sell his patented composition, but another, which was not marked or claimed to be patented (except in the single case of the pamphlet), and hence the trade-mark never became associated with the patented composition.

In the Yale Case, supra, the court said:

"To us it is clear the commercial value of a patent is the creation of a public desire for its product. And if the invention is such that its product has acquired a distinctive name, then the public, when its time of enjoyment comes, cannot enjoy to the full the freed invention, unless coupled thereto is the right to use the name by which alone the invented article is known. Nor is there injustice in this, for, when the real situation is analyzed, it will be seen that by enjoying the monopoly of his patent for a series of years the patentee impliedly agrees, as maker and seller of the invented article, that, when his patent expires, he will not only surrender to the public the mechanical right to duplicate the article, but also the distinctive name the public

has appropriated to the patented article; for it is apparent that the public cannot use the invention to the full without having the incidental right to vend its product by the distinctive name which the public has given it. In other words, taking this case, the public cannot now enjoy an untrammeled right to make the Triplex block of the 17-year monopoly, unless it has the incidental right of saying we now make and sell a Triplex block. Any other construction would make the patent a mere incident to trade-names, and would nullify the basis which alone justifies the grant of patented rights, namely, the right, on the expiration of the patent, to the full commercial use of the freed invention."

In the Horlick Case, supra, the headnote is:

"Where the manufacturer of an article, to which he gave a name, by which it became known, placed upon the packages in which it was sold to the public a notice in the usual form that the article was made under a patent, the right to the exclusive use of the name as a trade-name expires with the expiration of the patent, whether the article was in fact made in accordance with the patent or not."

In Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, the holding is:

"Where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created. Where another avails himself of this public dedication to make the machine and use the generic designation, he can do so in all forms, with the fullest liberty, by affixing such name to the machines, by referring to it in advertisements, and by other means, subject, however, to the condition that the name must be so used as not to deprive others of their rights, or to deceive the public, and therefore that the name must be accompanied with such indications that the thing manufactured is the work of the one making it as will unmistakably inform the public of that fact."

In Merriam Co. v. Syndicate Publishing Co., 237 U. S. 618, 622, 35 Sup. Ct. 708, 709 (59 L. Ed. 1148), this is approved, and the court held:

"As is the case with patents, so after the expiration of copyright securing the exclusive right of publication, the further use of the name by which the publication was known and sold cannot be acquired by registration as a trade-mark. Merriam v. Holloway Co. [C. C.], 43 Fed. 450, approved. And see Singer Manufacturing Co. v. June, 163 U. S. 169 [16 Sup. Ct. 1002, 41 L. Ed. 118]."

I cannot doubt that Allen, at the time he first registered his trademark "Cedarine," had it in mind to apply the name to his patented composition, furniture polish; but he did not manufacture and sell, or put on the market, that patented composition, furniture polish, but another, not patented, and one which he did not mark or represent as patented (except in the one instance fully referred to), and to this other composition, not patented, he actually and consistently applied the name "Cedarine," and it was to this other composition that reference was made at the time the registration of the second trademark "Cedarine," was applied for and made. The name or trademark "Cedarine" never became attached to or connected or associated with the patented article. Hence it did not pass to the public on the expiration of complainant's patent.

[6] The defense of laches presents greater equities. There is some evidence that the name "O-Cedar," applied to furniture polish, was used as early as 1908, and since that time it has been on the market to some extent. One witness said O-Cedar was sold in Chicago or that vicinity in 1910. March 11, 1912, the Channel Chemical Company applied for registration of the name "O-Cedar" as its trademark for its furniture polish. It was not registered until August 18, 1914, as registration was twice refused by the officials of the United States on account of the prior registration and use of the name "Cedarine," holding that "O-Cedar" and "Cedarine" were so similar as to be likely to lead to confusion, and also because "O-Cedar" was descriptive. These rejections took place April 1, 1912, when the examiner said, "Applicant's mark so closely resembles the registered trade-mark"-referring to "Cedarine"-"as to be apt to cause confusion in the trade," which was a proper conclusion, and May 21, 1913, when the rejection was made final. Thereupon counsel (not the facts) was changed, whereupon the decision was reversed, and the word "O-Cedar" was held not descriptive (and it is not) and that as the office had held that "Lax-o-cap" is not similar to "Laxo," while it is, and that "Chola-sol" is not similar to "Chologen," it would hold, which it did after some two years consideration and a change of lawyer, on the same facts, that "O-Cedar" is not so similar to "Cedarine" as to cause confusion. Actual experience has proven, however, that the similarity is so great that the one is sold quite generally for the other and accepted as the same.

It is urged that complainant has not applied to cancel the registration of "O-Cedar" and that he did not oppose registration. It is not shown that the complainant had any information of this application for the registration of "O-Cedar." The complainant also has the right to appeal to the courts, but he delayed a considerable time after he must have known that "O-Cedar" furniture polish was on the market under that name in competition with "Cedarine" furniture polish. If Allen, engaged as he was in manufacturing, advertising, and selling his furniture polish, "Cedarine," had knowledge for years that Channel Manufacturing Company was manufacturing, advertising, and selling O-Cedar furniture polish under that name, in competition with Cedarine, and expending considerable sums of money in building up the trade, and has not objected or protested until by this suit against a dealer, it would seem inequitable, after the business and trade in O-Cedar has been thus built up at large expense and made a success, to interfere by injunction and destroy the business thus established. But I find no substantial or convincing testimony that Allen has improperly or negligently "slept upon his rights" since actual knowledge of the infringement of his trade-mark came to him. The defendants, Walker & Gibson, commenced purchasing and selling O-Cedar polish December 11, 1913, and this suit was commenced within two years thereafter. The extent of the business of Channel Manufacturing Company does not clearly appear, and when knowledge of it first actually came to Allen does not appear at all.

In Menendez v. Holt, 128 U. S. 523, 524, 9 Sup. Ct. 143, 145 (32)

L. Ed. 526), the Supreme Court, per Mr. Justice Fuller, thus states the law as to laches as applied to the infringement of a trade-mark or trade-name:

"The intentional use of another's trade-mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence then in the use is not innocent; and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that, as the defendant had been allowed to cut down half of the trees upon the complainant's land, he had acquired, by that negligence, the right to cut down the remainder (Attorney General v. Eastlake, 11 Hare, 205); nor will the issue of an injunction against the infringement of a trade-mark be denied on the ground that mere procrastination in seeking redress for depredations had deprived the true proprietor of his legal right (Fullwood v. Fullwood, 9 Ch. D. 176). Acquiescence to avail must be such as to create a new right in the defendant. Rodgers v. Nowill, 3 De G., M. & G. 614. Where consent by the owner to the use of his trade-mark by another is to be inferred from his knowledge and silence merely, 'it lasts no longer than the silence from which it springs; it is, in reality, no more than a revocable license.' Duer, J., Amoskeag Mfg. Co. v. Spear, 4 N. Y. Super. Ct. 599; Julian v. Hoosier Drill Co., 78 Ind. 408; Taylor v. Carpenter, 3 Story, 458 [Fed. Cas. No. 13,784]; s. c., 2 Woodb. & M. 1 [Fed. Cas. No. 13,785]. So far as the act complained of is completed, acquiescence may defeat the remedy on the principle applicable when action in taken on the carpetite of speaking and the second completed. the principle applicable when action is taken on the strength of encouragement to do it; but, so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of an estoppel could rarely arise. At the same time, as it is in the exercise of discretionary jurisdiction that the doctrine of reasonable diligence is applied, and those who seek equity must do it, a court might hesitate as to the measure of relief, where the use, by others, for a long period, under assumed permission of the owner, had largely enhanced the reputation of a particular brand."

In Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 24, 104 C. C. A. 464, the Circuit Court of Appeals, Eighth Circuit, held that the infringement of a common-law trade-mark is a continuing trespass upon the rights and property of the owner. Also:

"The owner of a trade-mark is not chargeable with laches for a failure to prosecute an infringer before he knows or has such notice as would lead an ordinarily prudent person to inquire and learn the existence of the infringement. It is not his duty to search out and discover it because the presumption is that parties will abide by the law and respect his rights."

This is also held in Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 39, 21 Sup. Ct. 7, 45 L. Ed. 60.

In McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828, there had been a delay of some 20 years in instituting proceedings, but the court said:

"Equity courts will not, in general, refuse an injunction on account of delay in seeking relief, when the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits."

So in that case, while an injunction was granted, an accounting was refused. This case was cited and approved in 179 U. S. 19, supra. In Bissell Chilled Plow Works v. T. M. Bissell Plow Co. (C. C.) 121

Fed. 357, 375, after referring to McLean v. Fleming, supra, and Menendez v. Holt, supra, the court said:

"Simple laches, without more, which is the case here, is not sufficient to interfere with a complainant's right to injunctive relief, though it may affect his right to damages for past infringement."

If a party should register a trade-mark and for several years allow another to use on the same class of goods competing with his, if made, a name so like his as to show clear infringement of such trademark, and make no objection or protest, having full opportunity so to do, and knowingly permit such other to expend large sums of money in advertising and exploiting his goods under such name, he neither making nor selling his goods to which the trade-mark name was applied by him, and hence not use the trade-mark, we would have a case for finding abandonment of such trade-mark, or, at least, such laches as would bar injunctive relief. But here we do not have proof of facts showing abandonment or fraudulent conduct on the part of Allen in any way affecting or misleading the defendant or the Channel Manufacturing Company. It is a serious thing to interfere with business by injunction, and ought not to be done when the case is doubtful; but courts must not hesitate when a clear case is presented.

The defendant here has energetically and vehemently attacked Allen, the complainant, for his conduct in connection with the corporations with which he was connected and before referred to; but there is no evidence that any creditor of those corporations or any stockholder has complained of his acts at any time or in any manner. The acts of Allen complained of and denounced by the defendant in no way affected the defendant or the Channel Manufacturing Company. Such acts had nothing to do with inducing the said Channel Company to adopt and use the name "O-Cedar," or expend money in exploiting its product. The evidence and exhibits show that Allen is a unique character, a man who does things in a manner peculiarly his own, and he has word-pictured himself as "a man of many schemes"; but I fail to find he was dishonest, or that his "many schemes" were designed to cheat or defraud any one. He was "scheming" to get his "Cedarine" on the market and sell it. I am inclined to think he overdid the matter (examine Plaintiff's Exhibit 25, "A Commercial Pilgrim," and its illustrations), and that people, and even dealers, took him, in many instances, as a joke, and his "Cedarine" and advertising in the same way; but all this is no excuse or justification for the defendant or the Channel Manufacturing Company, if the complainant's trade-mark be valid. It has not induced their conduct in any degree or manner, unless it be that the Channel Manufacturing Company, finding Cedarine on the market as a furniture polish and extensively advertised, conceived the idea of also putting "O-Cedar" on the market in competition.

[7] It has been urged that the disclaimer of the word "Cedar" alone by Allen in the British Patent Office, when he applied there for registration of "Cedarine," and as a condition of securing such registration in Great Britain, operated and operates as a disclaimer everywhere and in the United States. But the trade-mark is "Cedarine," an arbitrary word, and not "Cedar." No such disclaimer was requested or required by the United States Patent Office, and the proceedings there show nothing of the kind. I am at a loss to understand why a compliance with the laws, rules, and regulations of the kingdom of Great Britain in securing registration of a trade-mark there operates to limit or destroy the rights secured by registration of a trade-mark in the United States, even though it be the same. Great Britain, in registering trade-marks, may limit and restrict their scope and effect as she sees fit, and the United States may do the same.

On the argument defendant's counsel cited and referred to Holzapfels Co. v. Rahtjens Co., 183 U. S. 1, 22 Sup. Ct. 6, 46 L. Ed. 49. That case does not hold that where a citizen of the United States applies for and obtains in England the registration of a designated trade-mark, and in order to obtain it disclaims the exclusive right to the use of a certain word or certain words forming a part of the trademark claimed and applied for, and also applies for registration of the trade-mark in the United States for which he asked registration originally in England, and obtains registration of the trade-mark applied for in the United States, without making any disclaimer, that the latter registration granted and made in the United States is either void or no broader than the British registration. What it does hold is stated in the headnotes thus:

"This was a controversy relating to a trade-mark for protective paint for ships' bottoms. The court held: (1) That no valid trade-mark was proved on the part of the Rahtjens Company in connection with paint sent from Germany to their agents in the United States, prior to 1873, when they procured a patent in England for their composition; (2) that no right to a trade-mark which includes the word, 'patent,' and which describes the article as 'patented,' can arise when there has been no patent; (3) that a symbol or label claimed as a trade-mark, so constituted or worded as to make or contain a distinct assertion which is false, will not be recognized, and no right to its exclusive use can be maintained; (4) that of necessity, when the right to manufacture became public, the right to use the only word descriptive of the article manufactured became public also; (5) that no right to the exclusive use in the United States of the words 'Rahtjen's Compositions' has been shown."

On the subject of disclaimer the assignee in the United States was held bound by the disclaimer made by his assignor in England. In other words, the rights of the assignee were no greater than those of his assignor. As to the one trade-mark, it was held void, for the reason it had been applied to a patented article, and the right thereto had expired with the patent and became public property; and as to the other, that the assignee was bound in the United States by the disclaimer made by the assignor in England. Judge Peckham, in giving the opinion of the court, said:

"The respondent claims the right to use these words by virtue of assignments from the Messrs. Rahtjen and also Suter, Hartmann & Co. in England, and also by virtue of a domestic trade-mark which it or its predecessors had acquired from user and registration in the United States. The rights of Suter, Hartmann & Co. to the exclusive use of these words had been disclaimed by them in 1883, long before any assignment of their rights to the respondent, and we do not see why that disclaimer should be confined to England. It was a general disclaimer of any right whatever to the exclusive use of these words, and it was only upon the filing of that disclaimer that they

obtained the trade-mark which they did in England. The disclaimer, however, was as broad as it could be made. When they assigned their rights, the assignment did not include a right to an exclusive use which, in order to obtain the trade-mark registration, they had already disclaimed. The assignment of the Rahtjen firm could not convey the exclusive right to the use of such words, because they had no valid trade-mark in those words prior to 1873, and by the expiration of the English patent in 1880 the right to that use had become public. These various assignors, therefore, did not convey by their assignment a right to the exclusive use of the words in the United States. The domestic trade-mark, which the respondent also claims gives it that right, was not used until after the sale of the composition by the petitioner in the United States under the name of 'Rahtjen's Composition, Holzapfel's Manufacture.' We think the principle which prohibits the right to the exclusive use of a name descriptive of the article after the expiration of a patent covering its manufacture applies here."

[8] It is urged that Allen should not maintain this suit, for the reason he does not come into court with clean hands. He who seeks equity must do equity; but this has reference to the matters with which the court is dealing and the parties are concerned. The contention, on the facts, may be summarized in this way: It is claimed Allen on his own statement was guilty of sharp practice in obtaining title to this trade-mark after once parting with it, and did not pay therefor and for the business with which it was connected adequate consideration, and that his label contains one or more misrepresentations calculated to deceive the public. Attention has been called to the transfers referred to. The label on the bottles contain the following:

"4 fluid Oz. CEDARINE Piano & Furniture Polish, the finest preparation in the world for cleaning and renewing all kinds of finished woods. It removes grease, scratches, fly-specks, mars, finger marks and is an excellent preventive against moth. Price 25 cts. Cedarine Co., Clinton, N. Y., Sole Manufacturers. Trade-Mark registered June 7, 1887. Reasons why CEDARINE should be used in preference to any other polish:

"1st.—It is manufactured from cedar trees and other compounds used to

produce the polish on the finest planos and furniture.

"2nd .- The cedar odor permeates the woolen goods in the rooms where it is

used, thus serving as an excellent moth preventive.

"3rd.—There can positively no harm come to your furniture by its use. On the contrary, from its very nature it is calculated to renew and preserve the original finish of all articles on which it is used."

I do not know why the odor of cedar will not permeate woolen fabrics. It was not proved that it will not. The statement that it "is an excellent preventive against moth," and that, permeating woolen fabrics, it is "thus serving as an excellent moth preventive," may be true and may be incorrect. The evidence will not justify a finding that the statements are false. In his application for letters patent as amended Allen said:

"In carrying out my invention, I combine with the aromatic oil of cedar, or a compound or extract made from cedar wood or boughs, a suitable vehicle consisting of linseed oil and turpentine to render the compound aromatic and serve as a moth preventive.

"I prefer to use a vehicle consisting of ten parts of linseed oil, ten parts of turpentine, and two parts of alcohol, to which one part of the oil of cedar is added to give the aromatic flavor to the compound, the whole being thoroughly mixed by agitation. * *

"I have found by practical use of the herein described polish that it thoroughly and quickly cleanses furniture, pianos, etc., restores the original lustre or color to the article treated, and imparts to the furniture an aromatic flavor which acts as an effective moth preventive."

Of this the examiner said:

"By reference to page 360 of Beasley's Druggists' Ret Book, 1857, applicant will find that to the ordinary furniture polish he adds as an insecticide the most common agent known 'as a moth preventive.' The first serves simply as a vehicle (as shown on page 529 of the 14th Ed. U. S. Disp. and page 292, Griffith's Formulary), but neither aids, assists, nor modifies the insecticide; that is, the new mixture has neither value nor usefulness beyond the obvious addition of the values of the simples employed, and the changes made give only the most obvious results from the known qualities of the matter employed, which is but colorable and at the most exhibits but ordinary skill and judgment."

Reply was made by Allen's attorneys July 26, 1887, containing the following:

"Applicant admits that the aroma or scent of cedar directly from the wood has been used as a moth preventive, but he is not aware that when used in that *manner* it amounts to an insecticide, but in the form in which we prepare and apply the cedar it would."

Thus the whole matter was called to the attention of the Patent Office, and that office conceded that oil of cedar is an insecticide, and finally, it seems, to be a "moth preventive." I do not see that Allen can be charged with fraud or misrepresentation, even if it be true that the odor of oil of cedar will not permeate woolen goods or act as a moth preventive. If, as the Patent Office examiner conceded, it is an "insecticide," it would seem to be a legitimate conclusion that it is a "moth preventive." It may be outside the record, but our great-grand-mothers, our grandmothers, and our mothers have used cedar for this purpose, and those living still pack our woolen clothing in cedar boughs to "keep out the moths." I am not willing to charge Allen with fraudulent conduct in stating that oil of cedar is a moth preventive and that its odor will permeate woolen clothing, or that the oil of cedar is derived from cedar trees.

On the label on a bottle of O-Cedar I find the following: "Kills all germs. Excellent for dusting." This exhibit was purchased on the market at Herkimer, N. Y., April 12, 1916. I think it safe to assert that a mixture which "kills all germs" will act as a "moth preventive." Even if the Channel Company has abandoned the use of this statement, it is convincing that it once believed its truth, or intended to deceive if it knew it would not "kill all germs." It has been said and held many times that a court of equity should not and will not pronounce a judgment or decree which will secure to another the exclusive right to deceive and defraud another or others by false representations and statements, and so it was held, as we have seen, that a trade-mark applied or to be applied to an article, which mark contained the false, and therefore fraudulent, statement that the article is "patented," when it was not, would not be registered, or, if registered, would be held void. But here there is no pretense of any false statement or representation in the trade-mark "Cedarine."

[9] I think complainant's trade-mark valid and infringed by defendant in selling "O-Cedar," the same kind and class of goods, used for the same purpose; but it seems to me that defendant ought not to be put to the expense of an accounting. Their sales have been small, and they were not notified of the alleged infringement, or that infringement was claimed, until suit was brought. Walker & Gibson have been selling the two polishes, "Cedarine" and "O-Cedar," side by side, for some two years, and it would seem complainant ought to have known the fact. No request to desist was made and no warning given. There is no evidence that the defendant has sold "O-Cedar" as and for "Cedarine," or made any misrepresentations.

The recent cases of Hamilton Shoe Co. v. Wolf Bros., 240 U. S.

The recent cases of Hamilton Shoe Co. v. Wolf Bros., 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629, which holds that "American Lady" infringes "The American Girl," and is to that extent in point, and Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713, while instructive on the subject of trade-marks, are not,

further than indicated, in point.

There will be a decree in favor of the complainant for an injunction, with costs.

Ex parte AVERY.

(District Court, E. D. North Carolina, at Wilson. July 14, 1916.)

 ARMY AND NAVY \$\igcup 19\$—ENLISTMENT OF MINOR—RIGHT OF PARENTS TO DISCHARGE.

The enlistment of a minor in the army is valid as to him, but is voidable at the instance of the parent or guardian, who did not consent, and he is entitled to the discharge of the minor on habeas corpus, unless there are pending charges against him which give a court-martial priority of jurisdiction.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 45-50; Dec. Dig. &=19.]

2. Army and Navy \$\infty\$ 19—Enlistment of Minor—Right of Parents to Discharge.

A minor, without the knowledge or consent of his parents, enlisted in the National Guard of a state after it had been called into the government service, stating his age at 21 years. Immediately on learning of the enlistment, and before he had been given any allowances, his parents went to the officers of the regiment, stated his minority, and demanded his discharge, which was refused. They followed to the concentration camp, and again made the demand, and on its refusal brought proceedings in habeas corpus. On the same day, but before the filing of the petition, because of the opposition of his parents, the minor had refused to enlist in the service of the United States, and the officers thereupon caused his arrest and confinement in his quarters, intending to have him tried by court-martial for fraudulent enlistment; but he was not told the reason for his confinement, nor notified of any charge against him, and in fact no charge was made. Held, on the facts, that there had been no such military proceeding as to deprive the civil court of jurisdiction, and that the parents were entitled to the minor's discharge.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 45-50; Dec. Dig. &=19.]

Petition of George S. Avery and Lila Avery for a writ of habeas corpus for the discharge from the National Guard of North Carolina of Richard Sandford Avery, a minor. Writ granted.

David L. Ward, of New Bern, N. C., for petitioners.

W. C. Rodman, of Washington, N. C., and S. T. Ansell, of Washington, D. C., for respondent.

CONNOR, District Judge. On July 7, 1916, George S. Avery filed his petition herein, in which his wife, Lila Avery, joined, alleging: That he was a resident of the county of Craven, in the Eastern district of North Carolina. That he was the father, and his wife the mother, of Richard Sandford Avery, a minor of the age of 20 years. That on June 22, 1916, their said son, without their knowledge or consent, enlisted as a private in Company B, Second Regiment, North Carolina National Guard, of which company Capt. A. C. Hill is in command. That Col. W. C. Rodman is the colonel and in command of the Second Regiment of National Guard. That petitioner has requested Capt. A. C. Hill and Col. W. C. Rodman to discharge and release their said son from military service, explaining to them that the enlistment of the said minor son was without their knowledge or consent. That they refused, and still refuse, to discharge or release their said son and to restore him to the custody of petitioner. That said Richard Sandford Avery is now restrained of his liberty, and petitioner is deprived of the custody and service of his said son, by Capt. Hill and Col. Rodman. That Company B, Second Regiment, National Guard of North Carolina, is a part of the United States Army, and subject to the control of the Secretary of War, under the advice of the Commander in Chief of the United States Army. Pursuant to said petition, the writ was issued on July 7, 1916, directed to respondents, and, on July 8, 1916, duly served upon them by the United States marshal. On July 14, 1916, the writ was returned, and Richard S. Avery produced before me at Wilson, N. C.; the hearing having been, by consent, continued to that day.

Petitioner, with leave of the court, amended his petition, alleging that he and his wife are the parents of eight children, six of whom are dependent upon them for support; that their son, Richard Sandford, is the only one of their said children who contributes anything to their support; that they are poor people, and are in actual need of the wages of their said son to aid them in caring for their other For return to the writ, respondents allege: That they hold the said Richard Sandford Avery by authority of the United States, as a soldier of the National Guard of North Carolina under the call and orders of the President of the United States. That said Richard Sandford Avery was duly enlisted as a soldier in the National Guard of North Carolina, in the service of the United States, at Kinston, N. C., on June 22, 1916, for term of 3 years. If the said Avery was not 21 years of age at the time of his enlistment, he being then a minor, he did fraudulently enlist in the military service of the United States, by falsely representing himself to be over 21 years of age, to wit, 21 years, 1 month, and 25 days, and since said enlistment has received allowances thereunder. That charges are being prepared and steps have been taken to bring him before a general court-martial for fraudulent enlistment, which said steps had been taken at the time of the filing of the petition herein, and he was at said time, under arrest and confined to quarters.

Upon the hearing testimony was introduced from which I find the

following facts:

Company B, Second Regiment, National Guard of North Carolina, was duly organized in accordance with the provisions of chapter 102, section 4848 et seq., Revisal N. C. J. F. Brown was, on and prior to June 19, 1916, captain of said company. Said Company B is a component part of the Second Regiment, National Guard of North Carolina. On June 19, 1916, the President of the United States, pursuant to the provisions of section 4, Act Jan. 21, 1903 (32 Stat. 776, c. 196), as amended by section 3, Act May 27, 1908 (35 Stat. 399, c. 204 [Comp. St. 1913, § 3045]), Fed. Stat. Anno. 1909, p. 347, called out said company and regiment. That in accordance with said call the said company was ordered to rendezvous at Kinston, N. C., and was thereafter ordered to Camp Glenn, near Morehead, N. C.

On June 22, 1916, at Kinston, N. C., the said Richard Sandford Avery, without the knowledge or consent of either of his parents, being then 20 years of age, signed the contract of enlistment as prescribed by law, in the presence of Capt. Brown, then commanding Company B, Second Regiment, National Guard of North Carolina, in which he represented himself to be over 21 years of age, and was thereupon enlisted in said company as a private. He received a uniform and such other allowances as by law he was entitled as a member of said

company and regiment.

Immediately upon learning that their son had enlisted, petitioner George S. Avery and his wife, at Kinston, before said company went to Camp Glenn, informed the captain in command that their son was not 21 years of age, demanding his release and discharge, which was refused. After said Company B went to Camp Glenn, petitioner and his wife went there, and again informed the captain, and the colonel commanding the Second Regiment, of the age of their son and again demanded his discharge and release. On July 7th the officers in command of said company and regiment informed the members of the company and regiment, including said Richard S. Avery, of the provisions of the recent act of Congress providing for enlistment in the United States Army, and invited said Avery, together with other members of his company, to enlist in accordance with the provisions of said act. Said Avery was willing to do so, except for the objection of his parents, and for that reason only declined to enlist, whereupon, and without any reason being assigned to him, and without notice, information, or suggestion of any charge against him of the violation by him of any law, military or civil, or breach of duty, he was placed under arrest, and so continued until the service of the writ herein. The officers in command ordered his arrest, and caused him to be held, for the purpose, and with the intention, of bringing him before a general court-martial, to be tried upon the charge of fraudulent enlistment. The arrest was made during the day of July 7, 1916. The petition for the writ herein was received by the judge at 7:20 p. m. on July 7, 1916, signed and immediately placed in the mail, directed to his counsel at Morehead City, received by him, and delivered to the marshal, who served same during the morning of July 8, 1916. No charges were then prepared, nor have any charges been at this time prepared, against Avery, nor was he informed, nor did he know, upon what charge he was held under arrest, until the time of the hearing herein. He supposed that he was placed and held under arrest for refusing to enlist under the terms of the last act of Congress, relating to the subject of enlistment. The arrest consisted of his being detained in his quarters. No general court-martial had been ordered at the time the writ was served or at the time of this hearing.

[1] It is well settled by numerous and controlling authority that a soldier enlisting in the army, not being 21 years of age, cannot himself avoid his contract of enlistment. In Re Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644, Mr. Justice Brewer says that the contract of enlistment is valid so far as the soldier is concerned; it creates a status with the government, which will not be disturbed, upon his application. The parent or guardian may, upon a writ of habeas corpus, invoke the aid of the court and secure the restoration of the minor to his custody. In re Bakley (D. C.) 148 Fed. 58, affirmed 152 Fed. 1022, 82 C. C. A. 659 (C. C. A. Fourth Circuit). In Exparte Reaves (C. C.) 121 Fed. 848, Jones, District Judge, writes an exhaustive and interesting opinion, which was reversed upon another point by the Circuit Court of Appeals, Fifth Circuit, 126 Fed. 127, 60 C. C. A. 675.

[2] Respondents, frankly conceding the controlling authority of these and other decisions to the same effect, suggest that by representing himself to be over 20 years of age and thereby securing enlistment, followed by obtaining allowances, the son has violated the provisions of law making fraudulent enlistment and receiving allowance and pay a crime, subjecting him to trial before a court-martial, and, upon conviction, punishment by imprisonment. They further insist that, at the time the writ was issued and served, proceedings had been instituted and were then pending for his trial, and that he was at that time under arrest, and was then held in custody for that purpose. It has been decided, and I think correctly so, that while the parent is entitled to demand and have restored to him the custody of his minor son, who has, without his consent, enlisted, yet if, at the time the writ is issued, or probably at the time it is served, proceedings have been instituted, and he is held for trial upon charges preferred, for the commission of a crime against the laws of the United States of which a court-martial has jurisdiction, the court will not discharge him from custody and deliver him to his parents. In Re Carver (C. C.) 103 Fed. 624, Putnam, Judge, said:

"It seems to be well settled by the decisions, and it is also consonant with the rules of law framed to prevent unseemly conflicts between different judicial tribunals, that ordinarily, where charges have been preferred, and a court-martial having jurisdiction has been ordered, and the person charged has been held to answer, the jurisdiction which attaches in favor of the

court-martial will exclude that of a civil tribunal in which proceedings for a writ of habeas corpus may afterwards be commenced. Under such circumstances, the civil tribunal must wait until the court-martial has concluded its proceedings, and even until the sentence, if any, imposed by the court-martial, has been worked out; and this rule might apply even where an arrest had followed in consequence of the charges, although preceding the organization of the military court."

In Re Miller, 114 Fed. 838, 52 C. C. A. 472, the soldier after enlisting, not being 21 years of age, without the consent of his parents, deserted. Upon the return to a writ of habeas corpus, issued upon the petition of his parents, it appeared that, before the writ issued, charges had been preferred against the son, charging him with desertion and fraudulent enlistment, and that he would be brought to trial as soon as practicable before a court-martial convened for that purpose, and that "the prosecution had begun before the suing out of the writ." Judge Shelby said:

"The question to be decided is whether the court-martial has jurisdiction to try the prisoner on the charges preferred against him. If it has jurisdiction, the civil courts have no right to interfere. If it is without jurisdiction, it is the duty of the civil courts to discharge the prisoner."

After a careful examination of the authorities, reversing the District Judge, it was held that while the parents were entitled, on account of the infancy of the son, to have him discharged, their right could not be so enforced as to take him from the custody of the officers, when he was held to answer charges preferred against him for violating the law before a court having jurisdiction to hear and determine the charge. Accepting this as the correct declaration of the law and the rights of the petitioner, the question arises whether, upon the facts found in this case, the jurisdiction of the court-martial had attached when the writ was served. It is immaterial in this case whether the jurisdiction had attached at the date of the issue or the service of the writ, because there was no change in the status of the soldier or the proceeding against him between these dates. An examination of the facts found in the decided cases will aid somewhat in the decision of the question presented here.

In Miller's Case, supra, the petition averred that, at the time it was filed, the soldier was detained in custody on the charge of having deserted the military service of the United States. The return of the officer set forth the enlistment, desertion and arrest, and that charges had been preferred against him and the prosecution thereon begun. The question presented in that case was whether, the soldier being a minor and having enlisted without the consent of his father, the enlistment was not, as against him and his right to the custody of his son, absolutely void. This contention was ruled against petitioner. The court treated the prosecution as having begun before the writ issued, and refused to interfere with the custody of the respondent.

In the Reaves Case, supra, the son, under the requisite age, had, without the consent of his parents, enlisted in the Navy and thereafter deserted. The petition for the writ of habeas corpus was filed by his father. Judge Pardee thus states the case:

"The minor had deserted the naval service; the executive authority, as appears by the return, had acted, by proclaiming him a deserter and offering a reward for his arrest, and he had been arrested before the writ was issued; and the case further shows that within a reasonable time after the arrest, and before the judgment in the Circuit Court, the Secretary of the Navy preferred formal charges for fraudulent enlistment and desertion. These charges can only be tried before a naval court-martial. Under this state of facts, on principle and authority, it must be held that the jurisdiction of the naval courts had fully attached, and that the naval authorities are entitled to the custody of the minor, notwithstanding the enlistment was without the consent of his father and voldable on his demand."

There can be no doubt that, in both of these cases, the jurisdiction of the court-martial had attached, at the time the petition for the writ was filed. Judge Jones' opinion, holding that the parent was entitled to have the custody of his minor son, is based upon an interesting and well-considered discussion of the paramount right of the parent to the control and custody of his infant son, the enlistment as against him being void. The point of divergence between the Circuit Court of Appeals and the District Judge is found in the status of the son created by the enlistment. Treated simply as a contract between the son and the government, voidable by the parent, there is much force in Judge Jones' reasoning. Whether any distinction may be found in a case wherein the essential element in the charge upon which the minor is held is the enlistment, and when, as in both of the cases cited, there was also the charge of desertion, may be open to discussion.

In Re Bakley, supra, Judge Waddill (E. D. Va.) writes an interesting opinion, indicating a mental and sympathetic leaning to the views of Judge Jones. There are, however, elements in the case which are not found in the Reaves Case. Bakley, an infant, that is, within the age requiring the parents' consent to enlistment, without such consent, enlisted in the navy. While on the receiving ship in the Elizabeth river, held under the terms of his enlistment, and within a week after such enlistment, his parents by letter demanded his release, for the reason that he was below the age entitling him to enlist without their consent. This was refused, the naval authorities saying that the boy made oath that he was 21 years of age, and that they must accept such oath as correct until positive proof was produced to the contrary, and that "upon presentation of such evidence, the Bureau will have no authority but to bring Bakley to trial by a general court-martial for fraudulent enlistment." The parents addressed another letter to the Navy Department, to which no reply was received. Some days later another letter was sent, containing an affidavit as to the age of the son and the lack of knowledge or their consent to his enlistment. A letter of similar import was sent to the officer in command of the ship upon which the boy was detained. No reply was sent by the Navy Department, but the officer in command of the ship wrote to the parents that the only action which the parents could take in the premises was to apply for a writ of habeas corpus, and that, with the evidence contained in the affidavit sent him, it was his duty to report Bakley to the Navy Department for fraudulent enlistment. Upon the return of the writ, the foregoing facts being found, the government demanded that the son should be held for court-martial.

Judge Waddill held, in Ex parte Lisk (D. C.) 145 Fed. 860, that the statute which made a fraudulent enlistment a crime, subjecting the minor to trial and punishment by court-martial, did not include a minor who had enlisted without the consent of his parents, because such a person, so enlisting, could not be said to "belong to the Navy." Without pausing to discuss this opinion of the learned judge, we pass to a consideration of his discussion of the question whether the jurisdiction of the court-martial had attached before the writ was issued. He says:

"The writ of habeas corpus ought not to be denied to a parent seeking the custody of his child, confessedly in the unlawful possession of another, because further proceedings looking to his detention for trial by court-martial are contemplated or may be inaugurated. * * * They may never be instituted at all, and it would be like trifling with justice to so treat the parent's request. This would seem to be correct in any case; but surely, when such suggestion of a court-martial was only made in answer to the repeated demands [of the parent] for possession of the child, the court should treat the parent's request, not as made at the time of the filing of the petition for the writ of habeas corpus, but as of the date of the first demand made for the child, and in this view in no event would the so-called court-martial proceeding avail to deny the parent's right here."

In regard to the court-martial he says:

"No such proceedings were, or have been, inaugurated, if the report was ever made at all, and within one week of the time of the notice of such threatened report this proceeding was regularly commenced by the parents of the child, in accordance with the government's suggestion as to the proper method to secure his release."

As suggested, the attitude of the government savors somewhat of keeping the promise to the ear and breaking it to the heart, by saying to the parent: The express provision of the law declares the contract of enlistment void as to you. Your sole remedy is by petition for the writ of habeas corpus; but, if you seek this relief, you at once subject your son to a court-martial, resulting in the denial of the relief. The judgment in Bakley's Case, discharging the minor, was affirmed, per curiam, by the Circuit Court of Appeals of this Circuit. 152 Fed. 1022, 82 C. C. A. 659.

Unless some controlling authority is found, or unless the cases be distinguished, I should feel constrained to follow this decision. The reasoning of the learned judge, who gave the question careful and exhaustive examination, commends itself to my judgment. Assuming, as I do, that Capt. Brown did not know, at the time he took the enlistment, that the son was not 21, yet the fact remains that, representing the government, he and the son did enter into a contract, voidable at the option of the parents, who, immediately upon being informed thereof, notified him and demanded the release of their son. It is not suggested that he disbelieved them in regard to the age of their son, or called for proof, which they had and produced on the hearing —the family Bible. He doubtless supposed that he was not authorized to release the son. The parents continued to press their demand, following the company to Camp Glenn. It was the representative of the government, and not the petitioner, who was in default. The father, as appeared upon the petition, is an illiterate man. Up to the moment that the son, in obedience to his duty to obey his parents, refused to enter into a second enlistment, the petitioner had the unquestionable right to demand the release of his son. There had been no suggestion to either the son or his father that the former had violated any law which subjected him to the jurisdiction of a court-martial. I cannot think, giving the most liberal construction to the rules of procedure in respect to the method of instituting a prosecution before a court-martial, that upon the admitted facts here such jurisdiction had attached, or that the power of the civil court to grant the relief to

which the petitioner is otherwise entitled is obstructed.

I am not familiar with, nor have I been informed in regard to, the procedure essential to give a court-martial jurisdiction of a charge against a soldier in the military service. I assume that, from necessity, frequently, it is more summary than is prescribed in criminal proceedings in a civil court; but there are fundamental, essential principles, inhering in every system of procedure which affects life and liberty, which suggest the necessity of notice, however informal, of the character of the charge, with an opportunity to be heard. I cannot think that a summary arrest, with an undisclosed purpose in the mind of the commanding officer, can confer jurisdiction upon a court-martial neither in existence nor ordered, so as to preclude the parent from appealing to the civil courts for the enforcement of a right founded upon positive law, sanctioned by the strongest dictates of human nature.

I have thus far discussed the rights of the petitioner and the government upon the assumption that Avery enlisted as a soldier of the United States Army, and that the consent of his parents was essention to constitute a valid contract of enlistment as against them and their right to his custody. If he had enlisted prior to June 19, 1916, that being the day upon which the President called the National Guard of North Carolina into service, I assume that his status and the rights of his parents would have been governed by the provisions of section 4896 of the Revisal of 1905, which are, in all respects, the same as the federal statute in regard to enlistment in the United States Army. I assume, further, that upon the call by the President, followed by the assembling of Company B, at Kinston, its members became subject to the rules and regulations unless otherwise provided, controlling the army. Act Jan. 21, 1903, c. 196, § 11, 32 Stat. L. 776, as amended by section 7, c. 204, Act May 27, 1908, 35 Stat. 399 (Comp. St. 1913, § 3052), Fed. Stat. Anno. 1909, 347, provides that when the militia is called into active service their pay "shall commence from the day of their appearing at the place of company rendezvous." It would seem, therefore, that on June 22, 1916, when Avery enlisted, the company was in active military service, as a portion of the National Guard of North Carolina, of the United States. It is suggested, in a very helpful brief filed by Maj. Ansell, representing the government, that when the state, in response to the call of the President, furnishes an organized militia as a constituent part of the National Guard, the status of its members, as represented by the Governor, is fixed, and that parents who have, at that time, failed to seek and secure the release of their minor sons, who have enlisted without their consent, are estopped from thereafter doing so. Maj. Ansell, who has rendered valuable aid to the court upon the hearing, frankly concedes that new, and sometimes difficult, questions are being presented under the order of the President mobilizing, in large number, in all of the states, the National Guard. Whatever doubt may have arisen upon the question suggested, it would seem, cannot arise in this case, because the minor did not enlist until after the National Guard of this state was called into service and had rendezvoused. The parents here could not have waived their rights by permitting the state to represent to the government that their son was over 21 or that they had consented to his enlistment. This question is interesting, and the views advanced by the judge advocate entitled to respectful consideration. It involves the question as to the extent to which acquiescence by the parent, while his son is a member of the National Guard under a voidable enlistment, will estop him, after the son is called into active service by the President, and receives pay and allowance, from asserting his right to avoid the contract of enlistment. I do not think that, upon the facts found here, the question is presented. The civil courts will not, upon such views as they may entertain in regard to the question of public policy involved, indulge in either a strict or liberal construction of the statutes regulating the subject of enlistment, as it is related to the rights of parents, but will endeavor to ascertain from the language used the intention of Congress, and enforce such rights accordingly.

With the aid of the decisions of the Supreme and other federal courts, in cases more or less in point, I am brought to the conclusion that the enlistment by Richard S. Avery was, as between the government and himself, valid, and established the status of a soldier in active service, imposing upon him the discharge of the duties prescribed by law, and obedience to the rules and regulations of the War Department, and entitling him to such rights and privileges as by law and such rules and regulations are conferred upon a soldier in the active service of the United States; that this status, with its resultant duties and rights, can be invalidated only by the parents or guardian, and until some action is taken by them for that purpose the minor son is a regularly enlisted soldier in the United States Army; that the parents are entitled to avoid the enlistment, and secure the custody of their son, by applying to the civil court for a writ of habeas corpus. If, before the petition is filed, a proceeding has been begun, in accordance with the law and the method of procedure prescribed by the regulations of the United States Army, in active service, against the son, for bringing him to trial before a court-martial, and the jurisdiction of such court has attached, the court having jurisdiction of the person and of the offense with which the soldier is charged, the civil court will not, upon the petition of the parent, take him from the custody of the respondent and deliver him to the custody of the parent. The civil court will confine its inquiry to the question of jurisdiction of the court-martial of the person and the crime charged against him, and whether such jurisdiction has attached before the petition for the writ of habeas corpus was filed. It will not permit its jurisdiction to be ousted, or the right of the parent to be affected, by any action taken after the petition for the writ has been filed.

There can be no doubt of the status of the son, and that a courtmartial has jurisdiction of the crime of fraudulent enlistment. The question which has given me most concern, in this case, is whether such jurisdiction had attached before, or at the time, the petition for the writ was filed. In Carver's Case, supra, Judge Putnam discharged the minor, upon petition of his father, notwithstanding the return showing that charges against the son had been preferred for fraudulent enlistment before the petition for the writ was filed. After stating the rule which precluded the jurisdiction of the civil court, he says:

"But it has no application merely because charges have been filed which have not been acted on by the executive department, and may never be acted on."

In Miller's Case, supra, it appears to have been conceded that, at the time the petition for the writ was filed, the son was detained in custody on the charge of desertion. Judge Shelby says:

"When an enlisted soldier is imprisoned by military authority upon a charge of desertion or other military crime, the * * * court will not interfere on habeas corpus when such military authorities have jurisdiction."

This language clearly imports that charges had been preferred before the petition for the writ was filed.

In McConologue's Case, 107 Mass. 154, Gray, J., referring to the jurisdiction of the court-martial, says:

"If, before a writ of habeas corpus is sued out, * * * he [the minor] is arrested on *charges for desertion*, he should not be released by the court while proceedings for his trial * * * are pending."

As we have seen, in Bakley's Case, supra, no charges had been filed. The question presented here is not whether the soldier, held under arrest before charges preferred, is entitled to complain, but whether the fact that he is under arrest, no charge having been preferred, prevents the civil court from awarding to the parent his right to the custody of his minor son. While the question is not free from doubt, and the decided cases are not uniform, I incline to the opinion, upon the facts found here, that the doubt should be solved in favor of the parent, who is in no default. He and his wife promptly, and repeatedly, demanded of the respondent their legal right to have their son released. This was done before the son had received allowances or any other benefit from the government on account of his enlistment. At the time he filed the petition he had no intimation that, by enlisting without his consent, the son had committed any offense, either military or civil. He has acted in good faith and with all possible promptness. That he is both a poor and illiterate man, with a large dependent family, and that, prior to his enlistment, his son lived with him, and contributed his wages in aid of the support of the family, are all unquestioned facts. They do not change the law, but appeal strongly to the court in resolving the doubt in his favor.

It is manifest that respondents were confronted with new and delicate duties, and as officers desired to discharge such duties. condition which confronted those to whom the people have intrusted the protection of rights essential to the national safety and welfare were new and urgent. The administration of legislation, making changes in the organization of the army, introducing new elements, will probably present questions difficult of solution. As with every statutory system of law, there is of necessity a degree of rigidity in its administration. The civil courts will, without unseemly or unnecessary conflict with the military tribunals, enforce the rights of the citizen when ascertained. Whether boys under the age of 21 should be permitted to enlist, without the consent of their parents or guardians, is a question for the consideration of Congress. When expressed, the civil courts must not nullify it by strained construction of the statute. The latest expression on the subject secures the right of the parent to the custody and service of the son until by his consent they are waived or surrendered to the government. This is a substantial, valuable right, expressly recognized and secured to the parent by the statute, and it is the duty of the civil court, when called upon, to protect and enforce it.

Respondents will release Richard Sandford Avery from further restraint and deliver him into the custody of petitioner. The question of cost will be disposed of in a separate order. The marshal will deliver a copy of this opinion and order to respondents at Camp Glenn, N. C.

BENEDICT v. CITY OF NEW YORK.

(District Court, S. D. New York. May 13, 1916.)

1. Limitation of Actions €==103(3)—Suit to Enforce Trust—Accrual of Right of Action.

A city in New York under a state statute issued improvement certificates in payment for paving, which were secured by the lien of the assessments made against abutting lots. The certificates were made receivable in payment of the assessments, and also on sales of lots for nonpayment. Under a statute subsequently enacted the treasurer sold the last of the lots for less than the assessments against them, and accepted certificates at face value in payment; the result being that a large amount in certificates was left outstanding and unsecured. A suit against the treasurer to test his right so to receive the certificates on such sales was decided in his favor by the Court of Appeals of the state. Held that, conceding that the city, as trustee, was bound to preserve the lien of the assessments for the protection of the certificates, it repudiated the trust when it made such sales, and that a suit against it for breach of the trust, brought in a federal court of equity 18 years afterward and 17 years after the decision of the state court, by a certificate holder, who had knowledge of the decision at the time, was barred under the state statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 508; Dec. Dig. ♦ 103(3).]

2. COURTS ⇐=375—FEDERAL COURTS OF EQUITY—FOLLOWING STATE STATUTES OF LIMITATION.

In the absence of special equities, it is the practice of federal courts of equity to follow the local statutes of limitation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 983; Dec. Dig. ©= 375.]

In Equity. Suit by Elias C. Benedict against the City of New York. Decree for defendant.

This is a suit in equity to enforce an express trust under the following circumstances: By chapter 326 of the Laws of New York of 1874 provision was made for the improvement of certain streets and avenues in a part of Long Island City in the state of New York. Commissioners of streets, who had been appointed by chapter 765 of the Laws of 1871, were given power to grade, sewer, and pave streets within the district described. They were to estimate the cost of such work and certify it to the board of assessors of the said city, who were to assess the same as nearly as might be upon the several lots in front of which the work was to be done. After the assessors had signed the assessment roll, describing the lots and the names of the owners. the roll was to be deposited in the commissioners' office, and the assessors were to hold meetings to hear objections and correct the same. It was enacted (section 4) that after confirmation "such assessment shall be a lien upon each lot, piece or parcel of land within the section or subdistrict covered thereby to the extent of the amount assessed upon such lot." In section 5 it was provided that no warrant should be issued for the collection of the assessments, nor for the sale of any land for nonpayment of assessments, until 10 years after filing of the assessment roll, but thereafter that the lots should be advertised and sold by the city treasurer for the payment of such unpaid assessments in the same manner as sales for unpaid city taxes. Meanwhile any owner of a lot assessed could pay in his assessment and discharge his land from the lien. The grading, paving, etc., was to be done by the commissioners, who were to issue "improvement certificates" in payment to the contractors as the work progressed. These certificates were receivable at par in payment of the assessments; they were negotiable, and a record was kept of them by the commissioners. The city treasurer was likewise directed to cancel all such certificates on receiving them in payment of the as-

The plaintiff's position is that Long Island City, by this statute, became a trustee of the lien created by the statute against the lots in question, in trust for the certificate holders, and that, since the certificates themselves were not an indebtedness, the only rights of the certificate holders consisted in their right as beneficiaries against Long Island City as an express trustee to compel it to execute for their benefit the liens so held. They rely particularly for this position upon a part of the language of section 6, which directed the treasurer, on receiving all moneys in payment of such assessments, to keep the same separate and apart from all other money in his hands, and to pay out no part of the fund, excepting in purchase of such certificates. The act in question, as has been shown, provided that the sale should be made in accordance with sales in the city generally. By section 23 of chapter 461 of the Laws of 1871, which is the charter of Long Island City, it was provided that all sales for taxes in that city "shall be made for the shortest period for which any person will take the premises and pay the tax or assessment, interest, percentage and expenses." By chapter 501, § 10, of the Laws of 1879, it was provided that at the sale of any lot for the nonpayment of assessments it should be the duty of the officer making the sale to receive the improvement certificates in payment of the assessments, and that such certificate, when received by him, should be permanently canceled. By chapter 656, § 4, of the Laws of 1886, it was also provided that on the day named in the notice of sale of land for such assessments the treasurer should sell the lots at auction for the lowest term of years for which any purchaser would take the same and pay the aggregate amount due, and if no person should so offer to purchase the property for a term of years then the treasurer should sell the fee simple of the lot to the highest bidder.

The plaintiff is the holder of large quantities of these certificates, which came into his hands by making advances to some of the contractors who did parts of the paving in question. In the year 1888, 10 years having expired since the filing of the assessment rolls, the city treasurer of Long Island City, one Bleckwenn, advertised the same for sale, and conducted a large number of sales, upon which he took, in purchase of the assessments, improvement certificates. In a large part of the sales conducted by him in that year he received bids equal to the amount of the assessments; the result being that, although the lands were cleared from the lien of the assessment, the certificates were reduced in proportion. In the years 1892 and 1893, however, when the city treasurer advertised other sales, he was in nearly all cases unsuccessful in obtaining the value of the assessment upon the lots sold. He nevertheless accepted the highest bids and took improvement certificates in payment. In this way he sold off the lands assessed, so that at the end of the sale there remained unpaid some \$300,000 of improvement certificates, none of which have been paid from that time on. As all the lands assessed had been sold, these certificates have no security under any statute, and the plaintiff sues to recover for the breach of trust arising from this conduct of the city. His position is that either the city treasurer of Long Island City proceeded in contradiction of the statutes of 1874, 1879, and 1886, taken in combination, or that, if these statutes purport to allow the action of the city treasurer, they were themselves unconstitutional, in that they impaired the obligation of the contract between the city and the certificate holders.

The Court of Appeals of the State of New York, in People ex rel. Rosalie Adele Oakley v. Bleckwenn, 126 N. Y. 310, 27 N. E. 376, decided that the owner of a lot which had been sold under the act in question could compel the city treasurer to accept these improvement certificates in redemption of her lot from an assessment. This was probably a redemption from one of the sales of 1888, although the case does not distinctly so state. In the case of Nelson v. Bleckwenn, 137 N. Y. 565, 33 N. E. 338, the same court affirmed without opinion the judgment of the General Term for the Second Department relating to the same statute (19 N. Y. Supp. 993). One Nelson, who, though not acting in behalf of the plaintiff herein, was acting with his knowledge, had obtained an injunction against the city treasurer from selling any of the lots under the sale of 1892 for less than the face value of the assessment and receiving in payment improvement certificates, instead of cash. The General Term reversed this injunction, holding expressly that the city treasurer might accept bids for less than the amount of the assessment, and still take the certificates in payment. The result was, therefore, that by February 10, 1893, the date on which the Court of Appeals handed down its decision in Nelson v. Bleckwenn, it was clear that the city treasurer could accept the certificates upon bids for less than the assessment. It was also clear that the city treasurer proposed to do so, because, although the plaintiff, through his agent, Warringer, appeared at the sale in 1892 and protested against the practice, the city treasurer then informed him of his purpose to continue till the end. As has been said, he did so continue, to Warringer's knowledge, till all was finished. This bill was filed on July 21, 1910, which was therefore more than 18 years after the city treasurer had taken the position of which the plaintiff now complains, and more than 17 years after it had been decided in the Court of Appeals that he was right in his construction of the statutes.

The defendant raises three points: First, that the city of New York, the successor in interest of Long Island City, is in no case the proper party defendant, since the commissioners were the agents of the state of New York, and could create no liability of the city; second, that the statutes of New York authorized the course adopted, which was legal, and that the later statutes affected only the remedy, and not the right, of the certificate holders; third, that in any event the statute of limitations has long since applied.

Reported in full in New York Supplement: reported as a memorandum decision without opinion in 65 Hun, 621.

Stephen A. McIntire and Charles K. Allen, both of New York City, for plaintiff.

George P. Nicholson and Arthur L. Goodhart, both of New York

City, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). [1] The Court of Appeals of the state of New York has construed the effect of the two subsequent enactments upon these certificates. It has decided that the law of 1879 gave to the county treasurer the right to accept certificates in payment of the assessments and that the law of 1886 authorized him to accept bids for less than the assessments. As a matter of statutory construction, including the Constitution of the state of New York, this is conclusive upon me, and the only question which could be open is whether the effect of those two statutes, when taken together, might not be to impair the obligation of the contract. The effect of those decisions seems to me to give a direct preference to those certificate holders who happened to present their certificates at the sales of lands, or to sell them to owners of assessed property. As I said upon the argument, the case of the other holders is precisely similar to what would be the fate of minority bondholders who did not come into a reorganization agreement, if those bondholders who did were permitted to use the face of their bonds upon the purchase price. Every one knows that the custom in those cases is to credit upon the bonds only that proportion of the amount of the purchase price which the bonds presented by the reorganization committee bears to the total issue. I think there would be a genuine question of the constitutionality of the statutes of 1879 and 1886 which gave a part of the certificate holders such a priority over the rest.

This question does not, however, seem to me to be open for consideration in this case, because the bill is clearly barred by the statute of limitations. The plaintiff's answer is that the statute of limitations never runs against the beneficiary of an express trust, unless the trustee has openly repudiated his obligations to the knowledge of the beneficiary himself. I may accept that doctrine, which happens to have been affirmed in a case very similar in subject-matter in the Supreme Court. New Orleans v. Warner, 175 U. S. 131, 20 Sup. Ct. 44, 44 L. Ed. 96. That case is not applicable, however, to the facts in the case at bar, even assuming that the defendant in the case at bar in any event could be held liable. Its obligations as trustee, according to the plaintiff's own theory, consisted in foreclosing the liens of the assessments for the benefit of the certificate holders, and keeping and distributing among them the money which was realized. The alleged breach of trust rested in what the trustee supposed was the final execution of these obligations. When the city sold all the lots and accepted the certificates in payment, it undertook, and as it supposed it successfully undertook, to wind up the whole proceeding, and if some of the certificates remained unpaid, that was supposed to be one of the misfortunes inherent in the situation. Moreover, in doing this the city, if a trustee, was guilty of no fraud, for it had the authority, not only of the statutes of the state of New York, but of a decision of the highest court of that state, which affirmed the propriety of the course undertaken by the city treasurer.

Furthermore, as early as 1892 the city treasurer had, upon protest made by the plaintiff, openly avowed his determination to pursue that course now indicated as a breach of trust. He had not only asserted that purpose, but had proceeded in the face of an attempted injunction from the courts, and had successfully pushed through all the courts to its conclusion his position. It is a little difficult to see what more open, definite, and final repudiation of his duties he could have made, assuming that his duty was not to accept certificates upon bids for less than the amount of the assessments.

[2] It is not necessary, I think, to consider whether a federal court of equity will feel itself absolutely bound by the state statute of limitations. Kirby v. Lake Shore, etc., Railroad, 120 U. S. 130, 138, 7 Sup. Ct. 430, 30 L. Ed. 569. There are undoubtedly certain principles by which it will feel itself guided, independently of state statutes. But where no such rules intervene, federal courts are accustomed in practice to follow the local statutes, even in cases of exclusive, and not of concurrent, jurisdiction. Clarke v. Johnston, 18 Wall. 493, 21 L. Ed. 904; Philippi v. Philippe, 115 U. S. 151, 5 Sup. Ct. 1181, 29 L. Ed. 336; Pearsall v. Smith, 149 U. S. 231, 13 Sup. Ct. 833, 37 L. Ed. 713; Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718. Clarke v. Johnston, supra, was the case of an express trust, where the trustee had closed up the estate and disposed of the property, as he supposed, 40 years before bill filed. The cause might no doubt have been disposed of upon the ground of general laches, but the court applied the statute of limitations of New York affecting suits in equity. Eighteen years is less than 40, but it is nearly twice as long as the New York Code prescribes.

Nor, if the case be looked at as involving only laches, is there any ground for a different result. The delay is unexcused, certainly after the Court of Appeals decided Nelson v. Bleckwenn, supra. If any constitutional question existed, it was time then to invoke it; nor is it an excuse that much time was lost in negotiations. If the negotiations were not to count, that should have been so understood at the outset. Nothing occurred which justified the reservation of the point for so many years.

Bill dismissed, but, under all the circumstances, without costs.

DITTMAR v. FREDERICK STARR CONTRACTING CO. et al.

(District Court, E. D. New York. July 6, 1916.)

Shipping \$\infty 54\)—Charters—Liability for Loss of Scow—Insecure Mooring.

The charterer of a scow, by a time charter which amounted to a demise, except that the owner furnished the captain, committed her to the care of a consignee of cargo, which, after she was unloaded, moored her in the bay to a part of an anchor used for a mooring, from which place she was driven on shore in a high wind and wrecked. When she was taken from New York Bay, the charterer, in consideration of the waiver by the owner of a provision of the charter party requiring him to insure her, agreed to be responsible for her safe return. Held, on the evidence, that her loss was due to the negligence of the consignee and the concurring negligence of the captain in failing to have her securely moored; that the consignee was in that respect the agent of the charterer, and the captain the agent of the owner, who was entitled to recover one-half damages from the consignee, or, failing its collection, from the charterer on its contract for safe return.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219-221; Dec. Dig. \$\sim 54.1\$

In Admiralty. Suit by William D. Dittmar, owner of the scow John J., against the Frederick Starr Contracting Company and the Elliot C. Brown Company. Decree for libelant for one-half damages.

Alexander & Ash, of New York City, for libelant.

Harrington, Bigham & Englar, of New York City, for Frederick Starr Contracting Co.

Graves, Miles & Yawger, of New York City, for Elliot C. Brown Co.

CHATFIELD, District Judge. The libelant claims damages for injuries to a scow, the John J., which went ashore during the night of January 3, 1914, in Oyster Bay, N. Y., where it had previously been taken with a cargo of materials for the Elliot C. Brown Company, which was building a dock upon the property of one of the residents

of the neighborhood.

The Brown Company had already removed the load, and had taken the scow away from the face of the dock to a mooring which was used by them for that purpose. It appears that two scows might be moored along the face of the dock, but that the contractors, for the convenience of their work, kept but one at the dock and left one scow which was waiting to be unloaded, or one which had been unloaded and was waiting to be taken away, at a mooring out in the harbor. This mooring had been put down the year before by the yacht captain of the property owner as a mooring for small boats. It consisted of a small anchor, with one fluke removed to obviate danger to boats passing over the mooring, and was originally placed in 15 feet of water. The Brown Company used the mooring during the course of its operations, and on one occasion before the accident its foreman took up the anchor, but replaced it after employing it as a kedge anchor.

The captain of the John J. was taken down to Oyster Bay and placed

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

in charge of the boat by one of the officers of the Starr Company, just as the unloading of the boat was begun. The captain testified that after unloading the boat was anchored in but 7 feet of water at low tide. Whether or not he is correct in this estimate, it would seem that the replacing of the anchor by the foreman of the Brown Company left it in shallower water, or in such a position that the single fluke did not hold to the extent that was necessary when a strain came upon the anchor. Further, the anchor was lightened by the removal of the fluke, and was insufficient to hold the boat unless the remaining fluke was securely buried or held against something comparatively solid.

On the day before the accident, the John J. finished unloading and was taken out to the mooring buoy by some of the contractor's men, who used a small oyster steamer as a tugboat. There is much dispute as to the length of the line and the strength of the line attached to the chain running from the mooring anchor. The depth of water and the angle at which this chain would extend from the chock of the John J. are also points as to which the witnesses seriously contradict each other.

The charter of this boat was in effect a demise of the boat, but the captain was furnished by the owner as one part of the equipment of the boat. His duties and responsibilities, in so far as the care of the boat itself was concerned, were performed as the servant of the owner rather than as the servant of the charterer. It would appear that the owner of the boat was responsible for the captain's mistaken idea as to the depth of the water and his failure to appreciate that the John J. would lift the anchor, or disturb it so that it would not hold, if rough weather intervened. There is no satisfactory evidence that the condition of the line was such as to indicate that it was insufficient for the purpose. In fact the John I, drifted for several hours, and the line held when the anchor caught upon a bank near the shore for some hours (while the wind continued to increase) before the line parted and the boat went ashore. In the meantime the Brown Company's workmen had attempted to put out another anchor, but had been unable to do so in such a way as to help the John J.

The mooring was furnished by the contractor without sufficient investigation to ascertain its sufficiency for the purpose. The contractor (the Brown Company) was responsible for the availability of the mooring, even if prepared by the owner of the property, and if furnished to them for such use as they might see fit to make of it in their own business.

The evidence of some of the witnesses shows that the contractor's men sought to have the captain of the John J. use a longer line. If this be so, they knew or had reason to suppose that the mooring was insufficient. They apparently did not keep track of the boat during the following day, until too late to go to its assistance, and they knew, or should have known, that the boat was placed at a mooring without an anchor of its own in case of need.

For all these reasons, the Brown Company is evidently responsible for at least a share in the accident. The captain of the barge, how-

ever, seems to have been careless in the way in which he either moored his boat, or allowed it to be moored, without proper investigation of the conditions, which he could ascertain for himself, and for his acts

in this regard the owner is primarily liable.

The libelant has based his action upon a charge of tort against the Starr Contracting Company. He has alleged, as a part of the circumstances under which the tort was committed, that the Starr Company had chartered his boat for the period of one year, and had also agreed to pay for additional insurance when the boat went outside of New York harbor. The latter agreement was waived in this instance and a temporary arrangement substituted. The libelant alleges as one of the "faults" or "grounds of negligence" that the Starr Company "agreed with libelant to pay for all injuries sustained by the vessel at Oyster Bay." It also alleged as a part of the cause of action in tort that the Starr Company did not return the boat in good order, as it undertook to do by its charter.

We must assume that the libelant intended to set up a cause of action in tort and also in contract, by showing that the conditions of this charter were broken by a failure to return the boat in good order and also to allege some breach of the so-called contract of insurance.

The case now stands upon the testimony, and not upon the letter of the pleading. It would appear that the Starr Company asked the libelant to waive his right to take out the additional insurance, upon the representation of the Starr Company that Oyster Bay was a safe harbor and that it would hold itself responsible for the safe return of the boat. Inasmuch as the Starr Company had in each instance previously paid the price of this additional insurance, there would be sufficient consideration to maintain the contract, by the saving to the Starr Company, on the one hand, and by the waiver of rights by libelant, on the other.

The case of Gannon v. Consolidated Ice Co., 91 Fed. 539, 33 C. C. A. 662, is authority for the proposition that the charterer of a boat is responsible not only in contract for the safe return of the boat, but responsible as well for the torts of its bailees and agents, committed in the course of the authority delegated. Unless the Starr Company can pass on the entire liability to some independent party, then it is in effect an insurer under its charter against negligence by its agent, and is a guarantor for the safe return of the boat in the present action. The Starr Company is responsible for the injuries to the boat through the actions of the Brown Company, to which the boat was intrusted by the Starr Company as agents, for such matters as are not directly concerned with the loading or unloading of the scow. It may be assumed that the Brown Company might be an independent contractor, and not an agent of the Starr Company, as to many things not having to do with the carrying of the load and the care or movement of the boats. But in the latter respects the Starr Company evidently made the Brown Company its agent and bailee, and hence the so-called contract of insurance, which apparently was made, merely corresponds to the obligation which rested upon the Starr Company in complying with this charter.

But such an obligation would not include the fault of the master of the scow as to things in which he represented the owner of the boat. The result is, therefore, that the libelant is entitled to recover in this action one-half his damages caused by the negligence of the employés of the Brown Company, and to that extent the Starr Company is relieved by having transferred, through the petition filed, its liability for the tort alleged in the libel. Inasmuch as the libelant has claimed (aside from the alleged contract to insure) only the tort or a breach of contract through the commission of the tort, and inasmuch as the Starr Company has allowed the case to be tried upon such an ambiguous form of pleading, no costs will be allowed the Starr Contracting Company against the libelant; but, as in the case of Harms v. Upper Hudson Stone Co. (D. C.) 225 Fed. 630 (affirmed in the Circuit Court of Appeals, 234 Fed. 859, — C. C. A. —, but modified as to the disallowance of costs to the charterer), the Starr Contracting Company may have one-half its costs in this court against the Elliot C. Brown Company. The libelant may have one-half damages and costs against the Elliot C. Brown Company.

In the event that the Brown Company does not respond to its share of the damage, the libelant will be entitled to recover one-half damages with one-half costs of this suit against the Starr Contracting Company, for breach of its contract to return in good order.

THE GYDA.

(District Court, D. Maine. July 31, 1916.)

No. 338.

MARITIME LIENS \$\igcup 6\to Persons Entitled to Lien\to Officers of Owning Corporation.

A stockholder in the corporation owner of a vessel, who is also a director and the treasurer and general manager, having full management of the business of the corporation and receiving and disbursing all its earnings, is not entitled to a maritime lien for services rendered, nor for money advanced to pay a claim for repairs; the presumption being that he relied on the credit of the company.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 10; Dec. Dig. ⊗ 5.]

In Admiralty. Suit by H. Dexter Malone and others against the gasoline schooner Gyda. In the matter of the claim of Frank R. Neal, intervener, to a maritime lien. Claim disallowed.

Gerry L. Brooks, of Portland, Me., for intervener. Benjamin Thompson, of Portland, Me., for mortgagee.

HALE, District Judge. Upon this libel the schooner Gyda was seized on January 11, 1915. On January 21st she was sold by the marshal, on an interlocutory order of sale; the proceeds of the sale were paid into the registry of this court. The intervener, Frank R. Neal, seeks to establish an admiralty lien for supplies furnished in

the operation of the Gyda. William M. Prest, holder of a mortgage on the Gyda, has also filed an intervention praying that his mortgage may be adjudged a lien on the remnants, and ordered to be paid from the funds in the registry. Prest contests the right of Neal to a maritime lien.

No question is made that the court, having sold the steamer on admiralty process, will dispose of the fund in the registry among the parties who are legally entitled to the same. Andrews v. Wall, 3 How. 568, 573, 11 L. Ed. 729; The Lottawanna, 21 Wall. 558, 582, 22 L. Ed. 654; American Trust Co. v. Fletcher Co., 173 Fed. 471, 476, 97 C. C. A. 477.

The proofs show that the Gyda and also the Wissoc were owned by the Seacoast Fisheries Company, a corporation organized under the Massachusetts laws, on August 28, 1915; that by vote of the directors Frank R. Neal was elected treasurer and general manager, with full power to act for the company. At the time referred to in his petition he was a stockholder in the company, and director, treasurer, clerk, and general manager of it. As treasurer, he received whatever funds were earned by the vessels, and disbursed them on the various accounts due from the vessels; he had the general management of the boats; he attended to provisioning them, keeping them up, and seeking markets for cargoes. The by-laws of the company (article 6) provided:

"The treasurer shall have charge of all funds and property of the company, and shall keep an accurate account of the same, depositing all money in the name of and to the credit of the company, and pay out the same as instructed by the board of directors."

As general manager he had "full power to act on behalf of the company, on all matters, as fully and as effectively as the board of directors itself could do." It appears that, as manager, he managed the

affairs of the company.

His claim is, in part, for money expended for the schooner Gyda, under the following circumstances: In February, 1914, it became necessary to have repairs made upon the schooner; by order of Neal this work, amounting to \$135, was done by Richard T. Green Company. In March following it became necessary to have certain other work done on the schooner, amounting to \$74.27. The first amount not having been paid, and the company being without funds, the Richard T. Green Company refused to do any further work until the first amount was paid; and, it being necessary to have the work done. Neal paid the \$135 and took an assignment of such claim. The second part of Neal's claim consists of one item, namely 22 weeks' labor, at \$20 per week. He claims that, for all the time at \$20 a week, he was employed as a seaman or fisherman, either on board the schooner or as a "resident member of the crew." He testifies that the practice in Gloucester was for a certain number of the men to stay ashore while the rest were out fishing, so that the nets might be repaired, and certain other work done, to carry on the business in which they were engaged. The learned proctor for the mortgagee (Prest) contends that Neal, being a stockholder in the Seacoast Fisheries Company,

a director in it, and manager and clerk of it, is a part owner of the vessel, within the meaning of the maritime law; that he is not entitled to a maritime lien for any service that he may have rendered; and that his acquiring the claim of the Richard T. Green Company, by assignment, was not only upon the credit of the owner; but that the payment of such claim operated to discharge any maritime lien that the assignor of the claim may have had.

In the case of the Murphy Tugs (D. C.) 28 Fed. 429, Judge H. B. Brown, for the District Court of Michigan, held that, where a stockholder, director and treasurer of a steamboat line, put repairs on several vessels of the line, his lien, if he had any, should be postponed to that of the other creditors. Judge Brown said that he did not think that the mere fact that Murphy was a director and stockholder would necessarily prevent his contracting with the company or from acquiring a lien on the property; but that his position as the legal custodian of its funds was strong evidence to show that he relied upon the personal credit of the company, or rather upon his ability to pay himself out of its funds, and his lien should be postponed to that of the other creditors.

In The Cimbria (D. C.) 214 Fed. 131, the District Court of New Jersey, 1914, held that a stockholder and director in a steamboat company, who took an active part in the management of its business, was, in essence, a part owner of its vessel, and, against strangers to the title who have a maritime lien, is not entitled to a maritime lien on one of the company's vessels for supplies furnished or for advances made to pay claims for repairs and supplies. The court cited Petrie v. Steam Tug Coal Bluff No. 2 (D. C.) 3 Fed. 531; The Queen of St. Johns (C. C.) 31 Fed. 24. In The Cimbria (D. C.) 214 Fed. 128, 133, the court said:

"In the present case, libelant was more than a mere stockholder. He was a director and actively engaged in transacting the business, involving both the company's finances and its use of the vessel. * * * The conclusion here reached, while contrary to that reached in The City of Camden (D. C.) 147 Fed. 847, is fully supported by The Murphy Tugs (D. C.) 28 Fed. 429, and The Queen of St. Johns (C. C.) 31 Fed. 24, which, squaring more with my own judgment, I am constrained to follow."

In the case at bar, the learned proctor for the intervener, Neal, urges that the case should be decided upon the authority of The City of Camden (D. C.) 147 Fed. 847, and that the proofs establish a lien for his labor, in spite of the decisions to which I have referred. In respect to the payment of Green's claims, he urges that the advances were made solely on the credit of the vessel.

While the question is not entirely free from doubt, and while I find no decisive Supreme Court case, and no case where a Circuit Court of Appeals has passed upon the subject, I am constrained to agree with the conclusions of the court in The Queen of St. Johns (C. C.) 31 Fed. 24, 28, where Judge Pardee, in the Circuit Court, in 1886, said:

"If such liens were to be allowed in a court of admiralty, it would open the door to fraud and collusion."

In the case before me, all the earnings of the company's steamer were received by Neal and disbursed by him; he had the entire management of the finances of the company. I do not find enough in the proofs to take the case out of the rule in the cases I have cited. So far as relates to the payment by Neal of the Richard T. Green Company's account, it has been held in The Sarah J. Weed, Fed. Cas. No. 12,350, by Judge John Lowell, that the general agent of the ship, at her home port, is not entitled to be subrogated to the lien of seamen whose wages he has paid in the regular course of his agency. In China Mutual Insurance Co. v. Ward et al., 59 Fed. 712, 714, 8 C. C. A. 229, in delivering the opinion of the Circuit Court of Appeals, Judge Ward said:

"A ship's husband does not have a maritime lien upon the vessel for the advances made in the course of his agency for the owners, in the absence of an express contract with them to that effect, or of peculiar circumstances from which such a contract should be implied. Presumptively, he relies upon the credit of the owners. The Larch, 2 Curt. 427 [Fed. Cas. No. 8,085]; The Sarah J. Weed, 2 Low. 555 [Fed. Cas. No. 12,350]; White v. The Americus (D. C.) 19 Fed. 848; The Raleigh (D. C.) 32 Fed. 633; The Esteban de Antunano (C. C.) 31 Fed. 920."

In The Raleigh (D. C.) 32 Fed. 633, 634, Judge Brown said:

"When such an agent pays the ship's obligations on the application of the master or the owners, the presumption is that he does so, not as a stranger, but as the agent of the ship and her owners, and upon the personal credit of the latter, or of the future business and earning of the ship." The Georgia (D. C.) 46 Fed. 669; White v. Two Hundred and Ninety-Two Thousand Three Hundred Dollars (D. C.) 19 Fed. 848; Henry's Admiralty, § 47.

After a careful examination of the proofs and of the authorities, I am constrained to find that the intervener, Frank R. Neal, is not entitled to any lien upon the remnants in the registry from the sale of

the Gyda, and that his petition should be dismissed.

A decree may be drawn dismissing his petition. In accordance with the stipulation made by the proctors in the case, the claim of the mortgagee, William M. Prest, is established for the full amount, with the further stipulation that it shall be postponed until all the lien claims which have priority by law have been paid. The lien claims having priority have now been passed upon by the court and paid. The claim of William M. Prest, as mortgagee, is therefore adjudged a lien on the fund, in accordance with the stipulation. The fund in the registry, then, after deducting the costs of this proceeding, shall be paid to the mortgagee, William M. Prest, or his proctor of record, in part satisfaction of his mortgage, and a decree to this effect may be presented.

KEELER BROS. v. YELLOWSTONE VALLEY NAT. BANK.

(District Court, D. Montana. June 21, 1916.)

No. 501.

JUDGMENT \$\infty 138(1)\to Defaults\to Vacation.

A default raises a presumption that the cause of action is valid and that defendant has no defense; but where a default is due to mistake, inadvertence, surprise or excusable neglect, and defendant appears to have a defense, the default will be set aside on terms, where motion is made within a reasonable time, and will not be upheld on the theory that there should be a speedy termination of litigation.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249-251; Dec. Dig. ⊕ 138(1).]

At Law. Action by Keeler Bros., a corporation, against the Yellowstone Valley National Bank, a corporation. On motion by defendant to open its default. Motion granted on terms.

A. J. Galen and Frank W. Mettler, both of Helena, Mont., for plaintiff.

H. H. Hoar, of Sidney, Mont., and Walsh, Nolan & Scallon, of Helena, Mont., for defendant.

BOURQUIN, District Judge. The true theory of defaults is that defendant voluntarily admits the cause of action is valid, admits he has no defense, and consents to suffer judgment. This admission and consent are inferences or presumptions of fact from his conduct. If, on motion to vacate and permit answer, it appears his conduct is so far explained and excused that such admission and consent cannot reasonably be inferred or presumed, the default is set aside, in that it is due to mistake, inadvertence, surprise, or excusable neglect. On the other hand, if, despite his explanations and excuses, it is clear the inference or presumption ought to be and is drawn that he in fact so admitted and consented, he will not be permitted repentance or afterthought to withdraw such admission and consent; and the default stands, it is said, as a penalty for what is characterized as gross or inexcusable neglect—a wrong reason, it is believed, for a right decision.

Where time has not estopped, and where there is a defense, no default should withstand a motion to open for defense, unless under all the circumstances the aforesaid inference or presumption of fact ought to be and is drawn by the court. Speedy termination of litigation, sometimes invoked as sufficient reason to deny the motion, is not the end, but means, to justice; and delays from defaults, generally more apparent than real, should be penalized by terms rather than by judgments that may be gratuities to plaintiffs and punishments to defendants, having nothing of ultimate justice therein. Hence courts ought to and do lean to trials of the merits, and to vacate defaults even when only doubtful whether the inference or presumption is repelled or overcome, or, as generally put, doubtful whether the de-

fault should be opened. Canning v. Fried, 48 Mont. 563, 139 Pac. 448.

In this case the circumstances do not warrant the inference or presumption of admission and consent aforesaid, and though to the cause of action sounding in unliquidated damages the defense may be doubtful, defendant's right to litigate the point (to say nothing of its right to participate in the assessment in any event), with all else, requires its timely motion be granted; and it is so ordered, provided within 10 days defendant pays all accrued costs and an attorney's attendance fee herein of \$25.

In re APPLEGATE.

Ex parte J. M. MINUGH CO.

(District Court, S. D. New York. July 20, 1916.)

BANKRUPTCY €==417(2)—DISCHARGE—VACATION.

Where creditors fail to file specifications against the granting of a discharge within the time limited through mistake, a discharge granted thereafter, the filing of specifications having been denied, may be vacated, and the creditors allowed to file their specifications, despite Bankr. Act July 1, 1898, c. 541, § 15, 30 Stat. 550 (Comp. St. 1913 § 9599), declaring that a discharge may be vacated at any time within a year after it is granted on proof that it was procured through fraud of the bankrupt, though it did not appear that the bankrupt was guilty of any fraud.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 869; Dec. Dig. с→417(2).]

In Bankruptcy. In the matter of the bankruptcy of John Applegate. Ex parte application by the J. M. Minugh Company to vacate the discharge of the bankrupt and for permission to file specifications. Discharge vacated, and permission to file specifications granted.

This is an application to vacate the discharge of the bankrupt and to be allowed to file specifications, under the following circumstances: The involuntary petition was filed against the bankrupt on the 6th day of October, 1915. On the 15th day of April, 1916, the bankrupt filed his petition for a discharge, which was returnable on the 15th day of May. On that day the creditor filed his notice of appearance and demanded an examination of the bankrupt, and the cause went over for two weeks, until the 29th of May, 1916; the objecting creditor having until the 25th to file his specifications. Some differences arose between the attorney for the bankrupt and the attorney for the objecting creditor as to the examination of the bankrupt, and four stipulations were signed, extending the time to file the specifications until the 19th day of June, 1916. On that day the matter was adjourned over again until the 26th. The attorney for the objecting creditors presented specifications, which the clerk declined to receive, as there had been no order extending the time. The discharge was then granted. Immediately thereafter this motion was made to vacate the discharge and to extend the time of the objecting creditor to file his specifications nunc pro tunc.

Tobias A. Keppler, of New York City, for objecting creditor. Meyer Levy, of New York City, for bankrupt.

LEARNED HAND, District Judge (after stating the facts as above). It would be reasonable in this case to open the default of the objecting creditor, which undoubtedly arose through some misunderstanding between him and the bankrupt's attorney about the time and place when the bankrupt should appear for his examination. The bankrupt, however, insists that under section 15 this cannot be done. It is quite true that the objecting creditor does not bring himself within section 15. There is no fraud, and, if there were, the fraud was not discovered after the discharge was granted. The bare question is whether this court, once the discharge has been signed, is without power to vacate the same, although there has been a mistake or any other reason of equity why there had never been a trial upon the merits. I do not believe that section 15 means this. The term "revocation" means, I think, a final denial of the discharge, though once granted, not merely to vacate the discharge and leave the matter open for determination. I agree with Remington, § 2811. Indeed, the bankrupt has even been allowed to vacate his own discharge. In re McKee (D. C.) 165 Fed. 269.

I see no reason why this order should not be subject to the same equitable control as any other order of a court of equity, certainly when there has never been any disposal of the cause upon the merits. Judge Ray, in Re Upson (D. C.) 124 Fed. 980, and In re Walsh (D. C.) 213 Fed. 643, seems to have interpreted section 15 as covering a case of this sort, but the distinction suggested in Remington does not seem to have been brought to his attention, and until the matter is conclusively determined I prefer what seems to me the more equitable construction.

An order will be granted, vacating the discharge and allowing the specifications as filed on the 26th of June to stand. The same will be referred to the special master.

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BEAL et al. v. CARPENTER. CARPENTER v. BEAL et al.

(Circuit Court of Appeals, Eighth Circuit. August 2, 1916.) Nos. 4548, 4549.

(Syllabus by the Court.)

1. EXECUTION \$\igstructure 29-Process \$\igstructure 73-Joint-Stock Companies-Certificates of Shares-Substituted Service-Jurisdiction and Sale of under Such Service.

Certificates of shares of the capital stock of a joint-stock association or partnership, the articles of which contain provisions that the capital stock shall be divided into shares of the par value of \$100 each, that certificates of shares shall be issued to each partner of the number of shares to which he is entitled, that the certificates and the interests they represent shall be transferable by written assignments on their backs, that they may be levied upon by writs of execution, or other legal process, in the same manner as shares of stock in corporations, and that the purchaser at any sale of shares of a partner under such process, or by virtue of any contract made by the partner, shall be entitled to have issued to him a certificate or certificates of such shares, are valuable personal property, and their presence in a state is sufficient to sustain the jurisdiction of a court of that state to subject the certificates and the interests in the property of the joint-stock association, which they represent, to adjudication and sale upon substituted service on the owner thereof, although he is not a resident of the state, and neither he nor any of the property of the association is within the state.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 61; Dec. Dig. \$29; Process, Cent. Dig. § 87; Dec. Dig. \$73.]

2. Judgment \$\infty\$=817—Cause of Action Good in One State and Bad in Another—Faith and Credit Due Judgment or Decree in the Former State in the Latter.

In a suit upon a judgment or decree of another state the same credit, faith, and validity must be given to it by the court in which the suit upon the judgment is brought as would be given to it in the state in which the judgment was rendered; and this, although it is founded upon a contract, transaction or action which, though good in the state in which the judgment or decree was rendered, was and is contrary to the public policy of and forbidden under penalties by the laws of the state in which the suit upon it is brought,

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1456, 1457; Dec. Dig. 🖘817.]

Reed, District Judge, dissenting in part.

Appeal from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Suit by Nathaniel L. Carpenter against Joseph T. Beal and another. From the decree, which granted only part of the relief sought, both defendants and plaintiff appeal. Affirmed.

Henry M. Armistead and Ashley Cockrill, both of Little Rock, Ark. (John R. Abney, of New York City, on the brief), for plaintiff.

C. C. Reid and J. M. Moore, both of Little Rock, Ark., for defendants.

Before SANBORN, Circuit Judge, and REED and BOOTH, District Judges.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 235 F.—18

SANBORN, Circuit Judge. This is an appeal from a decree against Beal, McDonnell & Co., a joint-stock association or partnership, and their members, to the effect that they transfer two certificates or shares of the capital stock of the company from J. S. McDonnell, the former owner, and issue certificates thereof to Nathaniel L. Carpenter, the plaintiff below. The reasons urged by the defendants below for the reversal of this decree are: First, that the Supreme Court of the state of New York acquired no jurisdiction by substituted service to render the decree of foreclosure of the pledge by McDonnell, and of the sale of these certificates of shares under which Carpenter claims title; and, second, that the decree of the New York court was not enforceable in the state of Arkansas, because the debt, to secure which the pledge on which it was founded was made, although valid and actionable in New York, was illegal and void in the state of Arkansas, because it arose out of transactions and contracts forbidden by the laws of Arkansas for the sale of cotton futures, which the parties intended to settle according to the differences between the contract and the market prices without the delivery or receipt of any cotton whatever.

[1] It was indispensable to the acquisition by the New York court by substituted service on McDonnell of jurisdiction to decree the foreclosure of his pledge and the sale of his pledged certificates that those certificates should constitute property having a situs in the state of New York, and the contention on which the first ground for the reversal of the decree rests is that they were not property, but were, like deeds of land, mere evidences of title to the interest of McDonnell in the property of the association. But certificates of shares of stock in a corporation are not only evidences of interests in the property of the corporation, but representatives of those interests having a situs wherever they are present to such an extent that they are property of value which will sustain the jurisdiction of a court to decree the sale and transfer of both the certificates and the interests they represent by its judgment or decree founded on substituted service upon the owner, although he is not a resident of the state in which the judgment or decree is rendered, and neither he nor any of the property of the corporation is present within its jurisdiction. Merritt v. American Steel Barge Co., 79 Fed. 228, 231, 24 C. C. A. 530; Blake v. Foreman Bros. Banking Co. (D. C.) 218 Fed. 264, 266. Why are not certificates of shares of the capital of a joint-stock association in the same class? A joint-stock association is a partnership, but the members of such an association are free to make and to estop themselves from denying every lawful contract regarding their interests in the partnership property, regarding the representation of those interests by certificates of shares in the company and regarding the pledge, levy upon, transfer, and sale of such interests by means of the pledge, levy upon, sale, and transfer of the certificates evidencing and representing them.

The members of this joint-stock association, by virtue of the articles of partnership, made with each other and with the association these agreements: That the capital of the firm should be \$300,000, divided into 3,000 shares, of the par value of \$100 each; that the business of the firm should be managed by an executive committee chosen by

the shareholders, who should ordain and establish all by-laws and regulations necessary to the management of their business; that the shareholders should also elect a president, first, second and third vice presidents, a secretary and treasurer: that there should be issued by the president and secretary, under the seal of the firm, certificates to each partner showing the number of shares he is entitled to, "which certificates and the interests they represent shall be transferable by assignment in writing upon the certificate and surrender of the same to the secretary of the firm, whereupon he shall issue a new certificate or certificates to the transferee," and "the transferee shall be entitled to all the rights and privileges of an original purchaser"; that the secretary shall keep a certificate book and register, and register the issuance and transfer of the certificates, and that none but those appearing by his record to be holders of certificates shall be entitled to dividends or to vote at any meeting of the members of the firm; that the certificates shall provide (and they did provide) that by accepting the certificates the persons to whom they should be issued respectively should become. as would also any who should become transferees or lawful holders thereof, parties to the articles of partnership, that the certificates might be transferred by assignment on the back and a surrender thereof to the secretary, and the obtaining of new certificates from the firm in the names of the respective transferees.

The articles of partnership also contained contracts that the death of any member of the firm should not dissolve the firm, or have any effect upon it, or its operations, or mode of business, except that the person or persons who should become the owner or owners of the interest of the decedent should succeed to his interest, and upon surrender of his certificate should receive a new certificate or certificates for the respective interests owned by the decedent; that the death of a member of the firm should not entitle the legal representatives to an accounting, or to any action in the courts or otherwise against the firm; that the owner of certificates "shall have the right to transfer, sell, or hypothecate the same without the consent of the other owners of certificates, or the officers or executive committee of the company"; that "the certificates may be levied upon by writs of execution, or other legal process, in the same manner as shares of stock in corporations may be levied upon in the state of Arkansas, and the purchaser at such sale of the shares of a partner in said business, or at any sale in pais by virtue of any contract made by the partner, shall be entitled to have issued to him upon producing proper authority of his accession to the shares of the partner in said firm, a certificate or certificates of such shares, and shall thereupon become in all respects subject to the terms and provisions of these articles."

The presence of certificates of the shares of a corporation in one state when all its property is in another is sufficient to sustain the jurisdiction of the courts of the former state to subject the certificates and the interests in the property of the corporation which such certificates represent to adjudication and sale by the courts of the former state on substituted service upon the owner of the certificates, because the certificates not only evidence, but also represent, the interests of their owner in the property of the corporation, because they are bought

and sold as chattels, and because they may be hypothecated and sold. have an inherent market value, and are generally classified as personal property. Cowles Electric Smelting & Aluminum Co. v. Lowrey, 79 Fed. 335, 24 C. C. A. 616. But there are none of these attributes of certificates of stock in corporations which the members of this jointstock association have not by their partnership agreement given to the certificates of shares in their company. These certificates evidence and represent the interests of their owners in the property of the jointstock association as completely as certificates of shares of stock in a corporation represent the interests of their owners in its property. The members of this association have expressly covenanted with each other and with the association in their articles of partnership that the "certificates and the interests they represent shall be transferable by assignment in writing upon the certificate," that they may be levied upon by writs of execution or other legal process in the same manner as shares of stock in corporations, "and that the purchasers under sales made under such legal process on surrender of the certificates sold shall be entitled to a transfer of the shares sold and to new certificates of the shares to themselves." By these covenants the association and the members are alike estopped from maintaining that the certificates do not represent the interests of their holders in the partnership property, or that the transfer of the certificates by the assignments of the holders, or by a levy upon or sale thereof under a lawful order or decree of court, does not convey those interests.

Certificates of joint-stock associations are bought and sold as chattels, they may be hypothecated and sold, they have an inherent market value, and they are generally classified as personal property. They have every attribute that renders certificates of shares in a corporation either representative of the interests of their holders in the property of the corporation or transferable by assignment, or by legal proceedings, or valuable, or leviable, or adjudicable, and they therefore constitute personal property, valuable in proportion to the value of the property of the joint-stock association they represent, whose presence in any state is sufficient to sustain the jurisdiction of a court to adjudicate and sell the interest of the owner thereof therein and in the property of the partnership they represent on substituted service upon him, although all the property of the association is situated and the owner of the certificates resides and is present in another state. In re Jones' Estate, 172 N. Y. 575, 65 N. E. 570, 573, 60 L. R. A. 476; Rice v. Rockefeller, 134 N. Y. 174, 179, 180, 181, 31 N. E. 907, 17 L. R. A. 237, 30 Am. St. Rep. 658.

Joint-stock associations, the interests of whose members are represented by certificates of their shares, transferable with the interests they represent by private and judicial assignment of the certificates, are valid at common law, and as there is no statute of Arkansas prohibiting or denouncing them they are valid in that state. Walburn v. Ingilby, 1 Myl. & K. 61, 76; Merchants' National Bank v. Wehrmann, 202 U. S. 295, 300, 301, 26 Sup. Ct. 613, 50 L. Ed. 1036; Re Mexican & South American Co., 27 Beavan's Reports, 474, 481, 482; Phillips v. Blatchford, 137 Mass. 510, 512; United States v. American Express Co. (D. C.) 199 Fed. 321, 323, 324, and cases there cited. Their analo-

gy to corporations is much closer than to ordinary partnerships. Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, 19 L. Ed. 1029; Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108.

Our conclusion has not been reached without a thoughtful consideration of the argument of counsel for the appellants to the contrary, based on the facts that a corporation holds the title to its property and the shareholders have no title thereto, while the title to the property of a partnership is in the partners, and that, in the absence of such agreements as have been found in the articles of partnership in this case, a levy may be made on the interest of a partner by levying on the property of the partnership, while a levy on the interest of a shareholder of a corporation is not effected by a levy upon the property of the corporation. But the representative character of the certificates of shares and the effect of their transfer by private assignment or judicial decree is conditioned, not by the nature or extent of the interest represented by them, but by the agreement of the owner thereof with those interested with him in the partnership and with the partnership itself, and all the owners of all the certificates of the shares in this joint-stock association, and the association itself, have contracted that the certificates of the shares shall represent the respective interests of the owners thereof in the property of the association, that the certificates and the interest in the property they respectively represent shall be transferable by private assignment and by judicial assignment of the certificates under legal process, and they are all estopped by these contracts from maintaining that these certificates were not valuable personal property, or that the rights in them and in the property they represent were not judicable and transferable by the decree of the court in New York within whose territorial jurisdiction the certificates were present.

It is not necessary to consider or decide whether or not a levy of an execution, or a writ of attachment, in Arkansas upon the interest of McDonnell in the property of the association in that state could lawfully be made, for none has been made, and, if it could be, and if it had been, it would be subject and subordinate to the contracts which have been recited in regard to the representative character of the certificates and the transferability of them, and of the interests they represent, by private or judicial assignment of the certificates.

Authorities to the effect that the individual interest in the property of a partnership the articles of which contain no such contracts as those which have been recited from the articles of this association regarding the certificates of shares, their representative character, and their transferability, may be levied upon in the state where the property is situated, such as Claggett v. Kilbourne, 1 Black (66 U. S.) 346, 17 L. Ed. 213, Jones, McDowell & Co. v. Fletcher, 42 Ark. 422, 448, 453, and Atkins v. Saxton, 77 N. Y. 195, 199, are aside the question which this case presents, because such partnerships lack the attributes of corporations, the certificates of shares, and the contracts concerning their transferability and its effect, which determine that issue in this case. Nor are the cases relative to the proper places of administration of the interests of deceased holders of stock in cor-

porations, such as Kennedy v. Hodges, 215 Mass. 112, 102 N. E. 432, nor those relative to the situs for taxation of such interests, or of the interests of holders of certificates of shares in joint stock associations, such as Peabody v. Stevens, 215 Mass. 129, 102 N. E. 435, and People ex rel. Winchester v. Coleman, 133 N. Y. 279, 283, 284, 31 N. E. 96, 16 L. R. A. 183, so relevant, consistent, or persuasive as to convince that the decision of the question in hand which was reached by the Supreme Court of New York, by the court below, and which has now been reached by this court, is erroneous, or to overcome or disturb the force of the reasons which have been stated for our decision. We turn to the second question.

[2] After the decree of foreclosure of the pledge of McDonnell's certificates, and their sale and conveyance to the plaintiff Carpenter under the decree, had been proved in the trial of the case below, the court rejected an offer of the defendants to prove that McDonnell's debt secured by his pledge arose out of his failure to cover margins on cotton, which, by means of telegrams sent from Arkansas to New York City, he ordered Carpenter to sell in that city for future deliverv. cotton none of which they ever intended to deliver, and none of which they ever delivered. This ruling of the court is assigned as error, and it is contended that the decree and the judicial sale in New York are ineffective and void in Arkansas, because the transactions upon which they rest were violative of the public policy and the laws of that state. Supplement to Kirby's Digest Statutes of Arkansas 1911. §§ 1753b. 1753c. But the contracts of sale were made and were to be performed in New York, and they were valid and actionable there. The orders of McDonnell to Carpenter in New York to make the sales for him in that city, and Carpenter's acceptance and execution thereof in that city, constituted a contract, or many contracts. made in New York, that McDonnell would pay him for the money he advanced and the services rendered in executing his orders. McDonnell's pledge of his certificates of his shares to Carpenter to secure his debt. and Carpenter's acceptance thereof, was a contract made in New York. and by the laws of that state all these contracts were legal and valid. Wilhite v. Houston, 200 Fed. 390, 391, 393, 118 C. C. A. 542, 543, 544; Berry v. Chase, 77 C. C. A. 161, 146 Fed. 625; Edwards Brokerage Co. v. Stevenson, 160 Mo. 516, 61 S. W. 617; Bibb v. Allen, 149 U. S. 481, 489, 13 Sup. Ct. 950, 37 L. Ed. 819. The decree of foreclosure of the lien of the pledge and of the sale and conveyance of the certificates and of the interest they represented was rightly rendered and executed in accordance with the laws of that state.

It is certain that the plea that the contracts and transactions out of which the debt and pledge of McDonnell arose were prohibited and denounced under prescribed penalties by the laws of Arkansas would have been no defense to a suit in the state of New York upon the decree, or upon the sale and title thereunder. And the Constitution, the acts of Congress, and the law of the land repeatedly declared by the Supreme Court are:

"That the judgment of a state court should have the same credit, validity, and effect in every other court in the United States which it had in the state

where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court of the United States." Constitution of United States, art. 4, § 1; Rev. Stat. § 905 (Comp. Stat. 1913, § 1519); Hampton v. McConnel, 3 Wheat. 232, 234, 4 L. Ed. 278; Mills v. Duryee, 7 Cranch, 481, 482, 3 L. Ed. 411; Christmas v. Russell, 5 Wall. (72 U. S.) 290, 300, 301, 302, 18 L. Ed. 475; Fauntleroy v. Lum, 210 U. S. 230, 236, 237, 28 Sup. Ct. 641, 52 L. Ed. 1039; Fall v. Eastin, 215 U. S. 1, 15, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853; Roller v. Murray, 234 U. S. 738, 743, 744, 745, 34 Sup. Ct. 902, 58 L. Ed. 1570; New York Life Ins. Co. v. Head, 234 U. S. 149, 160, 161, 34 Sup. Ct. 879, 58 L. Ed. 1259.

Counsel seek to avoid the logical and inevitable result in this case from the facts and the law which have been recited, by the argument that the rule quoted is inapplicable to a judgment or decree founded on a cause of action which, though good in the state in which the judgment was rendered, is in conflict with the laws and public policy of the state in which the suit is brought to enforce the judgment, and they cite in support of this position Andrews v. Andrews, 188 U. S. 14, 34, 23 Sup. Ct. 237, 47 L. Ed. 366, and Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 290, 299, 300, 8 Sup. Ct. 1370, 32 L. Ed. 239. But, as was shown by the Supreme Court in Fauntleroy v. Lum, 210 U. S. 236, 237, 28 Sup. Ct. 641, 52 L. Ed. 1039, and by Judge Trieber in his opinion in this case (222 Fed. 453, 455, 458), the decision in Andrews v. Andrews, a divorce case, was that where the jurisdiction of the foreign court rendering the decree was dependent upon the domicile of the parties the court of another state that was asked to give effect to the decree might re-examine that question in order to determine whether or not the court which rendered the decree had jurisdiction so to do, an issue always open in an action to enforce any judgment. The decision in Wisconsin v. Pelican Ins. Co. was that, as the jurisdiction of the Supreme Court over actions by a state is limited to controversies of a civil nature, it may look, for the purpose of determining its jurisdiction, into the nature of the cause of action on which a judgment upon which the state brought an action was founded, to determine whether or not the suit upon this judgment involved a controversy of a civil nature.

Neither of these cases sustains the broad proposition of counsel. On the other hand, after a careful review of the opinions in these two cases and the opinions in Christmas v. Russell and Fauntleroy v. Lum, this court is convinced that in the last two cases the Supreme Court has conclusively determined that in a suit upon a judgment or decree of the court of another state the same credit and effect must be given to it by the court in which the suit upon the judgment or decree is brought as would be given to it in the foreign state, although the judgment or decree is founded upon a contract, or transaction, or action good in the foreign state, but contrary to the public policy of and forbidden under penalties in the state in which the suit upon the judgment is brought.

In Christmas v. Russell, 5 Wall. (72 U. S.) 290, 300, 301, 302, 18 L. Ed. 475, Christmas, a resident and citizen of Mississippi, in 1841 made a promissory note upon which, by a statute of limitations of that state, action was barred in March, 1847. In 1853 he went to

Kentucky on a visit, where a suit was brought against him on his note, in which a judgment against him was rendered in November, 1857, after he had made the defense of the statute of limitations of Mississippi, and after the state of Mississippi in February, 1857, had enacted a statute to the effect that no action should be maintained on any judgment rendered by any court without that state against any person who was or should be a resident of that state at the time of the commencement of the action on which the judgment was or should be rendered in any case in which the cause of such action would have been barred by any act of limitation of that state if such action had been brought therein. An action was brought in Mississippi upon the judgment in Kentucky, and the Supreme Court held that, notwithstanding the facts that the case upon which it was based was not actionable in Mississippi when the action upon it was commenced and rendered in Kentucky, and notwithstanding the fact that its maintenance was contrary to the public policy and the laws of Mississippi, the judgment of Kentucky must receive the same faith and credit and have the same validity in Mississippi that it would have had in Kentucky, and that the plaintiff must have judgment upon it in the state of Mississippi.

In Fauntleroy v. Lum, 210 U. S. 230, 231, 236, 237, 28 Sup. Ct. 641, 52 L. Ed. 1039, an action was brought in Mississippi on a judgment rendered in a court of Missouri upon an award of arbitrators made in Mississippi upon a cause of action which arose out of contracts made in gambling transactions in cotton futures. The laws of Mississippi made such contracts and transactions misdemeanors, and provided that they should "not be enforced in any court." The Supreme Court of Mississippi held that the plaintiff could not recover, but the Supreme Court of the United States reversed that decision, held that the judgment in Missouri must be given the same faith, credit and validity in the courts of Mississippi that it would have in Missouri, and that the plaintiff must have judgment upon it in Mississippi, although the laws and public policy of that state prohibited the contracts and transactions on which it was based, made them misdemeanors, and forbade any action upon them.

Counsel argue that this opinion and decision is not conclusive of the question under consideration in this case, because there was an award of arbitrators between the original cause of action and the Missouri judgment. But if in the courts of Missouri a judgment based upon an award which was based on gambling contracts and transactions was not actionable in the courts of Missouri, as the Supreme Court of that state held before it was reversed, then it is certain that an action upon a simple award of arbitrators based on such contracts and transactions was not actionable, and the Supreme Court was necessarily called upon to determine and it did decide the very question in this case, that it was no defense to a suit on a judgment or decree of a court of another state that, although the cause of action on which the judgment was founded was good in the latter state, it was prohibited under penalties by the laws and against the public policy of the former state. This view of the decision in Fauntleroy v. Lum is confirmed by the fact that the Supreme Court stated in its opinion that this was the question it was considering and deciding. After discussing the jurisdiction of the Mississippi court, it stated the question it then entered upon, considered and decided in these words:

"We regard the question [the question of the jurisdiction of the Mississippi court] as open under the decisions below, and we have expressed our opinion upon it independent of the effect of the judgment, although it might be even if jurisdiction of the original cause of action was withdrawn, it remained with regard to a suit upon a judgment based upon an award whether the judgment or award was conclusive or not. But it might be held that the law as to jurisdiction in one case," where the judgment or award was conclusive, "followed the law in the other," where the judgment or award was not conclusive, "and therefore we proceed at once to the further question whether the illegality of the original cause of action in Mississippi can be relied upon as a ground for denying a recovery upon a judgment of another state." 210 U. S. 235, 236, 28 Sup. Ct. 641, 52 L. Ed. 1039.

And in Fall v. Eastin, 215 U. S. 1, 15, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853, Mr. Justice Holmes, who wrote the opinion in Fauntleroy v. Lum, speaking of a decree of a court in the state of Washington, and the faith and credit to which it was entitled in the state of Nebraska, cited that case to the proposition that:

"It does not matter to its constitutional effect what the ground of the decree may be, whether a contract or something else."

The plaintiff below, Carpenter, has also appealed from the decree in this case, because the court refused to award to him \$1,600, which was declared by the defendants as a dividend on the shares of stock in controversy on February 14, 1914, about four months after the suit in New York was commenced. The decree of foreclosure and sale was rendered on April 4, 1914; notice of sale under the decree was given, dated May 1, 1914; the sale was made May 8, 1914; and on May 20, 1914, the referee who made the sale, executed conveyances to Carpenter of the two certificates in controversy, and of all right, title, and interest in and to the same, and in and to the shares of the capital of Beal, McDonnell & Co. named in the certificates. But no mention was made in the decree, in the notice of sale, in the report of sale, or in either of the conveyances to Carpenter, of the dividend. In view of these facts no error is perceived in the failure of the court below under the New York decree, sale, and conveyances to adjudge the dividend to Carpenter, for this dividend was not advertised for sale, sold, or conveyed to him.

Let the decree below be affirmed, with costs in each case against those who respectively appealed.

REED, District Judge, dissents from the opinion and conclusion in No. 4548, Beal v. Carpenter, but concurs in the result in No. 4549, Carpenter v. Beal.

SMITH WALLACE SHOE CO. v. TERNES (two cases).

In re B. F. RICHARDSON CO.

(Circuit Court of Appeals, Eighth Circuit. July 31, 1916.)
Nos. 4589, 163.

BANKRUPTCY = 140(1)—PROPERTY PASSING TO TRUSTEE—CONTRACT CONSTRUED.

Bankrupt was a manufacturer of shoes, and claimant purchased his product. Bankrupt having become unable to continue his business for want of money, the parties entered into a written contract by which claimant authorized bankrupt to purchase, on its account and for it, leather, findings, and other necessary supplies to be shipped to claimant at bankrupt's factory and used in making shoes for claimant on agreed terms, the shoes to be shipped to it as completed. Title to the materials so purchased was to be and remain in claimant, and bankrupt was required to make stated reports of the amount purchased and on hand. At the time of the bankruptcy certain of such material was on hand and by agreement was used up by the trustee. Held, that the contract was not one of sale, conditional or otherwise, but that the material purchased thereunder was the property of claimant, which was entitled to recover from the estate the reasonable value of that on hand and used by the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199; Dec. Dig. &=140(1).]

Appeal from and Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Iowa;

Henry T. Reed, Judge.

In the matter of the B. F. Richardson Company, bankrupt; Herman Ternes, trustee. From an order denying its petition for reclamation of property, and also petition to revise such order, the Smith Wallace Shoe Company appeals. Reversed on appeal; petition to revise dismissed.

Hurd, Lenehan & Kiesel, of Dubuque, Iowa, and Brothers & Mills, of Chicago, Ill. (Louis G. Hurd, of Dubuque, Iowa, and Elmer D. Brothers, of Chicago, Ill., of counsel), for appellant and petitioner.

Brown, Lacy & Clewell, of Dubuque, Iowa (Frank R. Lacy of Dubuque, Iowa, of counsel), for appellee and respondent.

Argued before SANBORN, ADAMS, and CARLAND, Circuit Judges.

ADAMS, Circuit Judge. This is an appeal from an order of the District Court for the Northern District of Iowa disallowing a claim of the Smith Wallace Shoe Company against the estate of B. F. Richard-

son, in bankruptcy.

The claimant was a wholesale dealer in shoes, doing business in Chicago, Ill., and Richardson, the bankrupt, was a manufacturer of shoes, doing business in Dubuque, Iowa. For some time prior to September 22, 1913, the claimant had been purchasing the output of Richardson's factory on terms immaterial now to state. On September 22, 1913, Richardson's financial condition having become somewhat impaired, a new deal was negotiated between them, resulting in the following agreement:

"September 22, 1913.

"Confirming our previous understanding, we authorize you to purchase for us on our account leather, findings, and other materials used in and to be used in the manufacture of shoes for us, also packing cases, boxes, and other containers, all said leather, materials, and supplies to be billed to us and shipped to us in your care at Dubuque, Iowa. Title to all said leather, findings, materials, and supplies and the finished products therefrom to remain in us until the goods are delivered to us at Chicago, Ill. You shall render us a statement on the 1st day of each month of the amount of said leather, materials, and supplies consumed the previous month and give us credit on current invoices for the same. Our discount on total invoice price to remain as heretofore. You agree to render us an inventory of all leather, materials, findings, and supplies on hand, whether in the rough or partly or completely finished, every 60 days, and oftener if we request. This agreement may be terminated on 10 days' notice by either party. Your acceptance hereof shall constitute a binding contract between us.

"[Signed] Smith Wallace Shoe Co.,

"By Geo. D. Chandler, Vice President.

"I hereby accept the above proposition and agree to be bound by all the [Signed] B. F. Richardson Co." terms and obligations thereof.

Thereafter, and in 1914, Richardson was adjudged a bankrupt, and Herman Ternes was appointed trustee of his estate, having before that time been made receiver of the property of the estate by the court.

The claimant then made demand upon the trustee for possession of the leather, findings, and other materials furnished to Richardson pursuant to the contract of September 22d, then in the possession of the trustee. The claimant and the trustee thereupon entered into a stipulation to the effect that the trustee should make use of the leather, findings, and other materials then in his possession in completing work left unfinished by the bankrupt, and that the claimant should have recourse to the assets of the estate for the reasonable value thereof instead of against the property itself.

The claimant afterwards filed its petition with the referee, making a claim for \$2,700 alleging that sum to be the reasonable value of the leather, findings, and other materials delivered by it to the bankrupt under the contract of September 22d, and consumed by the trustee in the process of continuing the operation of the business. Afterwards it amended its petition alleging the reasonable value of such leather, findings, and other materials to be \$4,800, instead of \$2,700. On issue joined, the referee heard the proof and made these, among other, findings:

"That from September 22, 1913, to the date of the adjudication of bankruptcy, the petitioner purchased materials, findings, etc., for the bankrupt, as alleged in said (its) petition to the amount of \$12,074.08. That during the same period of time the bankrupt manufactured and shipped to the Smith Wallace Shoe Company, shoes to the amount of * * * \$11,215.72. * * *

"That after allowing credit as provided by said contract on the invoices for goods manufactured, the bankrupt was indebted to the petitioner for the difference between \$12,074.08 and \$11,215.72, or \$858.36.

"That as shown by the testimony introduced by the petitioner, there was on hand at the time of the bankruptcy, certain of the materials, findings, etc., which had been purchased by the petitioner, for the bankrupt, the value of which was \$4,758.15. That by the terms of the contract the title to the same was in the petitioner, and it could have demanded the delivery to it of any of the materials, findings, etc., which had not been paid for by the bankrupt as provided by the contract. * * *

"That the petitioner is entitled to receive \$858.36 as the value of the materials, etc., which was on hand belonging to it at the time of the bankruptcy, and which had not been paid for as provided by the contract. * * *"

On petition for review, the District Judge heard the case, and without approving or confirming any of the findings of the referee, or making any findings of facts whatever, held that the contract of September 22, 1913, properly construed, was a contract of conditional sale by the claimant to Richardson (the bankrupt) of the leather, findings, and other materials there specified, and as it had never been acknowledged or recorded, as required by section 2905 of the Iowa Code of 1897, it afforded no security for the payment of the value of the leather, findings, and materials furnished by the claimant to the bankrupt, but amounted to an extension of credit only by the claimant to him, to be paid as manufactured shoes should be delivered to the claimant, and an order was made by the judge disallowing the sum of \$858.36 allowed by the referee as a prior and superior claim against the estate of the bankrupt, and remanding the cause to the referee, with directions to allow the entire claim of the claimant as an unsecured claim only against the estate of the bankrupt.

The claimant prosecutes its appeal from that judgment to this court, assigning substantially two errors: That the trial court erred (1) in holding that the contract of September 22, 1913, evidenced a conditional sale of the property therein described by the claimant to the bankrupt; and (2) in not directing the referee to allow the entire claim as a secured claim and ordering it paid in full out of the estate

in the hands of the trustee.

Does the contract of September 22, 1913, evidence a conditional sale by the Smith Wallace Shoe Company to Richardson of the property therein described? Most certainly it does not in terms obligate the Smith Wallace Shoe Company to sell anything to the bankrupt (Richardson), nor Richardson to purchase anything from the Smith Wallace Company. The contract by its terms contemplates no sale, conditional or otherwise, by the Shoe Company to Richardson.

Adopting the language of the proposition made by the Shoe Company to Richardson, which, when accepted by Richardson, constituted the entire contract, the Shoe Company said to Richardson:

"We authorize you to purchase for us * * * leather, etc., * * * to be used in the manufacture of shoes for us, * * * all said leather, etc., to be billed to us and shipped to us in your care at Dubuque, Iowa. Title * * * to remain in us until the goods are delivered to us at Chicago, Illinois."

Then follow provisions requiring Richardson to furnish the Shoe Company every 60 days, or oftener if required, an inventory of all materials on hand, whether in the rough or partly or completely finished.

In our opinion the provisions of this contract show that the parties intended no sale at all to Richardson, but, on the contrary, studiously avoided the use of any language which ordinarily is employed to con-

stitute a sale. In our opinion they most clearly contemplated the creation of an agency in Richardson to make certain purchases for the Shoe Company and thereafter to account for the property so purchased, or its manufactured product, to the Shoe Company. The ruling of the District Court that the paper constituted a conditional sale was accordingly erroneous.

As that court made no finding as to the value of claimant's property taken over and used by the trustee, and as the findings of the referee are uncertain and inconclusive on that point, and afford no criterion for ascertaining that value, we, with a view to avoiding further and protracted litigation, have carefully examined the proof in the light of the pleadings, and have reached the conclusion that a fair value of that property is \$2,700.

The case is brought here both by appeal and petition to revise. As a question of fact is involved, it can be disposed of only on the appeal. The petition to revise must therefore be denied, and the judgment of the District Court is reversed on the appeal by the Shoe Company, and the cause is remanded to the District Court, with directions to allow the claimant the sum of \$2,700, and order the same paid in full by the trustee.

In re WALKER STARTER CO.

E. L. ESSLEY MACHINERY CO. v. BELSLEY.

(Circuit Court of Appeals, Seventh Circuit. May 17, 1916.)

No. 2341.

BANKRUPTCY = 160-PREFERENCES-INSOLVENCY OF DEBTOR.

Under Bankruptcy Act, July 1, 1898, c. 541, § 60b, 30 Stat. 562 (Comp. St. 1913, § 9644), stating, as one element of a preference, insolvency of the debtor at the time of the transfer, the insolvency which must be shown is not merely that the debtor was unable to pay all his debts if then presented, but under direct provision of section 1, subd. 15 (section 9585) that his property, at a fair valuation, was then insufficient to pay his debts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 249; Dec. Dig. ⊕ 160.]

Appeal from the District Court of the United States for the Northern Division of the Southern District of Illinois.

In the matter of Walker Starter Company, bankrupt. Petition of the E. L. Essley Machinery Company to recover possession of certain personal property. From a decree of the District Court for the Southern District of Illinois, Northern Division for the trustee, petitioner appeals. Reversed and remanded.

Harry A. Biossat, of Chicago, Ill., for appellant. Jay H. Magoon, of Lacon, Ill., for appellee.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

PER CURIAM. Appellant filed its petition to recover from the trustee possession of personal property on which appellant had a chattel mortgage, or in lieu of possession to have entered an order directing the trustee to pay the amount due upon the note secured by the chattel mortgage. The mortgage was dated September 1, 1914, within four months preceding the filing of the petition in bankruptcy. The trustee resisted upon the ground that the giving of the mortgage constituted a preference under section 60b of the Bankruptcy Act. This defense was sustained by the referee as special master and was approved by the district judge.

To establish a preference it was necessary for the trustee to prove that the mortgage was given while the mortgagor was insolvent, that the effect of the enforcement of such mortgage would enable the mortgage to obtain a greater percentage of its debt than other creditors of the same class, and that the mortgagee had reasonable cause to believe that it was intended thereby to give a preference. Appellant admits that the last two of these elements were sufficiently proven; but insists that there was a total failure of proof to establish the mortgagor's in-

solvency on September 1, 1914.

An examination of the evidence shows that the special master correctly summarized it in his report by saying that at the time the mortgage was given the mortgagee was duly advised that the financial condition of the mortgagor was such that if the mortgagor's general creditors pushed their claims the mortgagor would then be unable to pay them

Subdivision 15 of section 1 declares that:

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property * * * shall not, at a fair valuation, be sufficient to pay his debts."

No proof whatever was adduced respecting the amount of the mortgagor's property at a fair valuation on September 1, 1914, nor of any comparison thereof with the amount of the mortgagor's debts. And so the decree must be reversed.

But as it is manifest that the trustee and special master proceeded on the theory that it was enough to show that the mortgagor was not possessed on September 1, 1914, of sufficient ready means to satisfy his debts if they were then all presented, it is not in the interest of justice that a decree in favor of the mortgagee should be ordered. Consequently the decree is reversed and the cause remanded, with directions to permit the trustee to offer proof on the question of the insolvency of the mortgagor on September 1, 1914, within the definition of the statute, and to permit the mortgagee also to introduce any evidence it may have on the same question.

Reversed and remanded.

THE MILTON.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 116.

TOWAGE 5-11(10)-LIABILITY FOR INJURY TO TOW-UNSAFE MOORING.

A towing tug held not liable for injury to a loaded scow, owing to the uneven bottom on which she settled with the falling tide, on findings by the trial court that she was left in a safe place in a dock to await her turn to discharge, with directions to her master to put out lines, which he failed to do, in consequence of which she swung to the place of injury. [Ed. Note.—For other cases, see Towage, Cent. Dig. § 23; Dec. Dig.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 23; Dec. Dig \iff 11(10).]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Clinton Point Stone Company, owner of scow No. 37, against the steam tug Milton, the Red Star Towing & Transportation Company, claimant, and the New York Trap Rock Company, impleaded. Decree dismissing the libel, and libelant appeals. Affirmed.

On appeal by the Clinton Point Stone Company, owner of the scow No. 37, from a decree which dismissed the libel against the steam tug Milton with costs. The decree also dismissed, with costs, the petition of the Red Star Towing Company against the New York Trap Rock Company.

Oscar D. Duncan, Warner C. Pyne, and Van Iderstine, Duncan & Barker, all of New York City, for appellant.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Chauncey I. Clark, both of New York City, of counsel), for appellee.

Before COXE and WARD, Circuit Judges, and LEARNED HAND, District Judge.

COXE, Circuit Judge. This is an action brought by the owners of the scow No. 37 against the steam tug Milton to recover damages for alleged negligent towage.

The principal issue is whether the tug Milton was guilty of negligence in leaving the scow at Jones' dock at Bayville, Long Island. The important questions are all of fact and unless we are clearly satisfied that the trial judge has made erroneous findings we should not disturb his decree. All but two of the witnesses were present and testified before him at the trial.

The scow No. 37 is 112 feet long and 33 feet beam. At the time in question, November 17, 1913, she was loaded with trap rock and drew about 7 feet. The Milton is a tug 72 feet long and $22\frac{1}{2}$ feet beam. When she left New York she was drawing about 9 feet. All

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

loaded scows taken to Bayville must of necessity lie on the bottom at low water which, if proper precautions are taken, may be done in safety, as there are no rocks or dangerous obstructions of any kind. When the Milton arrived with her tow it was impossible to place the scow at Jones' dock as another scow was there unloading at the time.

The tug placed No. 37 astern of the scow already there, made fast two lines from the forward corners to the scow at the dock and steamed away. Before doing this, her master instructed the master of No. 37 to run a line to the breakwater on each side of the channel. When the tug left, No. 37 was in a safe position. The master of the 37 neglected to run the lines as directed and the next morning it was discovered that the scow had swung from her safe position to one upon the west embankment.

It is unnecessary to give a more comprehensive résumé of the facts.

We have stated them sufficiently for present purposes.

The contention that No. 37 was aground when the tug left her is not sustained. Certainly the judge was justified in accepting the statement of the master and mate of the tug rather than that of the master of No. 37. Even if the witnesses were equally credible, we should not substitute our judgment for that of the judge who saw and heard them on the stand and credited the tug's witnesses.

We think the tug was under no obligation to remain with the scow after leaving her at Jones' dock. If such vigilance were required of towing companies they could not long continue in business. The tug performed her full duty when she left the scow at her destination and gave proper instructions as to what should be done on the falling of the tide. We are unable to find any negligence on the part of the tug.

The decree is affirmed with costs.

PORTER SAFETY SEAL CO. v. E. J. BROOKS & CO.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 256.

PATENTS \$\infty 328-Invention-Seal.

The Porter patent, No. 719,865, for a seal for money bags, mail bags, and the like, in view of the prior art, is void for lack of patentable novelty.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Porter Safety Seal Company against E. J. Brooks & Co. for infringement of letters patent No. 719,865, for a seal, granted to Thomas I. Porter February 3, 1903. Decree for defendant, and complainant appeals. Affirmed.

The following is the opinion of Mayer, District Judge, in the court below:

The patent relates to seals for mail bags and for money bags. The device is very simple, and has been used mainly by the United States government for sealing bags containing mail, and is also serviceable for sealing money bags used by banking institutions for putting up bags of gold and packages of currency. The main commercial use, however, has been by the United States government.

The patentee states: "My primary object is to provide a seal of this character which is inexpensive in construction, easy of application, and thoroughly effective in use." He gives examples in his drawings and his claims cover: (1) A seal; and (2) a seal with a pin inserted for the purpose of additional protection, especially in the case of money bags. The invention is sufficiently described in the claims here in controversy which are as follows:

ciently described in the claims here in controversy which are as follows:

"2. A seal of the character described, comprising a sealing block provided with two outer substantially parallel retaining perforations and two inner guide perforations substantially parallel with said first-named perforations, and a two-member tie loop formed by threading the ends of a flexible cord through said outer perforations in a common direction and then returning said cords through said guide perforations.

"3. A seal of the character described, comprising a soft-metal sealing block, a loop of reducible size connected therewith, and a sharp bag-piercing point

carried by one of said members.

"4. A seal of the character described, comprising a soft-metal sealing block equipped with a projecting sharp bag-piercing point, and a loop of reducible

size connected with said block and operating to oppose said point."

The defendant company is a large manufacturer of seals, and, indeed, claims to be the largest manufacturer in the world. Mr. Wenk, an officer of defendant company, who has been connected with that company for many years, produced a number of catalogues which show examples of prior arry, and, in addition, produced some seals sent to him from Italy many years ago, and long before the date of the patent in suit. These seals are useful as illustrating the construction of an Italian patent. There were received in evidence two Italian patents as part of the prior art. It is quite unimportant whether it be held that the Italian patent was an anticipation. It is enough that, on all of the prior art, it seems to me that the seal in question did not exhibit inventive novelty.

In a case of this simplicity it is difficult to describe what induces the mind to conclude that a patent does or does not present that novelty which can be characterized as invention. Of course, as I said upon the argument, the mere simplicity of the device is not its condemnation, because very often a simple

device shows a high degree of invention. But in the case at bar I am of opinion that the patent in suit represents no more than could be accomplished by one skilled in the art. With the Italian patent and the Italian device before a worker in the art (not to speak of the many other examples of seals), it would not require inventive ability to change three holes into four and to substitute a flat for a round seal.

The sole accomplishment seems to be that "the feature of having the two members of the loop symmetrically arranged overcomes all tendency for the block to turn during the operation of drawing down or reducing the size of the loop while sealing the bag." While the arrangement in the patent in suit doubtless produced an efficient seal, the result was simply to put forth another form of seal as a competitive article rather than to monopolize the field by this trifling improvement.

In the brief observations above outlined, I have really been discussing only claim 2, because the mere addition of a pin, or "sharp bag-piercing point," which claims 3 and 4 seek to cover, obviously does not constitute invention. If the case were close (which I think it is not), commercial utility would, of

course, be of service in resolving the doubt.

While plaintiff has sold a very large number of seals, that fact in this case is not a safe guide, because the great bulk of the sales has been to the United States government. So many elements enter into a government contract that the mere use by the government is not per se convincing as to commercial utility. In competitive cases, where the contract is awarded to the lowest bidder, sometimes an article (though useful) inferior to another gains the government contract. In cases where competitive bidding is not had, the successful party is often elected for reasons in addition to the merit of the article, such as the reliability of the business concern, etc. The evidence of commercial utility which is most helpful is that which shows a more or less wide-spread and general adoption of the article by the trade.

As this article seems desirable mainly for the government bags, and as the government has not continuously adopted the article, there is not much aid to be found in looking to so-called commercial utility in this case in resolving

the doubt if it did exist.

In the circumstances, I am of opinion that the patent is void for want of patentable novelty, and the bill must be dismissed, with costs.

T. E. Brown and Clarence E. Mehlhope, both of Chicago, Ill., and Ralph L. Scott, of New York City, for appellant.

F. H. Bowersock, of New York City, for appellee.

Before COXE and WARD, Circuit Judges, and VEEDER, District Judge

PER CURIAM. Decree affirmed.

DE LASKI & THROPP CIRCULAR WOVEN TIRE CO. et al. v. UNITED STATES TIRE CO.

(Circuit Court of Appeals, Second Circuit. May 24, 1916.)

No. 273.

- 1. Patents \$\iiis 328\$—Anticipation—Apparatus for Making Wheel Tires.

 The Thropp patent, No. 822,561, for an apparatus for manufacturing wheel tires, held void for anticipation by prior use.
- 2. Appeal and Error \$\iff 990\text{-Review-Questions of Fact.}\$
 While an appeal in equity brings up all the facts for review, there must come a time when the suitors' right to new investigations of com-

plicated occurrences is properly limited to the indication of palpable error, and does not extend to discussion of matters about which all experience shows careful men may justly differ, and when issues of fact, repeatedly determined the same way, must be regarded as having passed into the realm of settled things.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3898; Dec. Dig. ⇐⇒990.]

3. Patents 573-"Date of Invention."

The "date of invention" of a patented device is the date when the invention in its entirety, as patented, was conceived.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the De Laski & Thropp Circular Woven Tire Company and the John E. Thropp's Sons Company against the United States Tire Company. Decree for defendant, and complainants appeal. Affirmed.

For opinion below, see 232 Fed. 884.

The decree of the District Court dismissed the bill on claims 1 and 2 of patent No. 822,561, to Peter D. Thropp for an "apparatus for manufacturing wheel tires."

Walter C. Noyes and E. Clarkson Seward, both of New York City, for appellants.

Livingston Gifford and Ernest Hopkinson, both of New York City, for appellee.

Before COXE, Circuit Judge, and HOUGH and MAYER, District Judges.

HOUGH, District Judge. [1] Plaintiffs have heretofore unsuccessfully litigated the claims in suit in the First Circuit. De Laski, etc., Co. v. Fisk, etc., Co. (D. C.) 198 Fed. 125, affirmed 203 Fed. 986, 122 C. C. A. 286. Defeat in that jurisdiction resulted from a finding of anticipation, made by the trial court and affirmed on appeal. It is now sought to (1) carry back Thropp's date of invention to a time earlier than the use hitherto successfully urged, (2) so interpret the claims as to make them fit what Thropp accomplished when he anticipated the anticipation, and (3) destructively criticize the evidence (repeated herein) upon which the First Circuit decisions rest.

The contentious history of this patent is not all contained in reported decisions. There was a lengthy interference in the Patent Office, and Thropp there swore (the point being already vital) that his inventive date was February 1, 1905. Decision in the Fisk Case found proof beyond reasonable doubt of a commercial use in January, 1905. The contention here, and in the court below, is that in January, 1904, Thropp made and used an apparatus upon which claims 1 and 2 will read, so that as to those claims at all events the anticipation is overthrown. With great assistance from Judge Hand's careful summary of evidence, we have gone over the testimony relating to the (so-called)

"Goodrich" use of January, 1905. In our opinion the comment of the trial judge on the anticipatory use most urged was fully justified, as we "can hardly imagine a more complete documentary demonstration of the making and delivery of four tires than this evidence discloses, under the necessary limitations of factory conditions."

[2] As one instance of prior use, which fully meets the requirements of law, is of greater worth than any number of cases less well sustained, further examination is unnecessary. This, however, is a litigation aptly suggesting the truth that, while an appeal in equity brings up all the facts for review, there must come a time when the suitors' right to new investigations of complicated occurrences is properly limited to the indication of palpable error, and does not extend to discussion of matters about which all experience shows careful men may justly differ. Three courts have now arrived at the same conclusion in respect of the "Goodrich use"; there is certainly evidence on which to base their findings; and, substantially the same evidential material having been used throughout, we regard the fact that the Goodrich Company did what has been so often found as having passed into the realm of settled things.

Giving the "Goodrich use" the scope and importance accorded to it in the First Circuit renders it necessary for plaintiff either to carry back his date of invention or assert that prior decisions have erroneously interpreted the patent and misunderstood the inventive concept. As above indicated, both efforts have been made. To carry the inventive date back of February 1, 1905, necessarily involves an admission of error (to say the least) on the part of Thropp when he took the interference oath. There is no legal bar to plaintiff's making the effort. It cannot be held that Thropp's oath constitutes an estoppel against what is now sought to be done; but inasmuch as the present effort mainly rests upon the testimony of the same witness, who once gave his date of invention as February 1, 1905, plaintiff cannot complain if evidence contradicting or varying that solemn statement is viewed with a critical eye, and strong corroboration demanded therefor.

In our opinion the patentee has never sworn that what he did in 1904 was the same thing that both he and Goodrich did in 1905. This is well shown by the form of question put to Thropp in the Fisk Case as compared with the corresponding question herein. When the patent was rested on February 1, 1905, as the inventive date, Thropp was asked "When did you conceive the *invention* set forth in" claims 1 and 2? And he gave in reply the date sworn to in interference. In this suit counsel inquired of Mr. Thropp, not when he conceived his invention, but "when [he] first conceived an open mold having the elements of claims 1 and 2," and he replied, "In January, 1904." Thus is it indicated that Thropp himself believed his invention to date from 1905 until he had been taught to confine that invention, not to what he thought it was when he first testified, but to what his counsel deemed it to be, after unsuccessfully encountering the "Goodrich use."

This reduces the case to one inquiry, What was Thropp's invention as disclosed by the specification? for it is from that (with such light as drawings may throw upon it) that we must ascertain in what the al-

leged invention consists. Hall-Borchert Dress, etc., Co. v. Ellanam, etc., Co., 213 Fed., at page 342, 130 C. C. A. 193. The patent states that it relates to apparatus for manufacturing wheel tires and more particularly "for holding a clencher tire in position during the vulcanizing process." The two claims in suit describe the invention as a

"tire-forming apparatus" comprising certain parts.1

The device described in the specification consists substantially in a mold which presses into shape the clencher edges of a rubber motor tire, plus tape wrapping and filling pieces, surrounding both clencher mold and the portion of the tire projecting therefrom, all for the purpose of holding the whole tire "in position during the vulcanizing process." This support is necessary, and what Thropp avoids, and presumably improved upon (in and by this patent), is the use of closed molds through and by which heat was applied to the whole tire. His small mold forming the clencher edge, when wrapped in the tape which supported the rest of the tire, is subjected, not to a closed hot mold, but to live steam. The result of the operation is known as the "wrapped-tread" tire.

The patentee never conceived a wrapped-tread tire, or the apparatus for or method of producing one, until 1905, and he therefore never reached the inventive thought of his specification until that date; but it is now asserted (and will be here assumed for purposes of discussion) that in 1904 he made and attempted to use so much of his "tireforming apparatus" as is necessary to mould the clencher edge or bead. It so happens that the two claims in suit will read upon the clencher bead-making mold, because from those two claims all reference to the

rest of Thropp's "tire-forming apparatus" is omitted.

But in 1904 Thropp was not endeavoring to make a wrapped-tread tire, nor to do without the closed hot molds, to dispense with which is the very object of the apparatus covered by this patent; he used (at the most) the same kind of molds for forming his clencher beads in 1904 that in 1905 he utilized for his wrapped-tread tire; but he vulcanized by molds only, and not by open or hot steam heat. He admits that the effort was not a success, and it is obvious that this discarded experiment has found its only utility in this endeavor to reinterpret the patent after its first defeat.

The invention disclosed by the specification is for an apparatus suitable for vulcanizing, not half a tire, but a whole tire, not by two steps, but by one. The "Goodrich use" must be met by testimony at least as persuasive as that establishing it. It cannot be overthrown, either by an unsuccessful experiment, or by anything short of a "conception of invention consisting in the complete performance of the mental part of the inventive act." Robinson on Patents, § 376. An anticipation must always be as broad as the invention, and the best that can be said for the contention here made is, not that any such broad conception enter-

1 Claim 1 is as follows:

[&]quot;1. Tire-forming apparatus comprising an annular core or mandrel, annular pressure-rings arranged to engage the clencher edges of the tire leaving the outer body portion of the tire exposed and means for forcing the pressure-rings into a predetermined position with respect to the core or mandrel."

ed Thropp's mind in 1904, but that he reached a part of this ultimate inventive concept at the earlier date, and, when he had arrived at the whole of it, so drew two of his claims that they appear to describe, not his whole inventive idea, but only that portion of it formed in 1904.

[3] The difficulty with this ingenious argument is that in 1904 Thropp arrived at no inventive idea that had relation directly or indirectly to what he patented. Even accidental use of some features of an invention, without recognition of its benefits, is not anticipation. Atwood-Morrison Co. v. Sipp, etc., Co. (C. C.) 136 Fed. 862, and cases cited. This patentee has remembered that he early used (to vulcanize a clencher bead by a closed mold) metal shapes similar to those he afterwards used as part of a vulcanizing apparatus suited for open heat only; the use does not rise to the dignity of a device intended for a different purpose, but capable of supplying an inefficient substitute for the machine of a later patent, which we held no anticipation in United Shirt, etc., Co. v. Beattie, 149 Fed. 736, 79 C. C. A. 442.

The invention in this case is single; if the claim does not cover the whole of it, so much the worse for the claim. The conception of invention dates from January, 1905, and belongs to the Goodrich Company. *Invention* is an idea; the quest for its origin is a search for the whole idea, not half of it. Thropp got his whole in 1905, a month after his anticipator.

Decree affirmed, with costs.

ORIENTAL TISSUE CO. v. LOUIS DE JONGE & CO. (District Court, S. D. New York, January 11, 1916.)

- 1. Patents \$\ist\$328—Validity and Infringement—Imitation Gold Leaf.

 The Gregory patent, No. 848,301, claim 2, for "a thin leaf or fabric composed entirely of soluble cotton and a coloring matter incorporated therein," designed to take the place of gold or other metal leaf for embossing and decorative purposes, was not anticipated, discloses invention, and the product is highly meritorious; but the claim is not infringed by a product containing a third ingredient, which is not merely an addition, but serves a useful purpose.
- 2. PATENTS ← 168(2)—CONSTRUCTION—ACQUIESCENCE IN LIMITATION BY PATENT OFFICE.

A patentee, who narrowed his claims to meet objections by the Patent Office, cannot have what he eliminated restored by construction, for the purpose of making out infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 244; Dec. Dig. \$ 268(2).]

In Equity. Suit by the Oriental Tissue Company against Louis De Jonge & Co. On final hearing. Decree for defendant.

Brown & Seward, of New York City (E. Clarkson Seward and Wm. McK. Barber, both of New York City, of counsel), for plaintiff.

Seward Davis, Drury W. Cooper, and Charles É. Wilson, all of New York City, for defendant.

MAYER, District Judge. [1] In a suit between these same parties, involving this same claim 2, the patent was held valid and infringed. 218 Fed. 170, 134 C. C. A. 50, affirmed 218 Fed. 173, 134 C. C. A. 50.

The present case involves a new imitation gold leaf. It will be recalled that claim 2 reads:

"A thin leaf or fabric composed entirely of soluble cotton and a coloring matter incorporated therein."

Plaintiff contends: (1) That the patent discloses a meritorious and pioneer invention; (2) that defendant's leaf infringes, under the doctrines of (a) addition and (b) equivalents. Defendant contends (the previous decree being still interlocutory): (1) That the patent is invalid for lack of invention and for inoperativeness; and (2) not infringed because defendant's product is not composed *entirely* of the elements set forth in the claim.

The value of the patent commercially is in its having pointed out how to make an imitation gold leaf which is now extensively used in place of the genuine gold leaf in stamping book covers; but the specification was not limited to this use solely, for Gregory said:

"My invention consists in providing a thin leaf of fabric which is made to imitate metal leaf—such, for instance, as gold leaf, silver, lead, and the like—which thin leaf or fabric is suitable for use in embossing and decorative purposes generally; it being extremely tenacious and capable of being more easily handled than the gold or other metal leaf itself."

Therefore the citable prior art will include patents relating to embossing and decorative purposes. The added prior art in this case does not change my conclusion as to validity, for I think now, as I did in the prior case, that Gregory's product shows invention and is highly meritorious; and, if any one entertained any doubt, the proven commercial utility would resolve the doubt.

True, the Oeser leaf (more fully testified about in this case) has had a considerable commercial use, but only for inferior work, and one need not be an expert to know that the Oeser is not in the same class with either the Oriental or the De Jonge leaves here in controversy. I may also state, for the information of counsel, that assuming, but not deciding (because unnecessary so to do), that the documentary evidence relating to the applications for patents in foreign countries is admissible, those proceedings, in my opinion, amount to nothing more than an effort to make the best argument possible in foreign jurisdictions to meet points of view, governmental attitude, and departmental interpretations which may be, at least in some respects, different from ours.

The contention as to invalidity because of inoperativeness rests on the proposition that "amyl oil" (which is amyl alcohol), referred to in the patent as a solvent for soluble cotton, is not such a solvent. Of course, amyl acetate is. This seems highly technical, because I think the skilled man would at once understand that amyl acetate was meant, as is clearly stated by Dr. McIlhiney on page 681 of the previous record, when he says:

"By 'amyl oil' I understand him to mean amyl acetate, one of the most common solvents for soluble cotton, and one which is commonly referred to as amyl oil."

But while, on the prior art and all that this record contains, the patent must be held valid, yet the scope of the claim cannot be stretched so as to exclude every third element, when the claim contains only two. It is therefore necessary to ascertain what was heretofore decided in respect of claim 2. In the previous case, I supposed that what Gregory had found out was how to produce a self-supporting imitation gold leaf by the combination of two elements: (1) Soluble cotton; and (2) coloring matter. This seemed to me ingenious, comparatively simple and economical, and therefore a real contribution, and in construing the claim I said, and now repeat:

"The most serious question is that of infringement. There is a sharp dispute as to the meaning of the claim; but the claim is stated in simple language and in connection with the context I think its interpretation is plain. 'Coloring matter' means, of course, coloring matter which will produce the imitation leaf desired. 'Entirely' means the absence of any ingredient which is foreign either to soluble cotton or the appropriate coloring matter."

On the evidence in that case I found as a fact that commercial soluble cotton, bought in the regular course of trade, contained, among other things, "gums and resins with the properties of gum sondrac, gum mastic, and common resin among the solids," and therefore I concluded that the per cent. found in plaintiff's leaf was natural and to be expected in soluble cotton after it was subjected to the process described in the patent. I was also impressed with the testimony of Dr. Carmichael, plaintiff's expert, that only a fraction of 1 per cent of gum mastic was found in defendant's leaf, and that this third element was merely an addition, introduced for specious purposes to avoid the patent. The Circuit Court of Appeals seems to have adopted my views, and, in any event, my conclusion, adding:

"Claim 2, taken literally, would cover products made by these earlier patents, and referring to Berard, Abel and Stevens, and Lefferts, and, so construed, would be invalid as too broad. It is, however, to be construed in connection with the specifications, and with what the patentee describes to be, and what we find actually was, his invention, viz. a thin metallic leaf, an article which is not shown to have been anticipated."

It is therefore apparent that the word "entirely" is of much importance, and especially on the evidence in this case. An examination of the file wrapper shows claims which at one stage read:

"2. A thin leaf or fabric comprising soluble cotton and a coloring matter."
"4. A thin leaf or fabric comprising soluble cotton and bronze."

These claims were rejected; the examiner stating that it would not involve invention over the disclosure of the prior art to color the leaf. Thereupon the claims were canceled, applicant stating:

"Applicant has canceled the claims against which the Eichengrun et al. patent was cited, and has substituted therefor a new claim 2, calling particular attention to the fact that applicant's thin leaf or fabric is composed entirely of soluble cotton and a coloring matter incorporated therein."

"Composed entirely," of course, does not mean "comprising" or "consisting of." See any dictionary.

[2] The principle of construction and interpretation here to be applied is concisely stated by Judge Townsend in Victor Talking Machine Co. v. American Graphophone, 151 Fed. 601, at page 604, 81 C. C. A. 145, at page 148:

"The applicant for a patent is entitled to specify and claim in his application the subject-matter of which he believes himself to be the original inventor, and to persist in his assertions and claims until final action thereon by the Patent Office. But when his claims are rejected on references cited against them, he is called upon to exercise his election between insistence and appeal or desistance and acquiescence. And while the language of the patent as issued may not be contradicted by mere voluntary expressions of opinion, or argumentative suggestions made by the applicant in his communications to the Patent Office, especially where no change is made in the claims, and while a patentee is entitled to the benefit of such equities as may be properly raised in his behalf from the transactions disclosed in the file wrapper, yet, on the other hand, the public is interested in securing due limitations upon the claim of an exclusive monopoly on the ground of patentable novelty, and is entitled to the benefit of admissions imposed upon the applicant as a condition precedent to the allowance of the patent. * * * 'Undoubtedly a patent, like any other written instrument, is to be interpreted by its own terms. But when a patent bears upon its face a particular construction, inasmuch as the specification and claim are in the words of the patentee, it is reasonable to hold that such a construction may be confirmed by what the patentee said when he was making his application. The understanding of a party to a contract has always been regarded as of some importance in its interpretation.' Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 227, 26 L. Ed. 149. * * While, therefore, an applicant for a patent may stake * * While, therefore, an applicant for a patent may stake out the boundaries of his territory, yet if, upon notice from the Patent Office that some portion of said territory is the property of another or is held in common by the public, he acquiesces in such statement and alters his boundaries accordingly, he is concluded by such abandonment, and cannot afterward undertake to define his territory by rolling stones, which he may move about across the lines of his original boundaries so as to appropriate property previously conceded to belong to others."

The facts in the present case are not seriously in dispute. The evidence now satisfies me that "soluble cotton" has long been sold commercially in two forms. Assuming chemically pure soluble cotton as represented by 100 per cent., these forms are, as to purity:

(1) Soluble cotton, 99+ per cent. pure; that is, cotton after treatment by nitric and sulphuric acid, and usually moistened with water,

for satety.

(2) Solutions of soluble cotton, 98.45 per cent. pure, and formed by

dissolving pure soluble cotton in amyl acetate.

The addition of other constituents in substantial amounts causes the substance to be called by a different name and to be a different compound, such as "bronzing liquid," etc.

Plaintiff's expert, Prof. Carmichael, analyzed the defendant's leaves,

"Complainant's Exhibit 5," as follows:

Bronze			
Cotton	5.21% }	19.0004	hindon
Gums, oils, and resins	8.67% J or	10.00%	pinger

Defendant's expert, Dr. McIlhiney, analyzed defendant's leaves as follows:

Bronze	
Cotton	701 hindon
Gum, etc11.03% f or 11.51	% ninger

Upon the basis of these analyses the two expert witnesses are in practical agreement, since, considering the substances other than bronze as 100 per cent. binder, we have

	Carmichael	
Pure Cotton	37.53%	38.62%
Gum, etc	62.46%	61.38%

The Carmichael percentages for binder just given are afforded, respectively, by his ratios of the gum, 8.67 per cent., to his total binder, 13.88 per cent., and of the cotton, 5.21 per cent., to the total binder, 13.88 per cent.

Complainant is reduced to the necessary contention that commercial soluble cotton "includes everything in the leaf except bronze." The contention is contradicted by the evidence of the undisputed fact that both parties to this litigation purchase from the Bloomfield Chemical Company, as their leaf-forming solution, the same commercial soluble cotton, known as "B. M. Lacquer"; that this solution is identical as to solvents and differs only in the amount of contained soluble cotton.

This solution was analyzed by Dr. McIlhiney, and consists of 3.59 per cent. soluble cotton dissolved in a completely volatile solvent, in which there is less than 1 per cent. of impurities, namely, 1.55 per cent. of 3.59 per cent.—i. e., .055 of 1 per cent.—impurity. If the bronze powder contains .7 of 1 per cent. of impurities of the bronze entering into defendant's leaf, according to Carmichael, or .24 of 1 per cent., according to McIlhiney, the percentage of impurity to be expected in a leaf composed entirely of "B. M. Lacquer" and "Bendalin Finest Pale Gold" would be less than 1 per cent., namely, 0.55 of 1 per cent., on Dr. Carmichael's analysis.

This would be a leaf "composed entirely of commercial soluble cotton and bronze." But it is not defendant's leaf, in which is found at least 8.67 per cent. gum, or at least 15 (as 8.67 to 0.55) times the amount of these expected impurities of commercial soluble cotton. The third ingredient of defendant's leaf is not an impurity, but an added gum, known in the art as "elemi." According to the formula of the composition of defendant's leaf as established February 4, 1915, by Olson, Orme, and Nelson, it is: Bronze, 73 per cent., elemi, 18 per cent., and cotton, 9 per cent. All leaf made by Olson from February 4, 1915, to the date of this suit, has been made pursuant to this formula, and his entire output has been sold to defendant, which has sold only this leaf and the Oeser leaf since November, 1914.

The apparent difference between the synthesis of defendant's leaf and its analysis is explained by Dr. McIlhiney to be due to the variation of the mixture in the mixing tank, by the settling of the heavier bronze. The ingredients of the leaf are mixed according to the established formula, and the volatile solution in which they are suspended is sprayed upon glass plates, from which the solvent evaporates, leaving the leaf to be stripped. No exterior coating of size is applied. The elemi gum is thus incorporated with the bronze and cotton in the leaf. Dr. McIlhiney found three-quarters of the gum inside the leaf and one-quarter on the outside. Prof. Carmichael admitted that an amount of the binder equal to 3.67 per cent. of the entire leaf is Microscopically, the leaf is a uniform leaf with a inside the leaf. uniform binder. Carmichael admitted that any difference in the appearances of the leaf is due to the difference in working the process of manufacture, but that the bronze is unevenly distributed. He further admitted that resin becomes a cementing substance in the leaf.

Defendant has shown that the manufacturer of its leaf, Olson, pur-

chased from McKesson & Robbins and used 600 pounds of gum elemi, which he mixed with 300 pounds of soluble cotton, in making leaf from February 4 to June 15, 1915. The addition of gum elemi, in the quantities given, serves a useful purpose. From the manufacturer's point of view, the utility of the incorporated elemi in defendant's leaf is twofold: First, it effects a saving in cost over soluble cotton; and, second, it facilitates the process of manufacture by delaying the drying of the film. The cotton costs \$1.50 per gallon of solution containing four ounces, or \$6 per pound. The elemi costs 20 cents per pound.

Various advantages are claimed by defendant. It is enough to state that on the evidence it is established that on most cloths the leaf blocks without size. From the foregoing it appears: (1) That the impurities from soluble cotton are far less than the per cent. of gum elemi; (2) that the gum elemi is a third element, which is incorporated in the product, and not merely a trifling addition thereto; (3) that the gum

elemi has at least one real and important advantage.

In this connection, and to avoid use for advertising purposes, I am not to be understood as expressing any opinion as to which is the better article—Oriental or De Jonge. That they can argue with their customers. I am referring merely to "advantage" in its relation to the questions of law and fact here concerned.

In view of the prior art (see, inter alia, Wilson, British, 491 of 1885, and Jacob, 2484 of 1878), and remembering that it was old to add gums and resin to other ingredients, the claim cannot be expanded, either on the theory of addition or equivalency, to mean "comprising" or "consisting." Of course, "soluble cotton" as an element is of major importance; but I think the courts went as far as they could to protect a meritorious patent when they gave "entirely" the elasticity they did in the previous case. If 8 to 11 per cent. of elemi and 5 to 7 per cent. of cotton (speaking in round numbers), with the coloring matter, come within the claim of the patent, where will we stop? How about 15 per cent. of elemi and 1 per cent. of cotton, for instance?

Of the cases cited by plaintiff, General Electric Co. v. Hoskins Mfg. Co., 224 Fed. 464, 140 C. C. A. 150, is a good example. In that case an element was described as "formed of" an alloy "consisting of nickel and chronium." In Treibacher v. Roessler (D. C.) 214 Fed. 410, the claim read an alloy "containing cerium alloyed with iron." But no case has been cited which, with or without a file wrapper history like this, defines "composed entirely" as meaning plus something

else which is a useful and not merely additive ingredient.

For the reasons outlined, the patent is held valid, but claim 2 is not infringed, and therefore a decree will pass dismissing the complaint, with costs.

A. B. DICK CO. v. UNDERWOOD TYPEWRITER CO. (two cases).

(District Court, S. D. New York. June 9, 1916.)

1. Patents = 292—Suits for Infringement—Interrogatories.

In a suit for infringement of patents for an article made by a chemical process, and the process of making the same, interrogatories by complainant should not be in the language of the claims, which use terms the meaning of which may be open to dispute; but defendant may be required to produce a true sample of its manufacture, and to state in accurate detail the process employed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. \$292.]

2. PATENTS \$\infty 292\$—Suits for Infringement—Interrogatories.

In such a suit, an interrogatory requiring defendant to state whether it made, used, or sold an article like that "illustrated" by one attached to the interrogatory is objectionable, as indefinite.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. € 292.]

3. Patents = 292-Suits for Infringement-Interrogatories.

In infringement suits, interrogatories by complainant should not ordinarily be in the language of the claims of the patent, which may call for their construction by defendant, nor should a defendant be required to state the names of experts or others from whom the information for his answers is obtained.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. ©292.]

i. Pleading €=323(1)—Suits for Infringement of Patent—Bill of Particulars—Exchange of Dates,

In an infringement suit, where anticipation is pleaded, complainant is entitled on demand to a bill of particulars stating the prior patents or publications, or prior use, proof of which will be offered and relied upon by defendant; but complainant must at the time of demanding such bill of particulars serve on defendant a statement of the approximate date of invention as claimed by him.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 976; Dec. Dig. \$323(1).]

In Equity. Suits by the A. B. Dick Company against the Underwood Typewriter Company. On objections to interrogatories and motions for bills of particulars.

Samuel O. Edmonds, of New York City, for plaintiff. Hans von Briesen, of New York City, for defendant,

MAYER, District Judge. There are two cases, both the usual patent infringement suits. The main case is based upon four patents relating to the art of stencil duplication. Two of these patents cover the so-called "Dermatype" stencil sheet, while the other two cover, respectively, methods of preparing and using stencil sheets. The second case is based upon a patent relating to a moistening solution for use on a stencil sheet such as covered by the patents in the main case.

Case No. 1 (Involving Four Patents)-Interrogatories.

There are in all 56 claims and 87 interrogatories. The answer, after setting up elaborate schedules of prior patents, etc., alleges that, prior to the issuance of the patents in suit, the defendant "purchased stencil

paper and afterwards sold the same," and that in or before June, 1915, it commenced to make and sell stencil paper "like the sheet marked 'Schedule A' hereto annexed, which it now is and has since July 15th been exclusively making and selling." Thus defendant's alleged infringing acts seem to be: First, the sale of stencil paper purchased from another; and, second, the sale of stencil paper made by itself.

There are annexed to the plaintiff's interrogatories two stencil sheets, one (Schedule 1) believed by plaintiff to illustrate the stencil paper first referred to, and the other (Schedule 2) believed to represent the stencil paper last referred to. Schedule 4 annexed to the interrogatories is believed by plaintiff to be the same as Schedule A which defendant has annexed to its answer. The interrogatories are "for the discovery * * * of facts * * * material to the support * * of the cause"; these facts being, mainly, those immediately concerned in the charge that the defendant has infringed the plaintiff's patents.

Interrogatories 21 to 76, Inclusive.

[1] Interrogatory No. 21 is typical of this group. It reads:

"21. Did the defendant make, use, or sell a stencil blank capable of being stencilized, consisting of a dry, but hygroscopic, sheet of fibrous material impregnated with a coagulated colloidal substance?"

This is precisely the language of claim 1 of patent No. 1,101,268. The remaining interrogatories are in the language of the claims. This interrogatory 21 is one of the simplest of the group. An example of the more elaborate interrogatories and claims is No. 32 as follows:

"32. Did the defendant make, use, or sell a stencil blank capable of being stencilized by pressure, consisting of a sheet of fibrous material impregnated with protein coagulated by a chromic coagulating agent and softened by a suitable tempering agent, whereby the same is rendered hygroscopic?"

Plaintiff contends that the various chemical terms used are simple and can be readily answered. Defendant insists that the interrogatories and claims refer to intricate chemical reactions.

In a case like this I think interrogatories in the language of the claims are objectionable. There may well be a difference of opinion, for instance, as to what is a "fibrous material," whether a sheet is "impregnated," whether the substance is "colloidal."

In Oriental Tissue Co. v. De Jonge & Co., 218 Fed. 170, 134 C. C. A. 50, and in a later case between the same parties (235 Fed. 294), there was a sharp controversy as to the meaning of "soluble cotton," and my experience in that case convinced me that, generally speaking, chemical cases cannot be compared in this regard to simple mechanical cases, where, for instance, a "steel rod" must be a steel rod.

Defendant has annexed to its answer a sheet of the stencil paper made by it, and that ordinarily would be enough. As it appears, however, from the argument of both counsel that, because the sheet is hygroscopic, it may be subject to changes, defendant should arrange to give plaintiff, immediately when manufactured, a sufficient number of sheets to enable plaintiff's experts to make a prompt analysis. If

any practical difficulties in this regard further appear, plaintiff may

move again for appropriate relief before or at the trial.

Another objection to this class of interrogatory is that in effect it may call for a construction of the claims contrary to the practice in this district. District Court rule 7.

Interrogatories 1–20.

[2] Interrogatory No. 1 is typical. It reads:

"1. Did the defendant, in this district and between June 23, 1914, and January 4, 1916, make or use or sell (if yea, which) stencil paper illustrated by the sheet hereto annexed and marked 'Schedule 1'?"

The objection is that the interrogatory refers to stencil paper "illustrated" by the sheet marked "Schedule 1." I think this objection is not captious, because the subject-matter of the specification and claims deals with much specific detail, and therefore in this case the word "illustrated" may be indefinite. This group of interrogatories, however, is practically disposed of by the suggested arrangement, supra, of furnishing plaintiff with fresh samples of the alleged infringing sheets.

Interrogatories 77-82, Inclusive.

Interrogatory 77 reads:

"77. What is the description and commercial designation of the filler employed in the coating compound of defendant's stencil paper as illustrated (a) by Schedule 1; (b) by Schedule 4; (c) by Schedule A, above referred to; and from whom (give address) did the defendant obtain the same?"

This group is objectionable because of the use of the word "illustrated." In other respects, these interrogatories are proper. When, therefore, defendant furnishes plaintiff with the samples as I have already indicated, plaintiff may propound questions like:

"What is the description and commercial designation of the filler employed in the coating compound of defendant's stencil paper (Exhibit ———) and from whom (give address) did the defendant obtain the same?"

Interrogatory 83.

Interrogatory 83 reads:

"83. When the defendant undertook the manufacture of its own stencil paper in July, 1915, as set forth in section VIII of the answer to the bill of complaint, what, in the stencil paper first produced commercially, were (a) the character, description, and trade designation of the base employed; (b) the ingredients (and proportions thereof) of the coating compound and the order in which they were combined; (c) the apparatus or appliances employed; and (d) the conditions and processes involved in preparing the coating compound and in applying the same to the base?"

Defendant's counsel states that "defendant is willing to supply a general answer," but should not be required to state the details called for. I think that the details are precisely what plaintiff is entitled to, and this objection is not sustained.

Interrogatory 84.

"84. Thereafter, and prior to January 4, 1916, were any changes made with respect to the matters or things covered by the last preceding interrogatory; and, if yea, what were they?"

Objection overruled.

Interrogatories 85 and 86.

"85. Did the stencil paper sold by the defendant, as stated in section VIII of the answer to the bill, differ in any respect (and, if so, in what) from the stencil paper which it had on sale in this district, and sold, on September 16, 1915? Also state whether any differences between such papers, stated in answer to this interrogatory, are the only differences between them known to the defendant, with respect (a) to the stencil papers themselves; (b) to the processes involved in their production; and (c) to the intended processes of using them for the production of multiple copies?

"86. Did the stencil paper sold by the defendant, as stated in section VIII of the answer to the bill, differ in any respect (and, if so, in what) from the stencil paper which it had on sale in this district, and sold, on April 8, 1916? Also state whether any differences between such papers, stated in answer to this interrogatory, are the only differences between them known to the defendant, with respect (a) to the stencil papers themselves; (b) to the processes involved in their production, and (c) to the intended processes of

using them for the production of multiple copies?"

I do not find any objection to the general tenor of these questions, but there is no explanation of the specific dates of September 16, 1915, and April 8, 1915. When the selection of these dates shall have been satisfactorily explained, then the interrogatories may be propounded again.

Interrogatory 87.

"87. Give the name or names and address or addresses of the person or persons furnishing the information upon which the answers to the foregoing interrogatories are based?"

Objection sustained.

Case No. 2.

There are 2 claims and 13 interrogatories, Nos. 2, 7, and 8 not being objected to. No. 1 is allowed, as an aid to fix the character of the material which defendant sold subsequent to the grant of the patent sued upon. Defendant in paragraph IV of its answer distinguishes between solution which it bought prior to June, 1915, and afterwards sold, and solution which subsequent to that date it manufactured, as well as sold. In view of this differentiation, the interrogatory is proper.

Interrogatories 3, 4, and 5 are proper, for the reasons stated in connection with interrogatory 83 in case No. 1.

Interrogatory 6.

Objection sustained as to interrogatory 6, because of use of expression "illustrated."

Interrogatories 9, 10, and 11.

Objection sustained, because phrased in the language of the claims.

Interrogatory 12.

Same ruling as to No. 84 of first case.

Interrogatory 13.

Objection sustained. In this case, also, defendant should furnish a fresh sample, as indicated in case No. 1.

Views.

[3] I have examined the cases referred to in plaintiff's brief, but an analysis of them is not necessary. The tendency of the District Court of this district is to be liberal as to interrogatories, all to the end that time and expense shall be saved to the litigants, and that when the case comes on for trial the case shall come down to the real issues as clearly and speedily as may be. In a case like this, the defendant should furnish plaintiff with a true specimen of the device alleged by plaintiff to infringe, and also state in accurate detail the process employed; but interrogatories ordinarily should not be in the language of the claims, nor should a defendant be required to state the names of his experts or others from whom the information is obtained for his answers to the interrogatories.

Guided by these rules, it will be found that the practice will be simple, and that a large number of interrogatories will not be necessary. Putting the matter colloquially, it is as if plaintiff said:

"Here is your infringing device. If you say that because of chemical changes it may not now be a true specimen, then produce your true specimen and explain in full detail how you make it."

When a defendant complies, by frankly answering such a question, such is all that plaintiff is entitled to and can fairly expect.

Bills of Particulars.

- [4] For convenience and future reference a copy of the motion paper is hereto attached, marked "A." 1
 - No. 1. Granted.
 - No. 2. Denied, under the circumstances of this case.
 - No. 3. (a) Allowed, if amended:

"Approximately when, where, and with whose knowledge the alleged prior use or invention occurred."

- (b) Allowed, if amended by striking out the words "and characteristics."
 - (c) Allowed.
 - (d) Denied.
- No. 4. Denied. Simultaneously with the service of the bill of particulars by defendant, plaintiff must serve on defendant a statement of the dates approximately of invention as claimed by plaintiff. The recent case of De Laski, etc., Co. v. United Tire Co., 232 Fed. 884,

¹ See matter following end of opinion.

affirmed 235 Fed. 290, is a good illustration of the desirability of fixing the date of invention during the progress of the first litigation.

By the exchange indicated, each side will be on equal terms. By "approximately" is meant, for instance, "in or about January, 1916," instead of "on the 1st day of January, 1916." The trial judge can then determine if the proof shows, for instance, December 28, 1915, whether that is a genuine date, or is created to meet the necessities of the case.

Failure to comply will debar defendant from introducing testimony, unless otherwise allowed by the trial court. Further procedure as to adjournment in case of surprise, or the matter of the imposition of costs, is necessarily left to the trial court.

In conclusion, it may be observed that there should always be an interchange of dates. The side urging the patent should not be called upon to give the date of invention, where no request is made for the prior use date. If, under such circumstances, one side were called upon to give the date of invention, while the opposing side was not called upon for prior use dates, there might readily be instances in which this information might be misused. It is believed that the system of contemporaneous exchange will work out fairly to both sides of the litigation.

My Associates, Judges HOUGH, LEARNED HAND and AUGUSTUS N. HAND, authorize me to state that they are in accord with the conclusions expressed under the headings "Views" and "Bills of Particulars," and that the practice outlined will be followed by this court.

"A."

1. What patents and publications will be offered in evidence at the trial of the cause to illustrate the prior state of the art, to support the contention of of anticipation, or for any other purpose, and, of those so offered, on which will defendant rely at such trial in support of the contention of anticipation of the patents in suit, or any of them, particularizing as to such latter patent or patents?

2. Of the patents and publications specified in the answer to the last preceding interrogatory, which of them will defendant contend, on the trial of this cause, refer on their face to the art of duplicating autographic or type-written matter by means of stencils in which characters or other ink-trans-

mitting media are formed by pressure?

3. What instance or instances of prior knowledge or use, as alleged in section XI of the answer to the bill of complaint, and what instance or instances of independent invention, as alleged in section XVI of said answer, will defendant attempt to prove on the trial of this cause, and what particular instance or instances will be relied upon by the defendant to sustain its defense or defenses (particularizing as to the description of such defense), and, with respect to each such instance, state:

(a) When, where, in whose presence, and with whose knowledge the alleged

prior use or invention occurred.

(b) The description and characteristics of the thing or things invented or used, and, if stencil paper, of its base, the ingredients (and proportions thereof) of its coating compound, and the process involved or practiced in its production and use.

(c) Is there in existence any stencil paper alleged to have been made or used or invented prior to the inventions of the patents in suit, or any records, documentary or otherwise, concerning the same; and, if yea, describe the same specifically, and state when and where may the same be inspected by complainant or its counsel or designee?

(d) Such other information and particulars as will enable complainant fully to investigate the facts to be relied upon at the trial.

4. What will the defendant contend, under section XIV of its answer, is the difference between "the alleged invention claimed" in patent in suit No.

1,101,269 and "the invention to which the inventor made oath"?

Complainant further moves that, if said bill of particulars be not delivered by the defendant to the complainant's solicitor within 10 days from the entry of order hereon, so much of defendant's answer as sets forth prior patents, publications, or names of persons or concerns having prior knowledge, or having made prior use of inventions set forth in the patents in suit, or any of them, or having independently invented the same, be stricken out, and that the defendant be debarred from taking any testimony herein relating to such prior patents, publications, knowledge, invention, or use, and for a further order that any and all costs and expense incurred by the complainant in preparing to meet proof as to the matters specified by the defendant in such bill of particulars, proof of which shall not be offered by defendant at the trial, be paid by the defendant, without reference to the final outcome of the suit.

be paid by the defendant, without reference to the final outcome of the suit. Complainant further moves that, if the particulars of defense to be filed by the defendant pursuant to order entered hereon be incomplete or insufficient, the complainant be awarded costs against defendant, regardless of the ultimate

outcome of the trial of this cause.

WIRTALLA et al. v. HALL.

(District Court, D. New Jersey. September 6, 1916.)

No. 385.

- 1. Patents \$\sim 328\$—Validity and Infringement—Loom Heddle-Frame.

 The Wirtalla patent, No. 729,477, for a loom heddle-frame, in view of the prior art is void for lack of invention; also held not infringed, if conceded validity.
- 2. Patents 517-Invention-Mechanical Skill.

The dividing of a thing which in the prior art was whole into parts, or the making of a part removable which was previously irremovable, does not constitute patentable invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 16, 17; Dec. Dig. ♦ 17.]

In Equity. Suit by Rudolph G. Wirtalla and the Steel Heddle Manufacturing Company against Isaac A. Hall, individually and doing business as I. A. Hall & Co. On final hearing. Decree for defendant.

Russell M. Everett, of Newark, N. J., for complainants. John W. Steward, of Paterson, N. J., for defendant.

ORR, District Judge. This is an ordinary patent suit, wherein the testimony was taken otherwise than in open court. The plaintiff Wirtalla, who is a citizen of New Jersey, is the patentee and owner of letters patent of the United States, No. 729,477, issued to him May 26, 1903, for a loom heddle-frame. The plaintiff corporation, which is a citizen of the state of Pennsylvania, is a sole and exclusive licensee under said patent to manufacture and sell the subject thereof. The defendant is a citizen of New Jersey, engaged in manufacturing and dealing in general silk mill supplies.

The bill charges the defendant with infringing the rights of the

plaintiffs by the manufacture and sale of heddle-frames which embody the important features of the heddle-frame described in the patent in suit. The answer avers that the patent is invalid for want of invention in view of the prior art, and further that, even if it were a valid patent, the heddle-frames manufactured and dealt in by the defendant do not infringe any of plaintiff's rights.

A loom heddle-frame is a necessary part of machinery for use in weaving. So far as appears in this case, it is a light, rectangular frame having within it, and near the top and bottom, horizontally disposed bars, called heddle-bars, which support or carry vertically disposed heddles, each of which is intended to receive a warped thread through its eye, which is midway between its ends. The heddles are, in ordinary practice, of metal, and have longitudinal slots in their ends, by means of which they are strung upon the top and bottom heddle-bars. The heddle-bars are ordinary flat strips arranged edgewise, and have such dimensional relation to the slots of the heddles that the heddles are loose enough on the heddle-bars to permit them to slide or shift thereon. It is perhaps apparent, but at all events is made clear by the testimony, that the top and bottom heddle-bars, because of their length and otherwise small dimensions, should be supported between their ends to the heddle-frame, lest they be distorted by reason of the many heddles strung thereon, and by reason of the use of many heddle-frames in the same operation.

Before considering the means of supporting or staying the heddle-bars, it is proper to consider the use to which the heddle-frame is put. As has been noted, the heddles carry through their eyes the warped threads. There must be more than one heddle-frame in use for weaving. Heddle-frames with the warped threads through the heddles are so disposed that by suitable mechanism some of the heddle-frames are caused to move upward and others downward, thus forming the "shed" for the shuttle to pass through. There may be thousands of warped threads used in weaving. To prevent distortion of the heddle-bars, stay-hooks have been used for many years to hold the heddle-bars in more or less firm position in relation to the top and bottom parts of the heddle-frame.

[1] The patentee, in his specification, states his object to be as follows:

"My invention relates to improvements in loom heddle-frames of that class wherein a series of heddles are strung on heddle-bars, the latter being stayed in place by hooks attached to the end portions of the frame. Heretofore considerable difficulty has been experienced by operators in adjusting the heddles within the frame and in applying or removing the heddles. This is due, primarily, to the attachment of the stay-hooks to the frame in a substantially permanent way, and this makes it necessary for the operator to forcibly lift the heddle-bars over the hooks, which practice is objectionable for two reasons: First, the heddles are strained or stretched lengthwise to such an extent that they are frequently broken or made useless; and, secondly, the application of force by the hands hurts them to such an extent that operators object to changing the heddles.

"The object that I have in view is to provide means by which the adjustment, removal, and insertion of the heddles can be easily, quickly, and readily performed without hurting the hands of the operator, because it is not necessary to forcibly lift the heddle-bars and strain the heddles strung thereon. I attain these objects by the employment of a stay-hook, which is removably attached to the heddle-frame and is easily slipped from engagement with the heddle-bars."

It is perhaps not necessary to refer at greater length to the specifications. What the patentee appears to have done has been to insert two rods through the vertical sides of the frame, and within the frame and parallel and near to the upper and lower parts of the frame respectively. These rods are bolted at their ends upon the outside of the frame, and may be removed and replaced as desired. The rods pass through the eyes of stay-hooks, which hooks tend to hold in place the heddle-bars. As many stay-hooks may be used upon the rod as is deemed proper. The rod itself is intended to be held in fixed relation to the portion of the frame with which it is parallel and more closely placed. It is braced by the employment of eyes on the frame, through which eyes it extends, as well as through the eyes of the stay-hooks. The patent, however, is not limited to the use of rods extending clear through the frame, but, as appears in Fig. 3, contemplates rods of shorter length held by eyes on the frame to which the stay-hooks are attached. The claims of the patent in suit are as follows:

"1. A loom heddle-frame having heddle-supporting bars, a rod or bolt fastened removably to said frame, and a stay-hook fitted to said rod or bolt and the heddle-supporting bar, whereby the rod or bolt may be withdrawn from the frame and the hook may be slipped from engagement with the heddle-supporting bar.

"2. A loom heddle-frame having heddle-supporting bars, a series of stay-hooks engaging with said bars, and a rod or bolt secured removably to the frame, said stay-hooks being threaded on the rod or bolt and adapted on the withdrawal of said rod to be easily disengaged from the heddle-supporting bar.

"3. A loom heddle-frame having heddle-supporting bars, a removable rod or bolt attached to said frame, and a stay-hook loosely and slidably fitted on said rod or bolt and engaging removably with the heddle-supporting bar.

"4. A loom heddle-frame having a heddle-supporting bar, a rod or bolt secured removably to the frame, an eye fastened to the frame and engaging said rod or bolt, and stay-hooks threaded on the rod or bolt and engaging the heddle-supporting bar."

In view of the evidence offered by the defendant as to the state of the prior art, this court has been unable to find invention in the apparatus of the patent in suit. The plaintiff Wirtalla was, at the date of his application for the patent in suit and for some years after, superintendent of the Astoria Silk Works on Long Island. His term of service there lasted some 17 years. In his testimony he states what led him to adopt the form of heddle-frame disclosed in the patent as follows:

"Q. 6. What led to the making of the invention covered by your patent No. 729,477? A. When the flat steel heddle first was put on the market, the frames used for them were of the old style, and caused much trouble to the operator in handling them.

"Q. 7. What was this trouble? A. The frames used at that time consisted of two wooden rails, two wooden end pieces, and two heddle-bars on which the heddles were strung. These heddle-bars were supported by stay-hooks which were fastened into the wooden rails. In order to put the heddle-bars into the frame for operation, they had to be lifted over those stationary hooks, which the operators objected to, as it hurt their hands. Those operators, who had

most to do with filling the frames with heddles and heddle-bars, were on the point of rejecting the steel heddles, which were satisfactory in every way. I told those persons who complained to me about this that I would do my best to get up a frame which would do away with the lifting of the heddle-bars over the stay-hooks, as we were all in favor of the flat steel heddle; they lasted for years, where the thread heddles which we formerly used would not last in some cases for a month. In order to continue to use the flat steel heddle, I was forced to get up a frame which was satisfactory and could be used without annoyance to the operator. I worked on this frame for some time, and the outcome was the frame which I had patented in the patent in suit."

This court is satisfied that the heddle-frame of the patent was just such a frame as any other man in Wirtalla's position would perhaps have adopted to have obtained the object he was after. What the patentee did was substantially to make the top of the heddle-frame and the bottom of the heddle-frame each in two parts, one of which was a rod of metal and was removable. To the removable part of the top and of the bottom of the frame he engaged the stay-hooks, which themselves could be removed from the removable part of the frame. By so doing he overcame an objection which his employés had made to the frames theretofore used by them, which objection was founded upon the fact that the stay-hooks were attached to the frame in a substantial permanent way. Whether he had knowledge of the prior art as disclosed in prior patents is immaterial, yet his long service to the Astoria Silk Works would reasonably lead to a presumption that he was well acquainted with the art of weaving and with the various utilities employed in that art.

[2] It is impossible to find invention in a case like the present, where a patentee divides that which is whole into parts, or where a patentee makes a part removable which is intended by his predecessors in the art to be irremovable. An experienced mind has under consideration many ways by which that which is removable may be held as firmly in place as though it were irremovable. The language of Mr. Justice Bradley in Atlantic Works v. Brady, 107 U. S. 192-205, 2 Sup. Ct. 225, 27 L. Ed. 438, appears to be more and more pertinent because of the multiplicity of patents issued yearly by the United States. It is well that it be often quoted, that it may be more constantly in mind, and act as a corrective of abuses to which the public may be subjected. He said:

"The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences. The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers, who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith."

In United States patent No. 36,166, issued to H. Parsons under date of August 12, 1862, for "improvement in harness for looms," this statement is made:

"The heddle-bars may be stiffened or braced centrally by hooks or supports i i, or in any desirable manner."

In the reissued United States patent No. 9,220, to D. C. Brown, issued May 25, 1880, for "harness for looms," there is the disclosure of rod hooks adjustably attached to the top and bottom of the heddle-frame, and which also brace the heddle-bar. The United States patent to Fehr, No. 673,499, discloses stay-hooks which support the heddle-bars, yet which are attached to and slide upon the horizontal part of staple-like brackets extending from the frame, the horizontal portion of which bracket is between the heddle bar and the top or bottom of the frames in the same relative position that the rod or bolt of the patent in suit occupies. The United States patent No. 253,335, issued February 7, 1882, to J. Ashworth, for a heddle-frame, was sufficient of itself to suggest to Wirtalla the apparatus of the patent in suit. In the specifications of the Ashworth patent there is this statement:

"The invention consists in the combination, with the heddle-frame having slotted side bars, the heddles, and the ordinary bars upon which the heddles are strung, of additional outer bars or rods and links and hooks or eyes for uniting the said bars and connecting them with the frame, whereby the ordinary inner bars upon which the heddles are strung are prevented from bending and twisting and the heddles are rendered easily changeable, as will be hereinafter fully described."

The rod or bolt of the Wirtalla patent is the outer bar or rod of the Ashworth patent. It passes through suspending hooks or eyes rigidly attached to the frame and through suspending slides or links, through which also passes the proper heddle bar. The suspending slides or links of the Ashworth patent are the equivalent of the stay hooks of the Wirtalla patent. The bars or rods E of the Ashworth patent are removable, and are secured removably to the frame, and the stay-hooks are threaded thereon.

Without further comment on the prior art, it is sufficient to find that there was disclosed therein every element of each of the claims of the patent in suit. It is well to note, also, that there is no evidence in the case that the Wirtalla heddle-frame leaped at once into general use, thus creating a presumption of novelty. Steel heddles had not been long in use. Therefore to use them with the existing apparatus of the art, some change therein was reasonably necessary. As appears by the catalogue of the plaintiff corporation, issued in the year 1908, and from other evidence, heddle-frames other than those like Wirtalla's are sold and used.

It is urged, however, that the utility of the patented frame is an important factor in determining its patentability. The defendant cannot

deny the utility of the patent, because for at least a year, and perhaps longer, he manufactured Wirtalla's heddle-frame under a license. Such relationship to the patentees does not estop him from denying the validity of the patent for want of invention. The interest of the public must be protected.

As there was no invention by Wirtalla, little need be said with respect to infringement. If the Wirtalla patent could be deemed valid, its scope would necessarily be limited to the exact device or arrangement therein shown. The apparatus of the defendant differs from that of the patent in this: That the rod or bolt does not extend through the sides of the frame or into the sides of the frame. It is held to the top or bottom of the frame, as the case may be, by eyes on the frame, it is true, and as well passes through the eyes of the stay-hooks, but it has no nuts at either end. Being within the plane of the frame, and not extending through the sides thereof, it cannot be removed from the frame without a slight distortion for the purpose of moving one end out of the plane of the frame before removing the same from the eyes of the frame or the eyes of the stay hooks. Furthermore, the evidence satisfies the court that, while it may be removed as last above indicated, yet in practice it is not ordinarily removed when it is desired to remove the heddle-bars and heddles from the frame. There is sufficient play in the heddle-frame of the defendant to permit the operator to raise the heddle-bars over the stay-hooks and thus release them from the frame.

The bill must be dismissed, at the cost of the plaintiffs. Let a decree be presented.

In re SHELLY.

(District Court, D. New Jersey. August 28, 1916.)

BANKRUPTCY \$\instruction \text{ONTRUCTION OF BUILDING CONTRACT.}

Under provisions of a building contract authorizing the owner, on default of the contractor, to finish the building at his expense, and that all materials delivered on the premises should be the property of the owner, any remaining after completion of the building to belong to the contractor, where the contractor ceased work and became bankrupt, his trustee was not entitled to unused materials then on the premises, although having the status of a creditor, with an execution or lien given him by Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), but the owner had the right to use such material in completing the building, being liable to the trustee only for whatever, if anything, remained due on the contract price after deducting the expense incurred in addition to such material.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199; Dec. Dig. ⇐⇒140(1).]

In Bankruptcy. In the matter of Oswin W. Shelly, bankrupt. On review of decision of referee. Affirmed.

David W. Kahn, of New York City, for trustee. Wm. S. Bennet, of New York City, for E. & Z. Van Raalte. RELLSTAB, District Judge. E. & Z. Van Raalte, a corporation, in November, 1913, entered into a written contract with Oswin W. Shelly for the erection by him of a building. Payment was to be made as the work progressed, based on the architect's estimate; 20 per cent. being retained until the completion of the work. The contract provided, inter alia:

"Fourth. Should the contractor at any time during the progress of said work refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have power to provide materials and workmen, after three days' notice in writing being given to finish the said work, and the expense shall be deducted from the amount of the contract."

"Ninth. All work and materials delivered on the premises to form part of the works are to be considered the property of the owner and are not to be removed without its consent, but the contractor shall have the right to re-

move all surplus materials after the completion of the work."

These provisions are common in building contracts made in New Jersey and are intended for the protection of the owner. Shelly began work and received one payment. He ceased work on December 13, 1913, and a few days thereafter became bankrupt. During the progress of the work materials for use in said building, but not actually used by him, appraised at \$1,782.52, were brought upon the premises, and were still there at the time the petition in bankruptcy was filed. Upon the failure of the bankrupt to proceed with the work after being notified as provided for by paragraph 4 of the contract, E. & Z. Van Raalte (hereafter called the owner) finished the work, the materials remaining on the premises being used in completing the construction.

The cost of completing the work exceeded the contract price by more than the appraised value of said materials. The proceedings under review were for the purpose of determining whether said owner or the trustee in bankruptcy was entitled to said materials. The referee decided in favor of the owner, relying on Duplan Silk Company v. Spencer, 115 Fed. 689, 53 C. C. A. 321. In that case it was held by the Circuit Court of Appeals for this circuit that:

A provision of a building contract that the owner may, in case of default by the contractor, proceed to finish the building himself, and, to that end, use materials brought by the contractor on the ground for the purposes of the building, being accountable to the contractor for any excess of the unpaid contract price over the cost of completion, is not one for a forfeiture, which must be strictly construed against the owner, since it does not involve the taking of any property of the contractor by way of penalty or punishment, but is in the interest of both parties, and is to be fairly construed to effect its purpose.

The trustee contends that to the facts of the present case such decision is inapplicable, but, if it covered such facts, it was superseded by the amendment of June 25, 1910, to section 47 of the Bankruptcy Act, and cites Titusville Iron Co. v. N. Y., 207 N. Y. 203, 100 N. E. 806, as an authority for such contention, and that the trustee, and not the owner, is entitled to the value of the said materials.

The difference in facts is said to be that in the Spencer Case the owner, after finishing the building on the default of the contractor and appropriating unused materials in doing so, was accountable to the contractor for any excess of the unpaid contract price over the cost

of completion, while in the instant case the materials brought upon the premises became the property of the owner by virtue of the ninth paragraph of the contract, and that it would not be accountable to the builder for such appropriation.

I do not think this is the proper construction of that paragraph. It is to be read in the light shed upon it by the other provisions of the contract, notably the fourth paragraph. Under the ninth paragraph the interest of such owner in the materials delivered on the premises was not absolute. To the contractor was reserved the right to remove all surplus materials remaining after the completion of the works. Under paragraph 4 only the expense to the owner of finishing the building was to be charged against the builder, so that it is manifest, if the materials left on the premises were used in completing the building, the cost of finishing would be less by just the value of said materials. In case the cost was less than the amount of the contract price, the surplus belonged to the builder. If it exceeded such price, the amount of damages for which the builder was liable for not performing his contract would be less by the value of the materials so used.

On the facts, the Spencer Case is still authoritative. Did the amendment of 1910 change the law, so as to make that case no longer controlling? Said amendment has undoubtedly wrought a great and a beneficial change in favor of the general creditors. Their representative, the trustee, is no longer pinched by the close-fitting shoes in which he was theretofore said to stand. He now has the more serviceable footing of a judgment creditor holding an execution duly returned unsatisfied or a creditor holding a lien by legal or equitable proceedings. Section 47a (2), Bankruptcy Act.

What is the character of the interest which the owner secured in said materials? If the bankrupt had used said materials in the building, and then gone into bankruptcy, and the building was thereafter completed by the owner at a cost greater than the contract price, the value of said materials would not be an asset in the bankrupt's estate, and would hardly have been claimed as such by the trustee. Yet in principle, though not in form, that is just what the trustee now claims. The contract expressly authorized the finishing of the building by the owner when the contractor failed to do so, and while in terms it did not contemplate a loss when finished by the owner, yet a loss was necessarily implied as a possibility.

The loss incurred in completing the building was less by the value of the materials on hand and used than it would have been in the absence of such materials, and the appropriation of said materials in accordance with the express terms of the contract, in the absence of fraud, cannot be made the basis of mulcting the owner, merely because it inured to its benefit. Those materials, after being used in said building, are in a situation no different, so far as the present controversy is concerned, from that which would have existed if they had been put into the building by the bankrupt, and he had then finished it at a loss to himself.

Had these materials been used otherwise than in completing said building, or had the owner not having so used them refused to deliver them to the trustee, it would be liable for their value. Having used them in the way authorized by the contract, and such use having reduced the loss in finishing the building, neither the building into which said materials were put, nor the owner thereof, would be liable for their value to a creditor holding an unsatisfied execution or lien, and hence not liable to the trustee in bankruptcy. Duplan Silk Co. v. Spencer, supra, 115 Fed. 695, 53 C. C. A. 321, so held, and no case in New Jersey has been brought to my attention that holds otherwise. The only interest the bankrupt had in such materials, and the only one that could be reached by any one of his creditors, whether through legal or equitable proceedings, was the possible one of there being a surplus, after deducting the cost of finishing such building, over the contract price, and that, as already noted, is nonexistent in this case. In Titusville Iron Co. v. City of N. Y., supra., the case principally

In Titusville Iron Co. v. City of N. Y., supra., the case principally relied upon by the trustee, the contract between the owner and builder was radically different in respect to the rights of the contractor. It provided that the expense incurred in the completion of the contract—
"shall be a charge against the contractor, who shall pay to the party of the

first part [city] the excess thereof, if any, over and above the unpaid balance of the amount to be paid under this contract; and the contractor shall have no claim or demand to such unpaid balance, or by reason of the nonpayment thereof to him, and shall forfeit all claim to any moneys retained."

This provision distinguishes that case from the one now considered as well as the Spencer Case. In the New York case the contract provided for a forfeiture of the contractor's property in case of his default, whereas in the Spencer and in the instant case, as shown, a forfeiture was neither agreed upon nor claimed by the owner. The difference in the two classes of cases was recognized by the New York court, for in that behalf it said:

"There is a vital distinction between the contract in the case of Duplan Silk Co. v. Spencer, 115 Fed. 689 [53 C. C. A. 321], and the one in the case at bar. There, as pointed out in the opinion, there was no forfeiture of unused materials, but they were applied to the completion of the contract, and if the contract was completed at a cost less than that which would be due the contractor, had he finished the contract, he was entitled to the surplus. In the present case it is expressly provided that the contractor shall have no claim for any unpaid balance, and shall forfeit all claims to any moneys retained. Therefore, if, on the other questions, the case cited were an authority in this state, the distinction pointed out would make the decision there rendered inapplicable to the present case."

The Spencer Case, in my judgment, has not been superseded by the said amendment of 1910, and still furnishes the rule governing the decision of this case.

The referee's decision is affirmed,

In re ROSENTHAL BROS. Ex parte UNITED STATES.

(District Court, S. D. New York. July 7, 1916.)

BANKRUPTCY \$\infty 346-PRIORITY-"TAXES"-DUTIES.

Under Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 (Comp. St. 1913, § 9648), declaring that all taxes due and owing the United States shall be entitled to priority, duties imposed upon imports and due from a bankrupt must be treated as taxes, and the United States' claim therefor is entitled to priority; the word "tax," as used in the statute, meaning a burden laid upon individuals or property for the support of the government, including duties.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. ⊗ 346.

For other definitions, see Words and Phrases, First and Second Series, Tax.]

In Bankruptcy. In the matter of the bankruptcy of Rosenthal Bros. The United States of America claimed priority for balance due upon duties imposed on goods imported by the bankrupts. On petition to review the order of the referee, holding the United States entitled to priority. Order affirmed, and petition denied.

This is a petition to review the order of a referee in bankruptcy holding the United States entitled under section 64a of the Bankruptcy Act to a priority in the payment of a claim. The claim was for the balance due the United States upon duties imposed upon silks imported by the bankrupts. The original amount of the duties had been reduced by sale of the goods, but a balance of \$651.33 remained, which was concededly owed by the bankrupts.

Charles L. Greenhall, of New York City, for petitioner. Earl B. Barnes, of New York City, for respondent.

LEARNED HAND, District Judge. The question turns upon whether the duties were a "tax" under section 64a. In re Pedlow, 32 Am. Bank. Rep. 808, Referee Dexter held that duties were not taxes and this was affirmed by Judge Hough in an unreported decision. That decision, however, was certainly intended only to serve as a stepping stone to a final decision, not as a binding precedent, as clearly appears from the memorandum handed down. Therefore I shall not treat it as such.

The word "tax," in section 64a, is certainly used broadly. New Jersey v. Anderson, 203 U. S. 483, 492, 27 Sup. Ct. 137, 51 L. Ed. 284. It covers a franchise license tax, which is rather akin to an excise upon the privilege of doing business in corporate form than to a tax proper. The language used of the section in New Jersey v. Anderson, supra, 203 U. S. 492, 27 Sup. Ct. 137, 51 L. Ed. 284, would include a duty or impost. It is as follows:

"Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the government."

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

A case like United States v. 59 Demijohns (D. C.) 39 Fed. 401, is not in point, because it construes the word "tax," when it occurs in a statute which distinguishes between taxes and duties. Here the word is used alone, apparently to cover all sorts of governmental exactions.

Were it not true, a strange result would follow. Taxes would have a priority, all debts to the United States would have a priority, though in later order, duties alone would share equally with all other creditors. I say that debts to the United States would have priority, because that is the obvious implication from Guaranty Co. v. Title & Security Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706. It is true that the only question in that case was of the priority between debts to the United States and wage claims, yet some priority was certainly supposed to be enjoyed by debts to the United States by virtue of section 64b(6).

The sovereign has always claimed priority in the payment of claims due it, and there is no conceivable reason to my thinking why an artificial distinction should be made because section 64a was not redundant in its expression.

Order affirmed; petition denied.

In re FORBES.

(District Court, D. Massachusetts. August 16, 1916.)

No. 19617.

BANKRUPTCY \$\$\infty\$84-Involuntary Proceedings-Amendment of Petition.

It is doubtful whether a court of bankruptcy has power to allow the amendment of an involuntary petition alleging new acts of bankruptcy more than four months after such acts were committed. If the power exists, it should not be exercised, except on a showing of due diligence on the part of the creditor and that the interests of justice require such action.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 126–129; Dec. Dig. \$\sime\$84.]

In Bankruptey. In the matter of Elon E. Forbes, alleged bankrupt. On motion to amend petition. Denied.

Fred L. Norton, of Boston, Mass., for creditors. Thomas B. Hughes, of Boston, Mass., for alleged bankrupt.

MORTON, District Judge. The petition was filed on June 14, 1913. The only acts of bankruptcy therein alleged were two preferential transfers on or about February 15, 1913; the first being to E. L. Guiger of property to the value of \$600, and the second to the American Radiator Company of property also to the value of \$600. On May 26, 1914, one of the petitioning creditors moved to amend the petition by adding four other preferential transfers, made to different parties from those named in the original petition, the latest of which is alleged to have taken place on or about March 1, 1913; i. e., almost 15 months prior to the application to amend. The creditor

alleges that it was ignorant of these transfers at the time when the petition was filed; but it does not allege any deception or fraudulent

concealment by the alleged bankrupt.

It has been expressly decided in this district that the court has no power to allow an amendment to a petition setting up a new, separate, and independent act of bankruptcy which occurred more than 4 months before the application to insert it in the petition. In re Lewis Shoe Company (D. C. Mass., No. 13534) 235 Fed. 1017, opinion of Dodge, J., October 27, 1908. See, too, Re Haff, 136 Fed. 78, 80, 68 C. C. A. 646 (C. C. A. 2d Circuit). In neither of these cases, apparently, was the attention of the Court called to In re Shoesmith, 135 Fed. 684, 68 C. C. A. 322, in which a decision contrary to that in the Haff Case was reached by the Court of Appeals for the Seventh Circuit, nor to the case of International Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866, on which the Shoesmith decision was rested.

Even if the court has power to allow amendments of this character, it certainly ought not to do so, except upon a showing that the petitioner was duly diligent and that the interests of justice require such action. In re Crowley & Hoblitzell, 1 N. B. R. 516, Fed. Cas. No. 11,644; In re Lenoard, Fed. Cas. No. 8,255. While there were in this case some unusual circumstances, it cannot be held, in view of the long delay, that the petitioners have established due diligence on their part in presenting the application to amend.

The petition to amend must therefore be denied.

NEVADA-CALIFORNIA POWER CO. v. HAMILTON, County Treasurer, et al.

SAME v. FRANKLIN, County Treasurer, et al.

(District Court, D. Nevada. June 19, 1916.)

Nos. A-31, A-32.

1. COURTS 328(1)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

The federal District Court has jurisdiction of a suit involving \$3,000 or more, where the parties are citizens of different states.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 890; Dec. Dig. \$328(1).]

2. COURTS \$\iiii 303(2)\$—ACTIONS AGAINST STATE—FEDERAL COURTS—JUBISDICTION

Despite the constitutional amendment depriving the federal courts of jurisdiction of a suit against a state by a private individual, the federal courts may take jurisdiction of a suit to enjoin state or county officers from illegal exactions under color of state tax statutes.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 844½; Dec. Dig. \$303(2).]

8. TAXATION \$397-AUTHORITY OF STATE-PROPERTY WITHOUT STATE.

Complainant, whose power plant and water rights are located in Callfornia, owns transmission lines extending into southern Nevada, where the greater part of its electric current is sold. Though the more valuable

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

part of plaintiff's property was located in California, that state taxed it on about 15 per cent. of the value of its entire property. Held, that the state of Nevada could not, on the theory that practically 85 per cent. of its income was derived from Nevada, tax plaintiff on a valuation made from capitalizing such income at 10 per cent., for, as the income necessarily resulted from current generated in California, the state of Nevada could not, though the state of California had not taxed plaintiff on all its property, impose taxes on property not located in Nevada.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 672; Dec. Dig. \$397.]

4. TAXATION \$\iiii 397\text{-Interstate Corporations-Carriers.}

Where an interstate corporation, as a carrier or irrigation company, owns property in several states, each state, for purposes of taxation, may value the entire property and impute a fair proportion of the aggregate value to that portion lying within its borders.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 672; Dec. Dig. \$397.]

5. TAXATION 397-Interstate Corporations-Assessment.

The most valuable portion of complainant's property is permanently located in California, and 85 per cent. of its transmission lines are in Nevada. If the value of the entire property for the purpose of taxation is ascertained by capitalizing its net earnings, and 85 per cent. of this valuation is assessed as the value of the company's property in Nevada, simply because 85 per cent. of the company's transmission line mileage is in Nevada, the assessment is bad.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 672; Dec. Dig. € 397.]

6. TAXATION \$\infty 608(12)\$—LIENS—CLOUD ON TITLE.

Under Rev. Laws Nev. § 3666, making a tax deed conclusive evidence of title, except as against actual fraud or payment of taxes by one not a party, enforcement of an illegal tax assessment, under which proceedings were about to be brought to sell land for taxes, will be enjoined, for a tax deed based on such proceedings would constitute a cloud on the title. [Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1241; Dec. Dig. ©=608(12).]

7. TAXATION \$\ightharpoonup 397\text{--Assessments---Mode of Taxation.}

In assessing the property of an interstate corporation, engaged in the sale of electric power and water, it is improper to capitalize the earnings of the whole property and ascribe the total value to the distributing lines as a mode of assessing such lines for taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 672; Dec. Dig. \$397.]

8. TAXATION \$\infty\$608(5)\top-Assessments\top-Fraudulent Assessments.

Where taxing officials assess in a manner which they must know will produce inequalities and unjust assessments, their acts are to be treated as arbitrary or fraudulent.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1234; Dec. Dig. \$\infty 608(5).]

9. Taxation \$\iff 542\text{-Assessments}\$—Recovery of Taxes Illegally Exacted. Where an assessment of taxes on real property was not wholly void, but was excessive, the taxes, if paid, cannot be recovered in an action against the taxing officials, the payment, though made under protest, being presumed to be voluntary.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1003-1005; Dec. Dig. ६=542.]

10. Taxation &= 608(10)—Collection—Injunction—Adequate Remedy at Law.

Act Nev. March 20, 1913 (Laws 1913, c. 134) § 7, declares that any property owner who has instituted court proceedings for redress from any increased valuation of his property, and who shall have paid his December installment of taxes in full, may, on filing with the treasurer of the county a certificate of the clerk of any court that such issue is pending, pay his June installment in two separate payments, one payment in a sum which, when added to the December installment, will represent the amount of taxes payable if computed on the valuation of the preceding fiscal year, plus the valuation of any improvement, and the other for the balance required to make up the full June installment, which sum shall be held to be disposed of according to the result of the litigation. Plaintiff's assessment was so raised in 1914 that payment of the December installment would result in payment of a sum in excess of the taxes payable under the prior valuation; the taxes being payable in two equal installments. Held, that section 7 did not afford plaintiff an adequate remedy at law, and so plaintiff might, being a foreign corporation, sue in the federal courts to enjoin the collection of the illegal assessment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1239; Dec. Dig. \$608(10).]

11. REMOVAL OF CAUSES \$\infty 41-Right to Removal-Diversity of Citizenship.

An action by the state, under Rev. Laws Nev. §§ 3657-3664, to collect taxes, cannot, though the defendant be a foreign corporation, be removed to the federal courts on the grounds of diversity of citizenship, because the state is not a citizen.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 82½-84; Dec. Dig. \$\sime 41.]

12. REMOVAL OF CAUSES \$\iiii 25(1)\$—RIGHT TO REMOVAL—CONSTITUTIONAL QUESTIONS.

An action instituted in the state courts cannot be removed to the federal courts, on the ground that a question arising under the Constitution or laws of the United States is involved, unless the complaint necessarily shows that such questions are involved; it being insufficient that they be raised by the other pleadings, or in anticipation of defenses.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. \$\sime 25(1).]

13. Courts \$\infty 259\to Jurisdiction\to Federal Courts\to Equity.

Despite Judicial Code (Act March 3, 1911, c. 231) § 267, 36 Stat. 1163 (Comp. St. 1913, § 1244), providing that suits in equity shall not be sustained in any court of the United States where a plain, adequate, and complete remedy at law may be had, the several states cannot, save in so far as the federal courts apply their remedies, restrict the equitable jurisdiction of the federal courts, which, unless abridged by Congress, is coextensive with that of the English Court of Chancery at the time of the Revolution.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 795, 796; Dec. Dig. ⇐ 259.]

14. Courts €=335(1)-State and Federal Courts.

An adequate remedy at law, which can be administered only in a state court, is not sufficient to compel a federal court to dismiss an equitable cause over which its jurisdiction is otherwise valid and complete, and relegate the complainant for his only alternative relief to a state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 902, 903, 906, 907; Dec. Dig. \$\sim 335(1).]

15. TAXATION 6=490-ASSESSMENT-NATURE.

An assessment imposed by the Nevada tax commission, created by Act Nev. March 20, 1913, is conclusive, and has the effect of a judgment, in the absence of fraud.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 872, 873; Dec. Dig. \$\infty 490.]

16. Taxation ← 608(9)—Injunction—Jurisdiction—Adequate Remedy at Law.

Judicial Code, § 267, declares that suits in equity shall not be sustained in any court in the United States where a plain, adequate, and complete remedy may he had at law. The property of plaintiff, a foreign corporation, which was located in Nevada, was assessed at an excessive rate. Rev. Laws Nev. § 3664, enumerating the defenses against tax suits, which enumerates fraud in the assessment, or failure to comply with the provisions of the act, provides that the defense that the assessment is out of proportion to the actual value of the property assessed shall be effectual only as to the excess. Held, that as a tax suit by the state of Nevada against plaintiff could not be removed by plaintiff to the federal court on the ground of diversity of citizenship, though plaintiff was a foreign corporation, as the defense against an excessive assessment, which could be interposed at law, was not available in the federal courts, and as a state cannot restrict the jurisdiction of the federal courts, the federal District Court had jurisdiction to entertain a suit by plaintiff to enjoin enforcement of an excessive assessment; it having no plain and adequate remedy at law.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1238; Dec. Dig. &—608(9).]

In Equity. Suits by the Nevada-California Power Company, a corporation, against Joseph Hamilton, as Treasurer and ex officio Tax Receiver of the County of Esmeralda, and others, and against Nathaniel K. Franklin, in his capacity as Treasurer and ex officio Tax Receiver of the County of Nye, and others. Injunctions pendente lite granted.

John R. Dixon, of Los Angeles, Cal., and Newman Jones, of River-

side, Cal., for plaintiffs.

George B. Thatcher, Atty. Gen., of Nevada, J. A. Sanders, Dist. Atty., of Tonopah, Nev., and M. A. Diskin, Dist. Atty., of Goldfield, Nev., for defendants.

FARRINGTON, District Judge. June 24, 1914, the Nevada Tax Commission established the full cash value of plaintiff's property within this state at \$1,492,815. Sixty per cent. of this was taken for the purposes of taxation, making the assessed value \$895,689. As between the interested counties, this amount was apportioned \$328,689 to Nye and \$565,000 to Esmeralda. Mr. Shaughnessy, chairman of the Tax Commission, testifies that:

"In finding the said \$1,492,815 as the full cash valuation of complainant's property, and \$895,689 for assessment purposes, the Commission took into account its nonphysical values, as well as the purely physical elements. The sum taken therefore was believed to cover the overhead costs incurred in the construction of the property, and also the franchise element contemplated by section 5 of the Tax Commission Law, in making up the collective unit valuation of the Power Company's property."

In October, 1914, the Power Company appeared before the Commission, complaining that this valuation was excessive, and would operate as an unlawful, unjustifiable, and unconstitutional discrimination, whereby it would be deprived of the equal protection of the laws of the state of Nevada. Instead of reducing the valuation, the Commission raised it to \$3,700,713, 60 per cent. of which, or \$2,221,417, was fixed as the value for purposes of taxation. The effect of this change was to increase the Nevada tax of complainant from \$21,850.29 to \$53,517.82. The Power Company then brought the present suits, one against Joseph Hamilton, in his capacity as treasurer and ex officio tax receiver of the county of Esmeralda, and Michael A. Diskin, in his capacity as district attorney of the said county of Esmeralda, and Cylde P. Johnson, in his capacity as auditor of the said county of Esmeralda, and the other against Nathaniel K. Franklin, in his capacity as treasurer and ex officio tax receiver of the county of Nye, and John A. Saunders, in his capacity as district attorney of the said county of Nye, and William M. Grimes, in his capacity as auditor of the said county of Nye. In each the prayer was that it be adjudged that the full cash value of plaintiff's property in Nevada at any time during the year 1914 was and is the sum of \$1,220,843; that the valuation fixed for that year by the Nevada Tax Commission was and is unjust and inequitable, and in so far as it exceeds 60 per cent. of said \$1,220,-843 it is wholly void, and of no force or effect: that complainant be granted writs of injunction, both temporary and permanent, restraining the enforcement of the valuations or orders of the Nevada Tax Commission as against plaintiff, or from commencing or prosecuting any action or actions at law for the enforcement of said valuations and orders, or for the collection of any tax claimed thereunder; and that the treasurer of Nye county be directed to accept and receive \$6,321.25, and the treasurer of Esmeralda county \$11,382.60, or such other sums as the court may adjudge, in full payment of all taxes levied or assessed against plaintiff within said counties for the year 1914.

Both suits are now before the court on complainant's application for orders of injunction pendente lite. Both applications have been heard together, and will be disposed of in this opinion.

[1, 2] 1. Complainant is a corporation organized and existing under the laws of the state of Wyoming; all the defendants are residents and citizens of Nevada. The amount in controversy in each case exceeds \$3,000. The cases, therefore, are within the jurisdiction of this court, unless they are in reality suits against the state, and therefore within the inhibition of the constitutional amendment, which declares the judicial power of the United States shall not extend to suits against a state. It would be an unfortunate construction of that amendment which would prohibit application to federal courts to protect rights guaranteed by the federal Constitution itself, when illegally invaded by state or county officials. These are not suits against the state, but against individuals, threatening wrong under color of authority from the state.

It is alleged and admitted that, unless restrained, defendants will levy on complainant's property, advertise it as delinquent, take each step prescribed by statute for the enforcement of taxes exceeding \$300, and thus compel payment of the taxes here complained of. If the assessment be illegal, excessive, and fraudulent, defendants' acts thereunder and in connection therewith, if purely ministerial, will constitute a trespass. If the suits were against an official, as representative of the state, not specially charged with the execution of the injurious acts, or threatening to perpetrate them, then the state would be the real party in interest and the real defendant. In that event, both suits could be dismissed, because, as we know, the state cannot, without its consent, be brought into court at the suit of a private individual. On the other hand, when a state or county official has committed, or is threatening to commit, an illegal or unconstitutional act under color of authority from the state, he is shielded by none of the state's immunity from suit; he becomes himself an actor; he incurs the liability of, and may be proceeded against as, the principal tortfeasor.

In Hopkins v. Clemson Agricultural College, 221 U. S. 636, 642, 31 Sup. Ct. 654, 656, 55 L. Ed. 890, 894, 35 L. R. A. (N. S.) 243, 249, the rule and its reasons are thus clearly stated:

"Immunity from suit is a high attribute of sovereignty—a prerogative of the state itself-which cannot be availed of by public agents when sued for their own torts. The eleventh amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the state's citizens. To grant them such immunity would be to create a privileged class, free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law. For how 'can these principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders * * * whenever they interpose the shield of the state? * * * The whole frame and scheme of the political institutions of this country, state and federal, protest' against extending to any agent the sovereign's exemption from legal process. Poindexter v. Greenhow, 114 U. S. 270, 291 [5 Sup. Ct. 903, 29 L. Ed. 185]. The many claims of immunity from suit have therefore been uniformly denied, where the action was brought for injuries done or threatened by public officers. If they were indeed agents, acting for the state, they-though not exempt from suit-could successfully defend by exhibiting the valid power of attorney or lawful authority under which they acted. Cunningham v. Macon & B. R. Co., 109 U. S. 446, 452 [3 Sup. Ct. 292, 609, 27 L. Ed. 992]. But if it appeared that they proceeded under an unconstitutional statute, their justification failed, and their claim of immunity disappeared on the production of the void statute. Besides neither a state nor an individual can confer upon an agent authority to commit a tort, so as to excuse the perpetrator. In such cases the law of agency has no application—the wrongdoer is treated as a principal, and individually liable for the damages inflicted, and subject to injunction against the commission of acts causing irreparable injury."

The distinction between suits against officers as representatives of the state, and suits against officers threatening in the name of the state to do illegal and unconstitutional acts, is recognized in the authorities cited by defendants. For instance, in Ex parte Ayers, 123 U. S. 443, 444, 8 Sup. Ct. 164 (31 L. Ed. 216) it is said:

"The court does not intend to impinge upon the principle which justifies suits against individual defendants who, under color of the authority of unconstitutional state legislation, are guilty of personal trespasses and wrongs; nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest."

In Fitts v. McGhee, 172 U. S. 516, 529, 530, 19 Sup. Ct. 269, 274 (43 L. Ed. 535) the court says:

"Upon examination it will be found that the defendants in each of those cases were officers of the state, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals, holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement."

In Union Trust Co. v. Stearns (C. C.) 119 Fed. 791, 793, this language occurs:

"There is a class of cases in which the Supreme Court has held that a suit against state officers was not a suit against the state. The principle governing these cases is not applicable to the present suit. Briefly stated, that principle is that such officers, as individuals, have committed, or are about to commit, a wrong or trespass, for which they are personally liable in a suit at law or in equity."

In the light of these authorities, the mere fact that the state is much concerned in this litigation is no reason why county officials should not be restrained from the commission of wrongs and injuries to complainant, though done in behalf of the state. To the same effect see 5 Pomeroy, Eq. Jurisp. § 366; Gregg v. Sanford, 65 Fed. 151, 154, 12 C. C. A. 525; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 391, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Harrison v. St. L. & San F. R. R. Co., 232 U. S. 318, 34 Sup. Ct. 333, 58 L. Ed. 621, L. R. A. 1915F, 1187; Taylor v. L. & N. R. Co., 88 Fed. 350, 356, 31 C. C. A. 537; Coulter v. Weir, 127 Fed. 897, 907, 62 C. C. A. 429.

[3] 2. Mr. Shaughnessy, chairman of the Nevada Tax Commission, testifies that at the October meeting of that body the value of the property in question was found by ascertaining the net profits of the Power Company for the year ending June 30, 1914; it then "ascribed 85 per cent. of those net profits to the state of Nevada, and capitalized that 85 per cent. on a 10 per cent. basis." The calculation in detail was as follows:

"I have given gross earnings for the fiscal year ending June 30, 1914, \$992,928. Thereafter the following deductions were taken: Operating expenses, \$339,115; taxes, \$18,435; annuity or return on the property, 4 per cent. on \$5,000,000, total plant valuation claimed, or \$200,000—making total deductions \$557,550. Taking that amount from gross earnings leaves net income of \$435,378. Taking 85 per cent. of that as creditable to Nevada, gives

\$370,071.30, and that capitalized at 10 per cent. will give \$3,700,713. Sixty per cent. of that, which was taken for assessment purposes, gives \$2,220,427. Then there is detail there, 'Less original assessment ordered on roll June 24, 1914, \$895,689,' leaves \$1,324,738, which is the corrected net increase ordered on the tax rolls of Nye and Esmeralda counties on November 14th."

Elsewhere Mr. Shaughnessy testifies that the \$5,000,000 allowed "represents pretty closely the appraised valuation claimed for rate fixing purposes before the Public Service Commission of Nevada by complainants." He also explains the annuity of \$200,000 as an allowance to cover depreciation. When asked why 85 per cent. of the Power Company's profits were credited to Nevada, he replied:

"It is upon the testimony given by Mr. Cooper before the Commission on October 22d, and is predicated upon the fact that practically all of the earnings of the Nevada-California Power Company are made within Nevada, notwithstanding the fact that the generating plant itself is located within California, upon Bishop creek, in Inyo county, and necessarily a certain amount of the transmission mileage is located within that state. The California taxing authorities, for the purpose of assuring their amount of taxes due in that state, put on a computed tax in lieu of a tax upon the body of the property. There they find the proportion of the earnings creditable to California by the proportion of the transmission line mileage within the state of California to the total transmission line mileage of the system."

Mr. Cooper's testimony before the Tax Commission, referred to by Mr. Shaughnessy, was as follows:

"Mr. Shaughnessy: What proportion of your taxes do you pay to California?

"Mr. Cooper: You mean the percentage of taxes of the entire company? "Mr. Shaughnessy: Yes. What percentage in California do you pay upon? "Mr. Cooper: Why, the laws in California are based upon the gross earn-

ings. On a company such as ours, an interstate company, the tax is paid on the ratio of the mileage in the state of California to the whole.

"Mr. Shaughnessy: What is that ratio?

"Mr. Cooper: On the basis of the interstate mileage?

"Mr. Shaughnessy: Yes. What is that ratio?

"Mr. Cooper: The ratio—I don't recall the exact ratio, but I am under the impression it is somewhere around 13 per cent. of our total interstate business, in addition to which we have to pay on the gross value percentage on revenue entirely within the state of California.

"Mr. Shaughnessy: Then 13 per cent. of the gross earnings made in Nevada are taxed upon the gross earnings basis in California as your assessment in

that state?

"Mr. Cooper: Approximately that. I would not be certain of that per-

"Mr. Shaughnessy: And the gross earnings for the last fiscal year period are what?

"Mr. Cooper: I haven't the figures of the earnings with me.

"Mr. Shaughnessy: You are sure that percentage factor of 13 per cent. is about correct?

"Mr. Cooper: I would not like to go on record as to the amount, because I did not know the question would be raised; but it is somewhere around 13

per cent. or 15 per cent., I am not positive.

"Mr. Shaughnessy: You are assessed this year upon a full cash valuation basis of \$1,492,815, and, taking 60 per cent. of that, your total assessment, or your assessed valuation, is \$895,689. Your net earnings for the previous year from operations were \$733,434; your taxes were \$16,500. Figuring depreciation at 4 per cent., which is in excess of the factor found by Mr. Gillette, on a \$5,000,000 plant valuation, we find the depreciation is \$200,000, or a total, including taxes, of \$216,500, which, taken from the net earnings from operation, leaves the net income \$515,934. Assuming there is 14 per cent. taken

from that—I have figured 14 per cent. for California—it leaves the net earnings creditable to the state of Nevada, or the net income, \$392,160. Now, if that is capitalized at 10 per cent. (the highest capitalization factor used by any state in the United States for determining franchise value), it will give a valuation of \$3,921,600. What would you say to an assessment of that kind?

"Mr. Cooper: Well; but I don't see how the state of Nevada is justified in

taking into consideration property that is not owned in the state.

"Mr. Shaughnessy: But a property is worth what it will earn, Mr. Cooper. "Mr. Cooper: It may be. But the valuation of our California property ought not to enter into the taxation in Nevada, and the earning ability of the plant in California.

"Mr. Colburn: Where is your largest market-California?

"Mr. Cooper: At the present time our largest market is in Nevada, although our California market is increasing rapidly."

Complainant's property, in the main, consists of water rights, pipe lines, flumes, canals, reservoirs, a generating plant, and lines of transmission and distribution. Practically all of this property, except about 85 per cent. of the transmission lines, is situated in California, and more than two-thirds of the value of the entire property is in that state. The Tax Commission found the net earnings of the company for the fiscal year ending June 30, 1914, were \$435,378; capitalizing this at 10 per cent., the total value is \$4,353,780. January 29th of the same year, the value of this property was ascertained by the Public Service Commission of Nevada for rate-making purposes. Mr. Shaughnessy, who was then and still is a member of that Commission, wrote the decision. The fair present value of the physical properties of the company in both states, the value on which it should be permitted to earn a reasonable income, he found to be \$3,318,985.

The company claimed \$1,412,000 as the value of its water rights, but Mr. Shaughnessy refused any allowance therefor in excess of original cost, which he fixed at \$225,385. The remaining \$1,186,615 he rejected as unearned increment. He was of the opinion that water rights should be treated as a franchise, and not valued above their original cost. Commissioner Bartine and Commissioner Simmons, constituting the majority of the Commission, held that water rights should be valued at what they are worth. They joined in the order fixing rates, because they were of the opinion that the rates prescribed would yield a fair return on the entire valuation, even if the full value for the water rights were included therein.

If the value of the water rights be added to the total value of other tangible property of the company in both states, we shall have about \$4,505,600, which slightly exceeds \$4,353,780, the value ascertained by capitalizing net earnings at 10 per cent. These figures fairly measure the value of the company's physical property in both states. The evidence shows clearly that more than two-thirds of this property is located in California. The whole of this valuation was evidently placed on the transmission and distributing lines, and 85 per cent. of it, or \$3,700,713, credited to Nevada. Some of the reasons suggested for this do not even enjoy the merit of plausibility. If it be said this course was taken in order to reach intangible or franchise values in Nevada, it may be admitted that a figure reached by capitalizing net earnings should include the value of the franchise as well as the value

of the tangible property, but in this case the value so found is less than the value found by the Public Service Commission for the purely physical features of the property. There is no room in \$4,353,780 for intangible value.

It is futile to urge that 85 per cent. of the company's income is earned in Nevada. There is no evidence to that effect. Eighty-five per cent. of the income may be collected in Nevada, because Nevada affords the company its principal market. The Commission utterly ignored the fact that the company earns a part of its income by the use of its water rights, reservoirs, ditches, pipe lines, and power plant. The company is engaged in two lines of business: It is a manufacturer, and as such its entire business is in California; there it generates all its power. It is also engaged in transmitting to, and selling electric power in, southern Nevada. If Nevada can capitalize all the net earnings of the company, both as a manufacturer in California and as a distributor in Nevada, and appropriate 85 per cent. of the capitalized value for assessment and taxation, why may not the Tax Commission of California with equal justice capitalize the gross earnings of the company in both states, and take the entire value thus ascertained, because all the property used in manufacturing the company's product is situated in that state? Furthermore, if 85 per cent. of the company's income is earned in Nevada, it necessarily follows that the earning power of each dollar invested by the company in Nevada transmission lines is more than 11-fold greater than the earning power of each dollar invested in the California water rights and power plant.

If the ownership of the power plant and transmission lines had been severed, it is not likely that the earnings of the former would have been used as a basis for ascertaining the value of the latter. Probably the Commission would have applied the rule thus: From the total receipts it would have deducted taxes, expenses, depreciation, and the amount paid to the owner of the generating plant for electric current; the remainder—the net proceeds—fairly capitalized, would constitute the value of the transmission lines, and this amount would have been apportioned between Nevada and California on a transmission line ratio. True, the power plant and water rights are serviceable to the company in its southern Nevada business, but they constitute no portion of the transmission and distributing lines. They bear the same relation to the lines that the fields, forests, and mines bear to a railroad; they furnish the product for transportation. Without such product the lines are of little or no value. The abundance of this product, and the extent of the market therefor, are material elements in fixing the value of the lines; and likewise the existence of the lines, and the market to which they bring the electricity, are important factors in determining the worth of the power plant and water rights. This relationship does not, however, in my judgment, authorize the Nevada Commission to spread the entire value of the power plant and water rights over the transmission lines.

As I have already said, the Tax Commission at its meeting in June, 1914, fixed the full cash value of the company's property in Nevada at \$1,492,815. In December of the same year the value was fixed at

\$3,700,713. It is suggested that during the interval, and in September, the annual report of the company for the fiscal year ending June 30, 1914, had been received, in which it appeared that the company was enjoying a gross income of \$992,928, and a net income of \$557,550, and that it was not until September "that the actual condition of this corporation, so far as its net revenue during that period of the year, was actually at hand for the benefit of the Tax Commission."

It is not unreasonable to assume that at the June meeting, when the valuation of \$1,492,815 was fixed, the Commission had before it the company's report for the fiscal year ending June 30, 1913, in which it appeared that the gross earnings of the company for that year amounted to \$947,096, and the net earnings to \$533,435. The difference in the net earnings for the two years is not so large, standing by itself, as to suggest a raise in the valuation of over \$2,200,000. It is difficult to escape the inference that the Tax Commission, at its December meeting, was making an original assessment, rather than equalizing values previously found.

It is impossible to conclude that the Commission making the assessment for 1914 considered anything but the earnings of the company. The evidence shows that the assessment of the property in California was based on gross earnings, and that the tax paid in California was in the ratio of the transmission mileage in that state to the whole mileage owned by the company. California took about 15 per cent.; the Nevada Commission then attempted to absorb the remaining 85 per cent. This state has no power, by any method or process known to the law, to gather to itself any tax on real property situated in California, because the authorities of that state fail to properly or adequately assess it.

It is not apparent that the valuation complained of included any assessment of intangible property. Furthermore, the method pursued, in view of the valuation fixed by the Public Service Commission of Nevada, does not indicate any purpose to reach intangible values. Ascribing 85 per cent. of complainant's net earnings, or 85 per cent. of its property, to Nevada, and claiming a portion thereof as intangible property, does not change the essential nature of the transaction. It was nothing more than an undertaking to appropriate for purposes of taxation property located in California. The entire value of power plant, reservoirs, water rights, and transmission lines, ascertained by capitalizing earnings of the whole property, was attributed to the transmission lines, and 85 per cent. of the total value was taken for Nevada, because 85 per cent. of the transmission lines are in Nevada.

Keokuk Bridge Co. v. People, 161 Ill. 132, 43 N. E. 691, was an action to recover judgment for taxes assessed on property consisting of a bridge across the Mississippi river between Illinois and Iowa. The Illinois assessment described the portion of the bridge claimed to be assessable in that state as extending "to the state line between the states of Illinois and Iowa," but did not state the length of the part so taken. The evidence disclosed that the part so valued extended to the draw, and about 850 feet west of the true state line, and thus into the state of Iowa. The lower court allowed the assessment record to

be amended, so as to precisely describe that part of the bridge in Illinois, but the valuation remained as before. Reversing the decision of the trial court, Justice Baker, speaking for the Supreme Court of Illinois, said:

"In the case at bar, the bridge, from the state line to the east end of the draw span, was not within the limits and jurisdiction of this state, and there was no power or authority to assess the same for taxation in this state. Said property was not subject to taxation here. The effect of including its value in the valuation that was made by the assessor was to render the assessment invalid. It would work an injustice and a fraud upon the rights of appellant to sell that part of its bridge that is in this state for the purpose of paying a tax levied here upon the value of its tangible property in Iowa, while at the same time such tangible property in Iowa is liable to taxation and sale in that state."

[4] 3. The courts have frequently held it proper to value the entire holdings of an interstate carrier, wherever located, as a unit, and to impute to the property of the carrier within the taxing state a fair proportion of the aggregate value. In fact, it is doubtful whether a reliable estimate of the true value of any fractional portion of such a property could be made, in the absence of data showing the value of the whole. In State Railroad Tax Cases, 92 U. S. 575, 608, 23 L. Ed. 663, where the distribution involved was among certain subordinate jurisdictions in the state of Illinois, Mr. Justice Miller said:

"It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole."

In Pittsburgh, etc., Railway Co. v. Backus, 154 U. S. 421, 430, 14 Sup. Ct. 1114, 1118 (38 L. Ed. 1031) Justice Brewer uses this language:

"It is ordinarily true that, when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair."

In Fargo v. Hart, 193 U. S. 490, 499, 24 Sup. Ct. 498, 500 (48 L. Ed. 761) Mr. Justice Holmes says:

"It is held reasonable and constitutional to get at the worth of such a line, in the absence of anything more special, by a mileage proportion."

[5] 4. It is significant that, while the judges recognize the rule stated as being "eminently fair," "reasonable and constitutional," and possibly "the best method which has been devised," they suggest exceptional cases in which its application would be improper. For example, in the Fargo Case, supra, 193 U. S., at page 499, 24 Sup. Ct. at page 500 (48 L. Ed. 761), Mr. Justice Holmes says:

"It is obvious, however, that this notion of organic unity may be made a means of unlawfully taxing the privilege of property outside the state, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division of mileage is justifiable. But it is recognized in the cases that if, for instance, a railroad company had terminals in one state equal in value to all the rest of the line through

another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the state under a pretense."

In the last case the state of Indiana had taxed the American Express Company for its intangible assets, and had ascertained their value by taking a mileage proportional part of all the assets, including securities worth \$15,500,000, which were located in New York, and were claimed by the company not to be used in its business. The state officials, however, contended that the securities were used by the company as a part of the necessary capital in its business, and as a part of its profit-producing plant. The Supreme Court, however, held that the effect of the state's action was to tax property outside the state, and that an injunction should be granted. It is also worth mentioning that the Express Company insisted that total mileage should include ocean as well as land lines of traffic. This proposition was rejected, because of the radical difference between the two classes of mileage.

In Western Union Tel. Co. v. Taggart, 141 Ind. 281, 40 N. E. 1051, 60 L. R. A. 671, the constitutionality of an Indiana statute was attacked on the ground that it permitted and required the assessment and valuation of property outside the state. Replying to this, the court said (141 Ind. 297, 40 N. E. 1055, 60 L. R. A. 697–698):

"The act, it is true, provides a method of valuation—the mileage method as a basis for the taxation of certain property within the state of Indiana. But this is simply a means for determining the true cash value of the property within the state; and if in the case of appellant's property, or in any other case, it is shown to the board, or is discovered by them, that still further deductions should be made, on account of larger proportional values outside of the state, or for any other reason, then the board must make such deductions, so that, finally, only the property within the state of Indiana shall be assessed, and that at its true cash value. * * * It will therefore be presumed, in the absence of evidence to the contrary, that the state board has deducted from the total valuation of all interstate property such values, if any, of extrastate property, as will leave the remaining property within and without the state, as near as may be, of equal proportional value. * * 'As, for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business, requiring for sole use in such localities an extra amount of rolling stock. If testimony to this effect was presented by the company to the state board, it must be assumed, in the absence of anything to the contrary, that such board, in making the assessment, * * * took into account the peculiar and large value of such facilities and such extra rolling stock."

In the Delaware Tax Case, 18 Wall. 206, 230, 21 L. Ed. 888, the court was of the opinion that a tax apportioned on a mileage basis could not be sustained, if it necessarily fell on property outside the state. The following is a very clear statement of the conditions on which the conclusion was formed:

"In the second place, assuming that the tax is upon the property of the corporation, if the ratio of the value of the property in Delaware to the value of the whole property of the company be less than that which the length of the road in Delaware bears to its entire length, and such is admitted to be the fact, a tax imposed upon the property in Delaware according to the ratio of the length of its road to the length of the whole road

must necessarily fall upon property out of the state. The length of the whole road is in round numbers 100 miles; the length in Delaware is 24 miles. The tax upon the property estimated according to this ratio would be in Delaware $^{24}/_{100}$ or $^{6}/_{25}$ of the amount of the tax upon the whole property. But the value of the property in Delaware is not $^{6}/_{25}$ of the value of the whole property, but much less than this proportion would require."

In Louisville, etc., Co. v. Kentucky, 188 U. S. 385, 23 Sup. Ct. 463, 47 L. Ed. 513, it appeared that the company, a Kentucky corporation, was engaged in operating a ferry across the Ohio river between Louisville, Ky., and Jeffersonville, Ind. At the time of its organization the company acquired a franchise from the state of Kentucky; later it purchased a second franchise which had been granted by the state of Indiana. The Kentucky board of valuation and assessment capitalized the net earnings of the company for the previous year at 6 per cent., which produced the sum of \$121,050. From this it deducted \$54,164, the assessed value of the company's tangible property in both states. The remainder, \$66,886, was then fixed as the value of the franchise for the purposes of taxation in Kentucky. In this the board followed closely a Kentucky statute, which declared that:

"The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid."

The highest court of Kentucky sustained the assessment, declaring that the company was domiciled in Kentucky, and had its situs in Kentucky, and that there was no attempt to tax appellant's business, income, or revenues, but that the income was considered in fixing the value of the franchise. The case was then taken by writ of error to the Supreme Court of the United States, where it was decided that the board had included in its assessment the value of the Indiana franchise, as well as the value of the Kentucky franchise, and that Kentucky was thus attempting to tax a property right which had its situs in Indiana, and to deprive the company of "property without due process of law, in violation of the provisions of the Fourteenth Amendment."

In Delaware, L., etc., R. R. Co. v. Pennsylvania, 198 U. S. 341, 25 Sup. Ct. 669, 49 L. Ed. 1077, the court held that a state cannot tax property permanently outside its territorial jurisdiction, and that it could not accomplish that end by taxing the enhanced value of the capital stock of a corporation which arose from the value of property beyond its geographic limits. The power of the state to impose taxes is limited to persons, property and business within its boundaries. State Tax on Foreign-Held Bonds, 15 Wall. 300, 21 L. Ed. 179.

In Louisville & N. R. Co. v. Bosworth, 209 Fed. 380, 429, it was contended that the Kentucky statute absolutely required a method of valuation in every case which in some instances would operate to include in the assessment of interstate railroads property not subject to taxation in that state. The court refused to so construe the statute, declaring that to do so would render it unconstitutional. Of a similar assessment it was said in Fargo v. Hart, 193 U. S. 490, 502, 24 Sup. Ct. 498, 501 (48 L. Ed. 761):

"It involved an attempt to tax property beyond the jurisdiction of the state, and to throw an unconstitutional burden on commerce among the states,"

And thus it was repugnant to the commerce clause of the federal Constitution. Article 1, § 8.

In later decisions by the Supreme Court such a mode of taxation has been regarded as violative of the Fourteenth Amendment of the Constitution of the United States, and a taking of property without due process of law. Delaware, L., etc., R. Co. v. Pennsylvania, 198 U. S. 341, 25 Sup. Ct. 669, 49 L. Ed. 1077; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 202, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493; Chicago, B. & Q. Ry. Co. v. Babcock, 204 U. S. 585, 592, 27 Sup. Ct. 326, 51 L. Ed. 636; Provident Savings Ass'n v. Kentucky, 239 U. S. 103, 112, 36 Sup. Ct. 34, 60 L. Ed. 167.

In cases where property both within and without the taxing state is practically homogeneous, where there is no evidence indicating so much dissimilarity as to render such a method unfair, the Supreme Court of the United States has upheld apportionments made on a mile-

age basis.

The issue on which these present cases turn does not appear to have been raised or considered in State v. Wells Fargo & Co., 150 Pac. 836, 845, recently decided by the Supreme Court of Nevada. The methods of valuation and apportionment in the two cases are entirely different, and finally, while the court approved the result, it expressed no opinion as to the method by which the result was obtained. Chief Justice Norcross said:

"Whether the system of determining the valuation of appellant's property, applied by the state board of assessors, was correct or not, it does not appear that it operated to impose an excessive valuation. The fact that erroneous methods may in good faith have been used to determine valuations is immaterial, we think, if an excessive valuation did not result therefrom."

Cleveland, etc., Ry. Co. v. Backus, 154 U. S. 439, 443, 14 Sup. Ct. 1122, 1123, 38 L. Ed. 1041, which is also cited and much relied on by defendants, contains nothing in conflict with the views here expressed. In that case the question was:

"If an assessing board * * * ascertains the value of the whole line as a single property, and then determines the value of that within the state upon the mileage basis, is that a valuation of property outside of the state?"

In reply, Mr. Justice Brewer for the court said:

Assuming "that no special circumstances exist to distinguish between the conditions in the two states, such as terminal facilities of enormous value in one and not in another, * * * the question must be answered in the negative."

[6] 5. It is admitted that the taxes in question are a lien on complainant's property, that if judgment be recovered therefor the property will be sold, and that the lien cannot be removed without paying the full amount of taxes due, together with costs and penalties, if they are awarded. It is denied "that said lien constitutes a cloud on plaintiff's title." It is alleged in the complaint, but not denied in the answer, that plaintiff owns various rights of way and other real prop-

erty in Esmeralda county and Nye county. Under the Nevada statutes (Rev. L. § 3666), a tax deed is conclusive evidence of the title, except as against actual fraud or payment of the taxes by one not a

party to the action or judgment.

Under all these conditions, does the lien constitute such a cloud as to entitle complainant to equitable relief? "A cloud on one's title is something which constitutes an apparent incumbrance or defect;" in other words, it is an apparent, but not a valid, incumbrance, or an apparent, but not an actual, defect. If the tax proceedings are invalid on their face, there is no cloud, because that which shows its own invalidity confers no semblance of right or title: for instance, a tax levied under an unconstitutional statute. If the proceedings are valid on their face, but the tax is incapable of enforcement without the production of evidence which will inevitably show its illegality, there is still no clouding of the title which a court of equity will either restrain or remove. But if an action be commenced in the name of the state to obtain a judgment for a tax apparently valid, and the action cannot be defeated, and the tax lien destroyed, without the production of extrinsic evidence showing the illegality of the assessment, the title is clouded, and equity will afford relief. The rule is thus clearly stated by Mr. Justice Field in Pixley v. Huggins, 15 Cal. 127, 133:

"The true test, as we conceive, by which the question whether a deed would cast a cloud upon the title of the plaintiff may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed. If the action would fall of its own weight, without proof in rebuttal, no occasion could arise for the equitable interposition of the court, as in the case of a deed void upon its face, or which was the result of proceedings void upon their face, requiring no extrinsic evidence to disclose their illegality. All actions resting upon instruments of that character must necessa-Where the claim of the adverse party to the land is valid upon the face of the instrument, or the proceedings sought to be set aside, as where the defendant has procured, and put upon record, a deed obtained from the complainant by fraud, or upon an usurious consideration, which requires the establishment of extrinsic facts to show the supposed conveyance to be inoperative and void, a court of equity may interfere, and set it aside as a cloud upon the real title to the land.'

In Woodruff v. Perry, 103 Cal. 611, 37 Pac. 526, where an injunction had been granted to restrain the enforcement of an assessment, illegal because not properly authorized, Judge De Haven said:

"Inasmuch as the invalidity of such assessment would not appear upon the face of the deed to be given the purchaser at the sale, on account of the tax levied by such assessment becoming delinquent, the plaintiffs are entitled to the injunction given by the judgment appealed from."

The suggestion that the property cannot be sold until after judgment obtained in a tax suit, and that the rules relating to removal of cloud on title to real estate therefor do not apply, is met by the reasoning in the case of Bolton v. Gilleran, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33. The court there, having found that an assessment for sewer construction in San Francisco had not been properly determined by the board of supervisors, said:

"The right of the plaintiff to maintain the action is clearly established. The statute makes the assessment a lien upon her lands, and there is nothing upon the face of the assessment to show that the lien is not in all respects valid. If, by reason of matters outside of the assessment as it is recorded, this apparent lien may be shown not to be a valid incumbrance, the assessment constitutes a cloud upon her title which she is entitled to have removed; and, although she can assert the same matters as a defense to any action for the enforcement of the assessment, she is not required to wait until such action may be brought, and, in the meantime, suffer the injury of having the title to her lands impaired by this apparent lien, but may herself invoke the equitable aid of the court to remove the cloud, and to enjoin the holder of the assessment from asserting any claim upon her lands by virtue thereof."

See, also, Gregg v. Sanford, 65 Fed. 151, 157, 12 C. C. A. 525.

It is needless to show that the jurisdiction of a court of equity to remove a cloud is coextensive with its authority to restrain action which will cast a cloud on the title to real estate.

The method of calculating and fixing the assessment of complainant's property in Nevada, and the misapplication of the rule for the apportionment of the value of homogeneous property between two jurisdictions, does not necessarily appear in the tax records which would be produced in court, to constitute a prima facie case in support of the tax lien, or to obtain a judgment for the taxes in question.

[7, 8] 6. Capitalizing the earnings of the whole property, and ascribing the total value thus found to the distributing lines as a method of fixing value for taxation, has little to commend it. Under such a rule overvaluation is inevitable. If this be intended, it is plainly illegal. If the purpose of the Nevada Tax Commission is to secure the company's intangible or franchise values, it is unjust, because all such values, if any there be, are thus arbitrarily attributed to a portion of the property, the whole of which is being operated at a profit. Furthermore, as we have seen, defendants' evidence negatives the existence of any substantial franchise values.

The value of this property assumed for rate making and income regulation by the Nevada Public Service Commission exceeds its value for taxation as determined by the Nevada Tax Commission, and from the former all franchise values were excluded. Mr. Shaughnessy, at the instance of defendants, testified that:

"Complainant has not been singled out for individual attack. The other companies coming within the provisions of section 5 of the Nevada Commission Act are assessed and taxed in the same manner as the Power Company."

He followed this with a detailed statement, showing that 12 such companies in the year 1913 paid in Nevada taxes ranging from 5.6 per cent. to 34.6 per cent. of their gross earnings. A similar admission is made in the answer.

If the method applied operates fairly in some cases, but not in others, and in this particular instance has resulted in gross overvaluation of plaintiff's property, under such circumstances that the assessing officers must have known the assessment was wrong, it may be regarded as intentional, on the theory that every man is presumed to intend the natural consequences of his acts.

An assessment is not necessarily fraudulent because it is excessive, if the assessor has not acted from improper motives. But if an as-

sessment is purposely and intentionally made too high, or if this is done arbitrarily and capriciously, without regard to actual values, or in intentional disregard of law, for the purpose of adding to the burdens of the owner, as where it is knowingly assessed at more than double the sum other property of the same class and value is assessed, it is a fraud on the owner. 2 Cooley on Taxation (3d Ed.) p. 1459; Johnson v. Wells Fargo Co., 239 U. S. 234, 243, 36 Sup. Ct. 62, 60 L. Ed. 243; 1 High on Inj. §§ 500, 504; Royal Salt Co. v. Bd. of Com'rs, 82 Kan. 203, 107 Pac. 640; Merrill v. Humphrey, 24 Mich. 170; Citizens' Nat. Bk. v. Bd. of Com'rs, 83 Kan. 376, 111 Pac. 496; Cal. & O. Land Co. v. Gowen (C. C.) 48 Fed. 771; Pacific Postal Tel. Co. v. Dalton, 119 Cal. 604, 51 Pac. 1072; Judge Cooley, in discussing this question, says:

"A tax founded on a fraudulent assessment will be enjoined. An assessment is not fraudulent merely because of being excessive, if the assessors have not acted from improper motives; but if it is purposely made too high through prejudice or reckless disregard to duty in opposition to what must necessarily be the judgment of all competent persons, or through the adoption of a rule which is designed to operate unequally upon a class and to violate the constitutional rule of uniformity, the case is a plain one for the equitable remedy by injunction." 2 Cooley on Taxation (3d Ed.) p. 1459.

In Northern Pac. Ry. Co. v. Clearwater County, 26 Idaho, 455, 470, 144 Pac. 1, 5, it was said that:

"Where the valuation is so unreasonable as to show that the officer must have known it was wrong, and that he could not have been honest in fixing it, such a valuation is clearly a fraud upon the owner."

In State v. Central Pac. Ry. Co., 7 Nev. 99, it was held that an excessive valuation made by an assessor, contrary to his official judgment, and with intent to injure, is a fraud, against which the law will afford relief. In that case the issue was raised on demurrer to the answer. In the answer it was charged that, while the assessor knew and believed \$6,000 per mile to be the fair value of the Central Pacific Railroad in Humboldt county, nevertheless he assessed it at \$15,000 per mile.

In Oregon & C. R. R. Co. v. Jackson County, 38 Or. 589, 602, 64 Pac. 307, 311, Judge Wolverton, speaking of valuations made by assessors and reviewed by boards of equalization, says:

They "are not subject to review or revision, except in the manner pointed out by law, nor can they be disturbed or annulled, except when they proceed arbitrarily and in willful disregard of the law intended for their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers. In the latter case, their acts being designedly oppressive and fraudulent, equity will interpose to prevent the consummation of such purpose, as there exists no adequate, certain, and complete remedy at law. * * Relief by action presupposes a submission to a fraudulent and oppressive act by payment of a void tax before it can be invoked."

This was said in sustaining a perpetual injunction against the collection of taxes levied on the roadbed and certain lands of the railroad company. It appeared that the assessor in order to further his election, had promised to assess the company's roadbed and lands at certain figures. The finding was that he had—

"proceeded with the purpose of setting a preconceived and arbitrary value,

* * without respect to their relative value as compared with other

real property assessed in the county, and that the assessment was capriclously made, * * * and it is so largely in excess of all other assessments of like roadbeds within the state as to carry with it the presumption that the board of equalization adhered to the overestimate by design, for the purpose of discrimination."

[9, 10] 7. It has been persistently urged that plaintiff—

"has a plain, speedy, and adequate remedy in the state courts in the ordinary course of law, and may avail himself of the provisions of section 7 of the Nevada Commission Act, or he may tender the amount which he claims to be actually due, and await suit * * * under sections 3657 to 3664, inclusive, of the Revised Laws of Nevada, and if he tender the proper amount no penalties will accrue, * * * or he could pay the full amount of the tax under protest, and maintain an action for recovery of the excess."

I am aware that our Supreme Court, in Wells Fargo & Co. v. Dayton, 11 Nev. 161, declared that where illegally assessed taxes on personal property are paid under protest, and received by the county, an action at law will lie against the county for the recovery of the money. This decision has been followed in Robinson v. Longley, 18 Nev. 71, 1 Pac. 377, and Barnes v. Woodbury, 17 Nev. 383, 30 Pac. 1068, and is not at variance with the rule in Conley v. Chedic, 7 Nev. 336. In each of these cases the tax was claimed to be void as a whole; it was not levied on real, but on personal, property. In such a case it is usually difficult to find any ground of equitable jurisdiction, and damages are recoverable at law. 2 Cooley on Taxation (3d Ed.) p. 1415.

I have found nothing in the Nevada law or decisions, prior to Act March 20, 1913, creating the Tax Commission, which lends any support to the theory that when a tax, unjust and illegal in part only, has been paid under protest, the unjust excess can be recovered in an action at law. Stanley v. Supervisors, 121 U. S. 535, 549, 7 Sup. Ct. 1234, 30 L. Ed. 1000, was an action to recover taxes paid under protest. Stanley, the assignee, claimed that the taxes were illegal, because national bank stockholders were not permitted to deduct from the total assessed value of their stock the amount of their just debts, while by the laws of the state owners of all other taxable personal property could deduct such debts from its assessed value. It was further charged that the assessors intentionally assessed shares of stock in the National Exchange Bank at a greater rate in proportion to their value than other property. The court, speaking by Mr. Justice Field, said:

"It is only where the assessment is wholly void, or void with respect to separable portions of the property, the amount collected on which is ascertainable, or where the assessment has been set aside as invalid, that an action at law will lie for the taxes paid, or for a portion thereof. Overvaluation of property is not a ground of action at law for the excess of taxes paid beyond what should have been levied upon a just valuation. The courts cannot, in such cases, take upon themselves the functions of a revising or equalizing board."

8. There is much authority for the rule that, in the absence of statutory permission, a tax voluntarily paid cannot be recovered; the theory being that every man knows the law, and if, with a full knowledge of material facts, he makes a payment which the law would not compel him to make, the payment is voluntary, and he is not entitled to the aid of a court for its recovery. This is especially true as to the pay-

ment of taxes on real property. The process of levying and collecting taxes is so well and generally understood, the taxpayer has such ample opportunity to investigate the legality of the claim which will be made, and to resist it, if unjust, that the courts have usually regarded the payment of a tax as voluntary, even when made unwillingly, or under protest. Union Pac. R. Co. v. Bd. of Com'rs, 222 Fed. 651, 653, 138 C. C. A. 175; 2 Cooley on Taxation (3d Ed.) p. 1495; 2 Paige & Jones on Taxation, § 1478.

It is unnecessary to pursue this discussion further, however, as the matter has been set at rest by statute. Section 7 of the act creating the Nevada Tax Commission, approved March 20, 1913, reads as follows:

"Any property owner who has initiated a court proceeding for redress from any increased valuation of his property for assessment purposes, and who shall have paid his December installment of taxes thereon in full, may, on filing with the treasurer of the county a certificate of the clerk of any court that such issue is pending, pay his June installment in two separate payments, to wit: One payment in a sum which, when added to the December installment, shall represent the amount of taxes payable if computed on the valuation of the preceding fiscal year, plus the taxes on any improvements added since such preceding levy, and the other for the balance required to make up the full June installment; and said county treasurer shall receipt for the latter as a special deposit, to be held by such treasurer, undisbursed, until the court by its finding shall award it; and said property owner, in such case, shall not be liable for any penalty under the delinquent tax act; and if the court by its findings reduce the assessment valuation of such property, said county treasurer, on order of the court, shall refund from such special deposit an amount corresponding to such reduction, and shall transfer the remainder to the public revenues, and if the court shall not reduce the valuation of said property, then said county treasurer shall transfer the entire special deposit to the public revenues." Laws Nev. 1913, c. 134,

In the section quoted, the Legislature has provided a method for recovering excessive taxes paid under protest. If this method is not exclusive, it is superfluous. If one may recover any illegal tax which he pays under protest, of what avail is a suit which expressly permits him a recovery out of the June installment of taxes? Section 7 could have had no other purpose than to change a rule, or an uncertainty which theretofore obtained. By thus providing for the recovery of taxes out of the June installment, it necessarily restricted recoveries to that installment, and to that portion of the June installment which the county treasurer receipts for as a special deposit. Clearly recovery can be had only in the manner and under the circumstances defined in the statute. As was said in District Township v. City of Dubuque, 7 Iowa, 262, 284:

"The expression of one thing is frequently the exclusion of another; and if, by a law or Constitution, a thing is to be done in a particular manner or form, this, as we have seen, includes a negative, that it shall not be done otherwise. * * * This rule, it is also said, is further modified by another, that where the means for the exercise of a granted power are given, no other or different means can be implied, as being more effectual or convenient."

To the same effect see 36 Cyc. 1122; Johnson v. Baker, 167 Cal. 260, 139 Pac. 86, 88. In the last-mentioned case the court held that

affirmative expressions in a statute introducing a new rule implied

a negative of all not within their purview.

If the Power Company complies with the foregoing statute, it will pay for its December installment of taxes \$26,758.91, or one-half of \$53,517.82, the total amount of tax assessed for the year 1914. The entire amount of tax admitted by complainant to be due is \$17,703.85; consequently, in order to avail itself of the remedy provided in section 7, if we assume that the merits of this controversy are with complainant, it would be required to pay into the county treasuries of Nye and Esmeralda more than \$9,000 in excess of the whole amount of taxes which it believes to be lawfully assessable against it for the entire year. Under the conditions of this case, the relief which complainant could have under section 7 would be wholly inadequate. The statute provides no method for refunding the \$9,000, in case the assessed valuation is reduced by order of the court to the figures contended for by complainant. King County, Wash., v. N. P. Ry. Co., 196 Fed. 325, 116 C. C. A. 143.

[11, 12] 9. In the present case, paying the taxes and bringing action for their recovery affords a relief neither adequate nor complete. The remedy is restricted by statute, and a resort thereto, if successful, would yield but partial relief. If the Power Company be remitted to its defense in a tax suit, under sections 3657 to 3664 of the Revised Laws of Nevada, the actions must be brought in the name of the state, and in the counties where the assessments are made. Section 3659. Such an action could not be removed to a federal court on the ground of diverse citizenship, because the state is not a citizen. Stone v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Title Guaranty, etc., Co. v. State of Idaho, 240 U. S. 136, 36 Sup. Ct. 345, 60 L. Ed. 566.

It is impossible to assume that such an action could be removed to this court on the ground that it does or may involve a question arising under the Constitution or laws of the United States. In such an action the complaint will undoubtedly follow the statutory form prescribed in section 3661, in which it is unnecessary to show that the action will involve federal or constitutional questions; and it is unreasonable to suppose that the pleader will raise them. But, conceding that such issues may appear in the pleadings, nevertheless it will avail nothing in this connection, because there can be no removal on such grounds unless they necessarily appear in the complaint, and that, too, unaided by anything alleged in anticipation or in avoidance of defenses which may be interposed. Adams v. Chicago Great Western R. Co., 210 Fed. 362; Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; Taylor v. Anderson, 234 U. S. 74, 34 Sup. Ct. 724, 58 L. Ed. 1218; Western Union Tel. Co. v. S. E. & St. L. Ry. Co., 208 Fed. 266, 268, 125 C. C. A. 466; Minnesota v. Northern Securities Co., 194 U. S. 48, 66, 24 Sup. Ct. 598, 48 L. Ed. 870; Storm Lake T. & T. Factory v. Minneapolis & St. L. R. Co., 209 Fed. 895; Moon on Removal of Causes, pp. 101, 102.

In Western Union Tel. Co. v. Railway Co., supra, an Illinois case, it was held that:

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"A suit cannot be removed as one arising under the Constitution, laws, or treaties of the United States, unless such fact appears by plaintiff's statement of his own claim. * * * If it does not so appear, the omission cannot be supplied by averment in the petition for removal or in the subsequent pleadings."

Consequently, if the Nevada-California Power Company be denied a hearing because relief is afforded in a tax suit in a state court, it will be deprived of the right to have its cause tried in a federal tribunal, notwithstanding the fact that the essential elements of federal jurisdiction, such as diverse citizenship and requisite amount in controversy, as well as an alleged constitutional right violated, are present.

[13-16] 10. Section 267 of the Judicial Code (Rev. Stats. § 723 [Comp. St. 1913, § 1244]) provides that suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. This has been the statutory rule since the first session of Congress in 1789. The courts, however, have invariably interpreted it to mean that the equity jurisdiction of the federal courts is independent of local law, and cannot be directly abridged by any action of the state, and, except as changed by congressional action, is coextensive with the equitable jurisdiction of the English Court of Chancery at the time of the Revolution. Peck v. Ayers & Lord Tie Co., 116 Fed. 273, 53 C. C. A. 551; McConihay v. Wright, 121 U. S. 201, 206, 7 Sup. Ct. 940, 30 L. Ed. 932. As Judge Storey says in the leading case of Bean v. Smith, Fed. Cas. No. 1,174:

"The equity jurisdiction of the courts of the United States does not depend upon what is exercised by courts of equity or courts of law in the several states, but depends upon what is a proper subject of equitable relief in courts of equity in England."

While this is strictly true as to those rights and duties for which the federal laws and Constitution furnish a definition, there is a broad field of jurisprudence, covered by state legislation, within which substantive law is subject to frequent changes. To these changes the federal courts must of necessity accommodate themselves. For instance, there was a time when a court of equity could award a decree of strict foreclosure, cutting off all rights of redemption; but when the state gave the mortgagor a right to redeem within a limited period after foreclosure sale, the right at once became as obligatory on federal courts sitting in equity as on state courts. Brine v. Insurance Co., 96 U. S. 627, 24 L. Ed. 858.

Recently Colorado adopted a statute permitting the taxpayers to maintain an action against the board of county commissioners to recover invalid taxes paid under protest. This was held to be a change in the substantive law, creating a new remedy, which could be enforced in the federal courts, if essential facts of jurisdiction, such as diverse citizenship and the requisite amount in controversy, were present. It was also held that such a statute furnishes a plain, speedy, and adequate remedy at law, which in general would exclude the jurisdiction of equity to enjoin the collection of a tax. But it must be noted that this, though a remedy at law, was quite as available in the national courts as the remedy by injunction had been prior to the adoption of

the statute. There was no denial of the right to invoke the assistance of the federal court in a proper case, nor did it in any manner narrow the jurisdiction of the federal courts. Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 485, 33 Sup. Ct. 942, 57 L. Ed. 1288; Union Pac. Ry. Co. v. Bd. of Com'rs, 217 Fed. 540, 133 C. C. A. 392.

In Cable v. United States Life Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188, a bill to cancel a policy of insurance, and to enjoin an action in the state court by the administratrix of the deceased policy holder, was dismissed on the ground that the insurance company had an adequate remedy at law in the action already brought in the state court; but the court called attention to the fact that the action sought to be restrained was removable to the federal court. The federal court has always set its face steadily against the doctrine that the state, by granting a remedy at law available exclusively in its own tribunals, can restrict the equitable powers of the national courts. Obviously, to hold otherwise is to hold that the state can abridge the jurisdiction of the federal court. 1 Pomeroy on Eq. Jurisp. § 292; 1 Pomeroy, Eq. Remedies, § 367; In re Tyler, 149 U. S. 164, 189, 13 Sup. Ct. 785, 37 L. Ed. 689; Western Union Tel. Co. v. Trapp, 186 Fed. 114, 121, 108 C. C. A. 226.

11. In order to supersede and displace an equitable remedy existing in the federal court, a legal remedy provided by the state statute must be one which is equally available in the federal or state courts, where the former has jurisdiction. This must be so, if the basic idea of federal jurisdiction is sound. Why should diverse citizenship confer jurisdiction, unless in such cases more adequate, full, and complete relief can be had in a federal court than elsewhere?

National Surety Co. v. State Bank, 120 Fed. 593, 52 C. C. A. 657, 61 L. R. A. 394, was a suit to restrain the bank from enforcing an unconscionable judgment. The defendant contended that the legal remedy by petition to vacate or modify the judgment in the court which rendered it was full, complete, and adequate. In reversing the decree dismissing the bill, Judge Sanborn, speaking for the Circuit Court of Appeals, said:

"It is a general rule that the absence of an adequate remedy at law is a sine qua non of jurisdiction in equity, and it is earnestly insisted by counsel for the appellees that the complainants in this suit were entitled to no relief in equity in the Circuit Court of the United States, because they had an adequate remedy at law in the state court which rendered this judgment, under these provisions of the Code of Nebraska. There are, however, many reasons why this contention cannot be sustained. The first, and one that is fatal to the position, is that it is an absence of an adequate remedy at law in the national courts, and that alone, which conditions jurisdiction in equity in those courts, and the appellants have no such remedy. The fact that they have a remedy at law in the state courts is not material."

In Smyth v. Ames, 169 U. S. 466, 516, 18 Sup. Ct. 418, 422 (42 L. Ed. 819) notwithstanding the fact that the Nebraska statute provided a special remedy at law for any unreasonable action of the state board of transportation in the matter of rates and fares, it was said:

"The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a federal

court is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

In Brun v. Mann, 151 Fed. 145, 153, 80 C. C. A. 513, 521, 12 L. R. A. (N. S.) 154, it was said that:

"It is an absence of an adequate remedy at law in the national courts, and that alone, which conditions jurisdiction in equity in those courts, and the complainant had no such remedy. * * * The fact that he had a remedy at law in the state courts is not material."

Coler v. Board of Com'rs (C. C.) 89 Fed. 257, was an application for an order restraining county officials from applying certain funds for any purpose except in payment of interest on certain bonds. The defendants urged there was an adequate remedy at law. The court said:

"Such a remedy might perhaps be found in the practice under the Code. But this will not affect the ancient and well-established jurisdiction of the court of equity. 'The adequacy or inadequacy of a remedy at law for the protection of one entitled on any ground to invoke the powers of a federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought.' Smyth v. Ames, 169 U. S. 516, 517, 18 Sup. Ct. 422 [42 L. Ed. 819]. The test is: Has he a remedy at law in this court? If he has not, then a court of equity has jurisdiction."

To the same effect see Stanton v. Embry, 46 Conn. 595; Bean v. Smith, 2 Mason, 252, Fed. Cas. No. 1,174; Mayer v. Foulkrod, Fed. Cas. No. 9,341, 4 Wash. C. C. 349; Singer Sewing Mach. Co. v. Benedict, 179 Fed. 628, 633, 103 C. C. A. 186; Hoey v. Coleman (C. C.) 46 Fed. 221, 223.

The permissible affirmative defenses available in a tax suit are stated in section 3664 of the Revised Laws of Nevada as follows:

"First-That the taxes have been paid before suit.

"Second—That the taxes with costs have been paid since suit, or that such property is exempt from taxation under the provisions of section 5 of this act. "Third—Denying all claim, title or interest in the property, assessed at the

time of the assessment.

"Fourth—That the land is situate in and has been duly assessed in another

county, and the taxes thereon paid.

"Fifth—Fraud in the assessment, or in failing to comply with the provisions of this act; or that the assessment is out of proportion to and above the actual cash value of the property assessed: Provided, however, that in such last mentioned case, where the defense is based upon the ground that the assessment is above the value of the property, the defense shall only be effectual as to the proportion of the tax based upon such excess of valuation, but in no such case shall an entire assessment be declared void."

The only possible defenses available to the Nevada-California Power Company under this statute are set out in the fifth subdivision. Such defenses are equitable. The fact that they are available in a tax suit does not change their essential nature. It is a plain, adequate, and complete remedy at law, not an equitable remedy in a statutory action in a state court, which relieves a court of the United States of its authority to sustain a suit in equity.

The assessment complained of is the decision and judgment of a Tax Commission. It has much of the force and effect of a judgment. In our revenue system the Tax Commission is a quasi judicial body; its judgments affect the people more universally and more sharply than those of any other court. It grasps what otherwise would be the property of the individual, and its decrees are executed by methods most drastic. Its decisions, if rendered in accordance with law, as to matters within its jurisdiction, are conclusive, in the absence of fraud, save as otherwise provided by statute. State v. C. P. R. R. Co., 21 Nev. 179, 26 Pac. 225, 1109.

This is true, notwithstanding the statutory suit for the collection of taxes. Such suits are in no sense to be regarded as an assessment de novo; the suit is essentially and substantially a procedure provided by the state, to be employed exclusively in its own courts, wherein a dissatisfied taxpayer may attack the judgment of the tax commission. I say exclusively, because the statute designates the state court in which such actions shall be brought, and requires them to be commenced in the name of the state, and, inasmuch as the state is not a citizen, there can be no removal to the federal courts on the ground of diverse citizenship.

The assessment which is complained of here is regular on its face, but it includes values of property beyond the jurisdiction of this state. The inclusion was not inadvertent, unintentional, or through mistake; it was made deliberately and intentionally. In State v. V. & T. R. R. Co., 23 Nev. 283, 292, 46 Pac. 723 (35 L. R. A. 759) it was held the defense "that the assessment is out of proportion to and above the actual cash value of the property assessed" could not have been made in a tax suit until it was authorized by statute in 1895. In Stanley v. Supervisors, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000, an action at law to recover taxes, it was held that an overvaluation of property is not a ground of action at law for the excess of taxes.

Balfour v. Portland (C. C.) 28 Fed. 738, was also an action at law to recover taxes on property alleged to have been deliberately overvalued, in disregard of the law requiring uniformity in the valuation of property for taxation. Recovery was denied, because, as the court held, there was no authority for paying the taxes as a whole, and then suing at law to recover the alleged excess. "Such a wrong," the court said, "may be corrected in equity by an injunction against the collection of the excess, on payment of what is justly due * * * a suit to enjoin the collection of this tax, so far as it is based on an improper valuation of the property, could have been maintained by the plaintiffs on the ground of fraud. * * * For such purpose, such an assessment is considered a fraud on the party concerned, against which equity will give relief." Of the assessment the court said:

"The proceeding being quasi judicial, and the subject-matter within the jurisdiction of the officers who conducted it, the result reached is so far conclusive that the legality of it cannot be questioned in an action at law to recover back the one-half of the tax as illegal."

In Western Union Tel. Co. v. Gottlieb, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116, the tax collector of Jackson county, Mo., brought an action against the county to collect taxes. The defenses offered were that the company's franchise, derived from the United States, could not be assessed, and that the state board had intentionally and deliberately overvalued the property. The Supreme Court of Missouri, and the Supreme Court of the United States as well, held that the second defense could not be entertained, "because it seeks to raise the question of discrimination by a defense to an action at law to collect the taxes, and thereby collaterally attacks the judgment of the board of equalization. * * Such a question can only be raised by a direct attack in equity."

In Los Angeles v. Ballerino, 99 Cal. 593, 32 Pac. 581, the county brought an action under a California statute to recover taxes. The defendant alleged a fraudulent, corrupt, and exorbitant assessment. The trial court held that this was an equitable defense, and inasmuch as he had failed to allege tender or payment of the amount of tax which would have been due if the land had been fairly assessed, his testimony as to fraud and overassessment was rejected. In holding that no error had been committed, Judge De Haven said (99 Cal. 597, 32 Pac. 583):

"It is undoubtedly true that a taxpayer may enjoin the collection of a tax founded upon an assessment fraudulently and corruptly made with the intention of discriminating against him, and for the purpose of causing him to pay more than his share of the public taxes (Merrill v. Humphrey, 24 Mich. 170: Lefferts v. Board of Supervisors, 21 Wis. 688; Iron Co. v. Hubbard, 29 Wis. 51); and it is equally true that the fact of such a fraudulent assessment would be available to the taxpayer as an equitable defense in an action brought to enforce the collection of a tax founded upon an assessment of that character."

The latest expression of the Supreme Court as to the jurisdiction of federal courts to enjoin the collection of taxes is found in Johnson v. Wells Fargo & Co., 239 U. S. 234, 36 Sup. Ct. 62, 60 L. Ed. 243. The Constitution of South Dakota required that the property of corporations should be assessed as nearly as may be by the same methods as are provided for taxing property of individuals. Notwithstanding this provision, the state board of assessment, while valuing the property of individuals for what it was really worth, in assessing the property of Wells Fargo & Company, gave controlling effect to the gross income of the company. The board attempted to justify this method under a statute which required it to take gross earnings of such companies into consideration. The court was of the opinion that such administration of the statute was in violation of the Constitution, though the statute on its face might be unobjectionable, and held that:

"A valuation for assessment so unwarranted by the law and a method of making the assessment, amounting either to a fraud or such gross mistake as to amount to fraud upon the constitutional rights of the person taxed, are grounds of equity for enjoining the enforcement of the tax."

The court said:

"The contention is made that there was no ground for equity jurisdiction, and that therefore the bill should have been dismissed. This court

has frequently held that a bill will not lie in the federal courts to enjoin the collection of state taxes where a plain, adequate, and complete remedy at law has been given to recover back illegal taxes, and the attack upon the assessment is based upon the sole ground that the same is illegal and void. See Singer Sewing Machine Co. v. Benedict, 229 U. S. 481 [33 Sup. Ct. 942, 57 L. Ed. 1288], where many of the previous cases in this court are reviewed. But in the present case it was alleged not only that the assessment was unwarranted by the law, but that the manner of making the assessment amounted to fraud upon the constitutional rights of the express companies, or such gross mistake as would amount to fraud, thus averring a distinct and well-recognized ground of equity jurisdiction. It also appears that the tax of 1909 had been enjoined similarly, and that from the decree in that case no appeal had been taken. Such continuing violation of constitutional rights might afford a ground for equitable relief."

I am therefore constrained to hold that the inclusion of values beyond the jurisdiction of the state of Nevada in the assessment complained of is a wrong for which complainant is entitled to equitable relief. An injunction pendente lite in each case will therefore issue as prayed for, to protect complainant against the collection of taxes on any valuation in excess of the assessment of June 24, 1914, made by the Nevada Tax Commission. In my judgment no showing has been made which will justify any interference by this court with that valuation.

ROSZELL BROS. et al. v. CONTINENTAL COAL CORP.

(District Court, E. D. Kentucky. August 12, 1916.)

No. 1203.

1. JUDGMENT 4-498-JUBISDICTION-DETERMINING QUESTION.

The exercise of jurisdiction by a court always involves a determination that the fact or facts necessary to give it jurisdiction exist.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 939; Dec. Dig.

2. BANKRUPTOY \$\insigma 100(1)\to Jurisdiction of Courts\to Corporation\to Principal Place of Business.

In bankruptcy proceedings against a corporation, the fact that its principal place of business is within the district of the court is not jurisdictional, but quasi jurisdictional, and the court's determination thereof cannot be collaterally attacked, but is conclusive upon another bankruptcy court, which has not theretofore acquired jurisdiction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 142, 143; Dec. Dig. 5=100(1).]

8. BANKEUPTOY 6-311—JURISDICTION—CONFLICTING—DIFFERENT BANKEUPTCY COURTS.

Upon bringing of bankruptcy proceeding against a corporation in a District Court, that court acquires exclusive jurisdiction of the subject-matter of the adjudication of the bankrupt as such, and the settlement and distribution of its estate, including the determination of the question as to whether or net its principal place of business is in the district of the court, and, until that court determines that it has no jurisdiction, no other bankruptcy court can acquire jurisdiction, for the filing of the first petition is a caveat to all the world, and in effect an attachment and injunc-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

tion, and from the time thereof the estate of the bankrupt is in the custody of the court first petitioned.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. ⊚—11.]

4. BANKRUPTCY \$\sim 16\to JURISDICTION\to "PRINCIPAL PLACE OF BUSINESS" OF COAL-MINING CORPORATION\to "PRINCIPAL OFFICE\tag{Figs.}"

A foreign coal-mining corporation's principal place of business was in the district where its coal-mining and shipping operations and nearly all of its coal lands were, and where it had conformed to the state foreign corporation laws, and not in a district in another state where it had its head office, where its main stockholders and most of its officers and directors, who had general direction and supervision of the business, resided, where its financial business was conducted, and where it had not conformed to the state foreign corporation laws; a corporation's principal place of business not necessarily being its principal office, which latter is where its books are kept and its corporate business transacted, and which determines its residence, if in the state of incorporation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. \$20.

For other definitions, see Words and Phrases, First and Second Series, Principal Office; Principal Place of Business.]

In Bankruptcy. Petition for involuntary bankruptcy by Roszell Bros. and others against the Continental Coal Corporation, to which trustee in voluntary bankruptcy of the defendant in the District Court for the Eastern District of Tennessee and a committee of creditors filed answers. On exception to referee's finding as to principal place of business of defendant, and motion to stay proceedings. Exceptions overruled.

C. L. Williamson, of Lexington, Ky., N. R. Patterson, of Pineville, Ky., and R. A. Chiles, of Mt. Sterling, Ky., for petitioning creditors. Moore & Darwin, of Chattanooga, Tenn., for respondent.

COCHRAN, District Judge. This is an involuntary proceeding in bankruptcy. The petition was filed May 5, 1916, and process was served May 8th on the bankrupt's statutory agent. It is a Wyoming corporation, created in 1911. Its domicile and residence, therefore, are and have always been in that state, and the only possible ground for this court having jurisdiction of the proceeding is that its principal place of business for the preceding six months, or the greater portion thereof, has been in this district. It is so alleged in the petition. On May 8th, after notice of this proceeding, the defendant filed a voluntary petition in the District Court for the Eastern district of Tennessee, alleging therein that that district had so been its principal place of business. Thereupon that court adjudged the defendant a bankrupt and appointed a receiver for its assets. Thereafter, on the 12th, answers were filed herein by the defendant and the Tennessee receiver, in which they denied, amongst other things, the allegation of the petition as to this district being the principal place of business of the defendant. They filed also a motion to stay this proceeding on the ground that the adjudication in the voluntary proceeding in the Tennessee district was conclusive as to the defendant's principal place of business, and hence a bar to the further prosecution

of this proceeding.

This motion was overruled, and a petition to revise my action is pending in the appellate court. At the same time the motion was overruled the issue as to the principal place of business of the defendant was referred to the referee, as special master, to hear the evidence and make a finding in regard thereto. This he has done, and his finding is that, since its incorporation, the principal place of business of the defendant has been in this district, to which the defendant and the Tennessee receiver have taken exception. In the meantime in the Tennessee proceeding the receiver therein has been appointed trustee, and he, as such, and a committee of certain creditors, appointed prior to the institution of this proceeding, have also filed answers herein, similar to those heretofore filed, and the trustee and the committee have also filed a motion to stay this proceeding on the same ground upon which the former motion was based. This cause, therefore, is before me on the exception taken to the referee's finding, and this new motion to stay.

As I still think that this court has the right to proceed herein, not-withstanding the adjudication in the Tennessee proceeding, I might do no more than overrule this additional motion to stay. But, as, since my former ruling, because of the persistency with which it is urged that I have no such right, I have gone into the matter more deeply, and, as I delivered no formal opinion on the former occasion, I avail myself of this opportunity of setting forth fully my reasons for so thinking.

The question as to the conclusiveness of that adjudication on the issue as to the principal place of business of the bankrupt may be considered in two respects. One is without reference to the possible effect thereon of the fact that at the time the Tennessee proceeding was brought and the adjudication was made therein this proceeding had theretofore been brought and was then pending. The other is with reference thereto.

[1] It may be conceded that, if it were not for this fact, the value claimed for the adjudication must be given to it. Though it was not thereby expressly determined that the principal place of business was in that district, as the District Court thereof had no power to make the adjudication unless it was, the court in making it impliedly determined that such was the case. The exercise of jurisdiction by a court always involves a determination that it has jurisdiction; i. e., that the fact or facts necessary to give it jurisdiction exist. Such being the case, the question as to whether the adjudication is subject to collateral attack on the ground that the principal place of business of the defendant corporation was not in that district depends on whether the existence thereof was strictly jurisdictional or only quasi jurisdictional. In the case of Noble v. Union River Logging Co., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123, Mr. Justice Brown pointed out the distinction between facts that are strictly jurisdictional and those which are only quasi jurisdictional, and the effect of such distinction. As to the former he said:

"It is true that in every proceeding of a judicial nature there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity."

After giving certain examples thereof, he continued:

"In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or subject-matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding."

As to the latter he said:

"There is, however, another class of facts which are termed quasi jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties."

He then gave certain examples thereof, and characterized them as cases "where the want of jurisdiction does not go to the subject-matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act." And as to this class of cases he concluded:

"In this class of cases, if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding."

[2] Did, then, the fact as to the principal place of business of the defendant corporation relate to the court's jurisdiction of the subject-matter of the proceedings or of the parties thereto, or did the court have such jurisdiction without reference to such fact, and was it merely a preliminary fact necessary to be alleged and proven to authorize the court to act?

Seemingly, at least, the latter was its only significance. Clearly it had no relation to the court's jurisdiction of the subject-matter of the proceeding. That court had jurisdiction of a proceeding in bankruptcy, and such was the character of the proceeding. The only possible ground for saying that it had relation to its jurisdiction of the parties thereto-i. e., the bankrupt and its creditors-is that, in view of the fact that no provision is made for notice prior to an adjudication in bankruptcy, save in an involuntary proceeding, and then only as to the bankrupt, and of the character of the notice required to be given after adjudication, it is against the principles of natural justice for jurisdiction to be exercised in bankruptcy without reference to the domicile, residence, or place of business of the bankrupt. But as the jurisdiction is in rem, the proceeding being to determine the status of the bankrupt and to settle and distribute his estate, and the jurisdiction of the federal government is as wide as its territory, it would seem that this consideration is not sufficient to cause the fact in question to relate to the court's jurisdiction of the parties. If it is not, then it is simply a preliminary fact necessary to be alleged and proved to authorize the court to act, and its determination thereof in favor of the power to act cannot be questioned collaterally. And so it has been held. The courts in a number of cases have held that an adjudication could not be attacked collaterally as to a fact determined thereby which clearly related to the power to act and not to the jurisdiction of the subject-matter or of the parties. As, for instance, they have held that a determination thereby that the bankrupt was such an one as was subject to adjudication in bankruptcy cannot be attacked collaterally. In re Columbia Real Estate Co. (D. C.) 101 Fed. 965; Edelstein v. United States, 149 Fed. 636, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236; In re First National Bank, 152 Fed. 64, 81 C. C. A. 260, 11 Ann. Cas. 355. Also that the bankrupt had committed the act of bankruptcy alleged. In re Hecox, 164 Fed. 823, 90 C. C. A. 627; In re Dempster, 172 Fed. 353, 97 C. C. A. 51.

The decision in the case of In re Elmira Steel Co. (D. C.) 109 Fed. 456, may be thought to be against the position that the determination of the principal place of business of a bankrupt, where that fact is relied on as giving the right to an adjudication, is quasi jurisdictional only. And so seems to have been the reasoning of the referee which the court approved. But two considerations prevent such an effect being given to it. One is that the adjudication relied on as a bar was a premature adjudication. It was made the day the involuntary proceeding was filed in the Pennsylvania court. The other is that the involuntary proceeding in which it was made was brought subsequently to the involuntary proceeding in New York in which it was pleaded as a bar. And both of these considerations were made much of by the referee.

The decision in the case of In re Clisdell (D. C.) 101 Fed. 246, hardly supports that position. It was there held that a creditor who had appeared and filed his proof of claim and examined the bankrupt before the referee could not be heard to claim, in opposition to the bankrupt's petition for discharge, that he had not resided within the district a sufficient length of time to give the court jurisdiction over him. But in the case of In re Hintze (D. C.) 134 Fed. 141, a dictum of Judge Lowell favors the position. He said:

"The adjudication in bankruptcy, here rendered upon a petition alleging residence, has made that residence res judicata, * * * and, as the proceeding was in rem, has determined the bankrupt's residence as against all the world."

And the decision in the case of In re Sage (D. C.) 224 Fed. 525, is squarely in point to this effect. That was a petition filed in the District Court for the Eastern District of Missouri by a trustee in bankruptcy, appointed in an involuntary proceeding pending in the District Court for the Southern District of Iowa, against a receiver, appointed in a proceeding in a court of the state of Missouri, to compel the latter to turn over to him certain assets of the bankrupt in his possession. The petition was sustained. Amongst other reasons urged against it was that the bankrupt did not have his principal place of business, residence, or domicile in the Southern District of Iowa. Judge Dyer, as to this, said:

"As the pleadings showed the requisite jurisdictional fact as to domicile, the adjudication made thereon cannot be questioned collaterally."

The decision of the Supreme Court of the United States in the recent case of Fairbanks Steam Shovel Co. v. Wills, 240 U. S. 642, 36 Sup. Ct. 466, 60 L. Ed. 841, may be thought to conclude the question. That case involved a contest between a trustee in bankruptcy, appointed in an involuntary proceeding in the Southern district of Illinois, and a mortgagee, as to the validity of its mortgage on a floating steam dredge owned by the bankrupt. The bankrupt was an Illinois corporation. Its principal office was in Cook county, Ill., in the Northern district thereof. It had possession of and was using the dredge in Cass county, in the Southern district thereof. The statute of Illinois required mortgages to be recorded in the county where the mortgagor resides. It was held that the mortgage was invalid, because not recorded in Cook county, where the bankrupt's principal place of business was, and where, therefore, it resided. The mortgagee urged that, if the mortgage was invalid for this reason only, the adjudication in bankruptcy and the appointment of the trustee were void also. The bankruptcy proceeding should have been instituted in the District Court for the Northern District of Illinois, and not in that of the Southern District. The Seventh Circuit Court of Appeals responded to this position that it related to the trustee's capacity to sue, and, as it had not been pleaded, it would not be considered. Possibly a sufficient answer was that, though the residence of the bankrupt was in Cook county, where its principal office was, its domicile was in every part of the state, or, its principal place of business was in the Southern district of Illinois, and hence the District Court thereof had jurisdiction of the proceedings. The answer of the Supreme Court, through Mr. Justice Pitney, was in these words:

"It is insisted that the adjudication of bankruptcy was invalid, and that the trustee had no capacity to sue. But the adjudication is not open to collateral attack, and the question of capacity was waived because not raised in the trial court."

I proceed, therefore, upon the idea that the position is sound, if the matter of the conclusiveness of the adjudication by the Tennessee court on the issue as to the principal place of business of the bankrupt is considered without reference to the possible effect thereon of the fact that at the time that proceeding was brought and the adjudication therein was made this proceeding had theretofore been brought and was then pending, it is conclusive that it was in the Tennessee district and that the adjudication is not subject to collateral attack.

[3] How does this matter stand with reference thereto? Did that fact make any difference as to the conclusiveness thereof in regard thereto, at least, so far as this proceeding is concerned? I think it clear that it did, and that, so far, that adjudication is an absolute nullity. This is for the reason that upon the bringing of this proceeding this court acquired exclusive jurisdiction of the subject-matter of the adjudication of the bankrupt as such and the settlement and distribution of its estate, which included the determination of the question as to whether or not its principal place of business was in this district, and hence that the Tennessee court was without any jurisdiction thereof whatever, so long as this court had not determined

that its principal place of business was not therein. If this proposition is sound, of course, it must be conceded that that adjudication is an absolute nullity, at least so far as this court is concerned, and is not in the way of its proceeding to determine the issue as to the bankrupt's principal place of business on its merits. I will now endeavor to show that it is sound.

It is possible for the District Courts of at least three federal districts to have concurrent jurisdiction of a bankruptcy proceeding as to a natural person. Such is the case if his domicile is in one district, residence in another, and principal place of business in a third. The District Court of each of these districts has jurisdiction of a bankruptcy proceeding as to him, and this jurisdiction is concurrent. In the case of a corporation, it is possible for the District Courts of at least two such districts to have jurisdiction as to it. This would be the case if its domicile and residence were in one and its principal place of business in another; and, if it is possible for its domicile and residence to be in different districts, it is possible for the District Courts of at least three districts to have such jurisdiction as to it, the same as in the case of a natural person. Bankr. Act July 1, 1898, c. 541, § 32, 30 Stat. 554 (Comp. St. 1913, § 9616), and General Order No. 6 (89 Fed. v), have made provision, in part at least, for the course of procedure in such a case of concurrent jurisdiction. They provide, as I take it, that the first hearing shall be had in the district in which the debtor has his domicile, and, if the court adjudges him a bankrupt, then it is for it to determine whether the greatest convenience of the parties in interest requires that another of the courts having concurrent jurisdiction should proceed with the cases, and, if it so determines, to order them to be transferred to that court. Suppose such concurrent jurisdiction existed, and not only no such provision, but no provision whatever was made for the course of procedure in such a case, how would the matter stand? Resort would have to be had to general principles of jurisprudence to find a rule to govern it, and they would yield one.

It is a general principle that, if two courts have concurrent jurisdiction of certain property, the exercise of which involves the taking possession and disposing of such property, the first court appealed to has exclusive jurisdiction thereof, and the other court is without power to interfere therewith. It results from the consideration that both courts cannot at the same time take possession and dispose of it. One or the other must yield. And it is reasonable that the one last appealed to should give way to the first. There may be the limitation upon this principle laid down in the recent case of Empire Trust Co. v. Brooks (C. C. A.) 232 Fed. 641; but I am not concerned here to determine whether there is such a limitation. This general principle finds frequent application in cases of concurrent jurisdiction by courts of bankruptcy and the state courts. The Bankruptcy Act and General Orders make no provision for such a case of concurrent jurisdiction, and the matter is left to be determined by the general principles of jurisprudence. And it is well settled that, if the proceeding in bankruptcy is begun first, the state court is ousted absolutely of all

jurisdiction over the property pending the proceeding. Immediately upon the filing of the bankruptcy petition the property of the bankrupt not adversely held is in the potential possession of the bankrupt court, in custodia legis, as the saying is; and it is immaterial whether such property is located in the district where the bankruptcy proceeding is pending or in another district. In Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, Mr. Chief Justice Fuller said:

"It is as true of the present law as it was of that of 1867 that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction (Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866), and, on adjudication, title to the bankrupt's property becomes vested in the trustee (sections 70, 21e [Comp. St. 1913, §§ 9654, 9605]), with actual or constructive possession, and placed in the custody of the bankruptcy court."

This was at one time taken to involve the right of such court to send its process into other districts where the bankrupt property may be located to protect its custody, and hence there was no necessity for, and no such thing as, ancillary jurisdiction in the District Courts of such other districts. In re Granite City Bank, 137 Fed. 818, 70 C. C. A. 316; In re Dempster, 172 Fed. 353, 97 C. C. A. 51.

But the Supreme Court held otherwise in the case of Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969. There was, however, no taking back to any extent of the position that, immediately upon the filing of the petition in bankruptcy, the property of the bankrupt, wherever situated, within the territorial limits of the United States, passes into the custody of the court of bankruptcy in which it was filed, and that the effect of the filing thereof is an attachment and injunction, and that everywhere in the United States. Upon the appointment of the trustee the title to such property, as of the date of adjudication, passes to him, and that court has power to provide for its sale and conversion into money. Robertson v. Howard, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174. And the courts of bankruptcy in the districts where the property is situated have ancillary jurisdiction to protect the custody thereof by the court of bankruptcy of the primary jurisdiction. The latter has to rely on the former to protect its custody and to enable it to acquire actual possession. Babbitt v. Dutcher, supra. There may be an inconsistency in the position that a bankruptcy court may have the custody of property, and the filing of a petition in bankruptcy therein has the effect of an attachment and injunction beyond the territorial jurisdiction of such court, and the position that it has no power to issue its process beyond its territorial jurisdiction to protect its custody, but must depend on the bankruptcy court where the property is situated for that. but I am not concerned to think this matter out. It is judicially settled that both positions are sound.

Such being the case, it follows that any action taken by a state court in relation to such property, which, otherwise, it would have jurisdiction to take, would be beyond its jurisdiction and an absolute nullity, and that whether the state court taking the action was within the territorial limits of the court of bankruptcy of primary jurisdiction or outside of it. In the case of Murphy v. John Hofman Co., 211 U. S.

562, 29 Sup. Ct. 154, 53 L. Ed. 327, which involved a conflict between a court of bankruptcy and a state court, Mr. Justice Moody said:

"Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts."

And again:

"The jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them."

Note the statement in the one case, "The property is thereby withdrawn from the jurisdiction of all other courts," and in the other, "The jurisdiction * * * is exclusive of the jurisdiction of all other courts." It is true that in that case the court of bankruptcy had the actual possession of the property, and the statements are limited to cases of actual possession. But the same principle applies with just as much force where the possession is merely potential.

The case of Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208, involved an attachment of the bankrupt's property in a suit brought in a state court of Missouri, instituted after the filing of the petition in bankruptcy in Illinois. It was held that the attachment would have been invalid, had not the petition in bankruptcy been practically dismissed before the attachment was sued out. Mr. Justice Day said:

"An attachment of the bankrupt's property after the filing of the petition and before adjudication cannot operate to remove the bankrupt's estate from the jurisdiction of the bankruptcy court for the purpose of administration under the act of Congress. It is the purpose of the bankruptcy law, passed in pursuance of the power of Congress to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of the jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition. It is true that under section 70a of the act of 1898 [Comp. St. 1913, § 9654] the trustee of the estate, on his appointment and qualification, is vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt, but there are many provisions of the law which show its purpose to hold the property of the bankrupt intact from the time of the filing of the petition, in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings."

And in the case of Lazarus v. Prentice, 234 U. S. 263, 34 Sup. Ct. 851, 58 L. Ed. 1305, where persons claiming property of the bankrupt were not allowed to intervene in ancillary proceedings in Louisiana, but required to assert their claim in New York, where the bankruptcy proceeding was pending, Mr. Justice Day said:

"The filing of the petition and adjudication in the bankruptcy court in New York brought the property of the bankrupts, wherever situated, into custodia legis, and it was thus held from the date of the filing of the petition, so that subsequent liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law."

And again:

"The property when seized was by virtue of the terms of the bankruptcy act held for and to be turned over to the court of original jurisdiction, and no right could be acquired in it by assignment subsequent to the filing of the petition which would defeat this purpose. Such assignment was a mere nullity, properly disregarded by the bankruptcy court, and notwithstanding which it could direct the delivery of the bankrupts' property to the receiver by summary process."

A striking instance of the absolute nullity of proceedings in the state court, initiated during pendency of the bankruptcy proceedings, may be found in a case arising under Act March 2, 1867, c. 176, 14 Stat. 517, to wit, that of Phelps v. Sellick, Fed. Cas. No. 11,079. There a suit to foreclose a mortgage was brought in the state court, and decree of foreclosure and sale therein was had, after the filing of the petition in bankruptcy. It was held that those proceedings were a nullity and the action of the mortgagee in bringing and prosecuting the suit a contempt of the bankruptcy court.

If, then, in such a case concurrent jurisdiction, where neither the Bankruptcy Act nor the General Orders contain any provision covering the situation, the court of bankruptcy, if first appealed to, would have exclusive jurisdiction, and the state court would be so absolutely without jurisdiction to proceed that anything it might do would be a nullity, in a case of concurrent jurisdiction of two or more courts of bankruptcy, if neither the Bankruptcy Act nor the General Orders contained any provision covering the situation, the same rule would apply. Each proceeding involves the taking possession and disposing of the bankrupt's estate. In the nature of things, two such courts cannot do this at the same time. One or the other must give way, and it is reasonable that the one last appealed to should give way to the first. The filing of the first petition here, as always, is a caveat to all the world, and in effect an attachment and injunction, and from the time thereof the estate of the bankrupt is in the custody of the court where that takes place. And another court of bankruptcy, as well as any other court, is affected by this condition of things.

There is another case of concurrent jurisdiction in bankruptcy, and one for which neither the Bankruptcy Act nor the General Orders make any provision, of which note should be taken, in passing, to point out that, whatever should be the rule applicable thereto, it is without significance here. It is where an involuntary petition is filed, and thereafter a voluntary petition is filed by the bankrupt in the same court. A number of such cases are found in the Federal Reporter. Such are the cases of In re Dwyer (D. C.) 112 Fed. 777; In re Stegar (D. C.) 113 Fed. 979; Gleason v. Smith, Perkins & Co., 145 Fed. 895, 76 C. C. A. 427; In re New Chattanooga Hardware Co. (D. C.) 190 Fed. 241; In re Lachenmaier, 203 Fed. 32, 121 C. C. A. 368. Generally, in these cases, the order of procedure has been thought to be determinable by practical considerations. It has not occurred to the court that the matter was affected by the fundamental general principle to which I have referred, and how, consistently therewith, it could proceed in the subsequent voluntary proceeding with the involuntary

proceeding pending, except probably in the case of Gleason v. Smith, Perkins & Co., where it was held that the adjudication did not invalidate the prior involuntary one. But the fact that in such a case the two proceedings are pending in the same court keep these decisions, which are more relied on by the defendant, from having any bearing whatever on the question we have here, and no further notice need be taken of them.

If, then, this were a case of concurrent jurisdiction on the part of this court and the Tennessee court, and neither the Bankruptcy Act nor the General Orders contained any provision determining the courts to pursue, it would have to be held that upon the filing of the petition herein this court acquired exclusive jurisdiction of the matter of adjudging the defendant corporation a bankrupt and settling and distributing its estate, and the Tennessee court was without any jurisdiction whatever to proceed. There is no escaping from this. But this is not a case of concurrent jurisdiction. This court and the Tennessee court do not each have jurisdiction to adjudge the defendant corporation a bankrupt and to settle and distribute its estate. This is so because, as its domicile and residence was in the district of neither court, but in that of the state of Wyoming, the only possible ground for either having jurisdiction is that its principal place of business was in its district. And this could have been in but one of the two districts. As it is not a case of concurrent jurisdiction, neither the Bankruptcy Act nor the General Orders contain any provisions as to the course of procedure. That must be determined in accordance with general principles.

Why, then, does not the same rule apply here as would apply if it were a case of concurrent jurisdiction and section 32 of the Bankruptcy Act and General Order No. 6 did not exist? Just the same, as in that case the filing of the petition herein would have been, it was a caveat to all the world, and in effect an attachment and injunction, and brought into the custody of this court the entire estate of the bankrupt wherever situated. The only difference between the two cases is that in that case there would be no question as to this court having jurisdiction, whereas here there is a question in regard thereto. There is a possibility that it is without jurisdiction. But there is an equal possibility that it alone has jurisdiction. Certainly, if as a matter of fact the latter alternative is true, its jurisdiction is exclusive. and the Tennessee court is without jurisdiction to proceed. It would be strange indeed that such would be the case if it had jurisdiction concurrently with the Tennessee court, and neither the Bankruptcy Act nor the General Orders contained a provision as to the course of procedure, and not be the case if it alone has jurisdiction. And, if in fact it has no jurisdiction, that being in the Tennessee court, still it has jurisdiction to determine whether it has jurisdiction. It was because of the fact that the Tennessee court had jurisdiction to determine its jurisdiction that I have acceded to the position that, leaving out of consideration the fact that this proceeding was pending when the Tennessee proceeding was instituted, its adjudication would be conclusive as to the bankrupt's principal place of business, and not subject to collateral attack. Having such jurisdiction, it must be exclusive.

In the case of McAlister v. Chesapeake & Ohio Ry. Co., 157 Fed. 740, 85 C. C. A. 316, 13 Ann. Cas. 1068, it was held that in a removal case the federal court acquired jurisdiction, at least for the purpose of determining whether the removal proceedings vested jurisdiction of the cause in it, and, as ancillary to such jurisdiction, might enjoin the plaintiff from proceeding in the state court until it could hear and determine the question of its own jurisdiction. And, as held in the case of Mueller v. Nugent, the effect of the filing of a petition in bankruptcy is both an attachment and an injunction, and such is its effect, as much so if it should turn out that the court in which it is filed is without jurisdiction as if it should turn out that it had jurisdiction. And the injunction operates as much against the prosecution of a bankruptcy proceeding as any other proceeding where it is not specifically authorized.

I therefore conclude that upon the filing of the petition in this court it acquired exclusive jurisdiction of a proceeding in bankruptcy as to the bankrupt, and at the time of the adjudication in the Tennessee court it was without jurisdiction to make it, and hence, at least so far as this court is concerned, the adjudication and all subsequent proceedings in that court were nullities. The prosecution of the voluntary proceeding in the Tennessee court was, baldly speaking, in fact, though unconsciously so, in contempt of the jurisdiction and authority of this court. And what this court is asked to do by the motion to stay is to ignore this contempt. I have said nothing against the right to file the voluntary petition in the Tennessee court, so that it may be proceeded with, if it should turn out that this court is without jurisdiction, and have only held that there was no right to prosecute it pending the proceeding in this court.

[4] I proceed next to dispose of the exception to the referee's report, and to determine whether the principal place of business of the bankrupt was in this district or in that of the Tennessee court. It is certain that it was in one or the other. In order to do this the nature of its business, and how and where it did it, should be fully and accurately set forth. The bankrupt's charter has not been filed, but it is stated by the referee in his report that it seemed agreed that the business which it called for was that of owning and holding coal lands and mining and shipping and selling coal. Its coal lands contained about 19,000 acres, of which about 17,000 are in Bell and Knox counties, Ky., in this district, about 16,000 in Bell and 1,000 in Knox, and the remaining 2,000 in Van Buren county, Tenn., in the Eastern district thereof. Possibly all this acreage is not coal land. The Tennessee land has never been developed. It has mined the Kentucky acreage extensively, mainly in Bell county. It has had in operation there 10 mines, and has mined and sold therefrom, on an average, over 600,000 tons per year. It has also owned and operated in close proximity to the mines four commissaries, at which it has sold merchandise to its employés and the public generally. These sales have averaged \$325,000 per year. In addition it has been selling timber from its lands, the sales of which have amounted to \$25,000 to \$40,-000, and numerous portions of its lands in small tracts and town lots. The mining and shipping of the coal and all sales of merchandise, timber, and lands have all taken place in Bell county. The purchase of all supplies for the mines, and of all merchandise for the commissaries, have likewise been done there. It has had an office in Bell county, and the detailed account of all these transactions have been kept in its books there. It has had in its employ, in connection with all these matters, more than 1,000 men, possibly as many as 1,200 or 1,300, mainly miners. These employes have lived, mainly, in houses on its lands near the mines, of which there are more than 500, for which they have been charged rent. Until June 5, 1915, all these matters were under the immediate supervision and direction of its vice president and general manager, who lived and had his office in Bell county. He was succeeded on that date by the chairman of an executive committee of three, appointed to bring about a more efficient operation of the business of the company, who has also resided or had his office in that county. Its entire assets, outside of the 2,000 acres in Tennessee and certain office furniture in its office at Chattanooga, Tenn., in the Eastern district thereof, shortly to be described, are in this district. There is a mortgage indebtedness on the real estate to cover bonded indebtedness of \$2,000,000, and it owes in unsecured debts possibly as much as \$1,000,000.

Its head office has been at Chattanooga, and consists of three rooms in the twelfth story of a skyscraper. Its main stockholders, all its directors and officers, except the vice president and general manager, and the chairman and another member of the executive committee. have resided there. The office is occupied by its president, secretary and treasurer, and sales manager, each possibly having a room to himself, who have given their entire time to the bankrupt's business. It has had two or three stenographers there, possibly one for each officer. The board of directors have met there. The officers have exercised general supervision over the business and given directions in regard thereto. It has been under their general supervision and direction that it has been carried on. Communications between them and those in charge at the mines have been had by mail and a telephone line, of which they had the exclusive use, at first for an hour, afterwards for three quarters of an hour, each day. Reports were regularly made to them by those in charge at the mines. The financial business of the bankrupt may be said to have been conducted at the Chattanooga office. The money borrowed was borrowed there. principal bank account was kept in Chattanooga. Probably the major portion of its unsecured indebtedness is owed there. Payment for all purchases made on its behalf were made by checks on this bank account. The checks for same were made out at the mines and sent to the Chattanooga office to be countersigned. It does not appear

where the checks were mailed from to the debtors. The amounts of the regular pay rolls were sent to the Chattanooga office, and it caused the money to be sent to a bank in Bell county by a Cincinnati bank. No bookkeeping was done at the Chattanooga office, except the keeping of what is termed the general accounts. These seem to have been kept by the secretary and treasurer. Agencies for the sale of its coal were maintained at Atlanta, Ga., Knoxville, Tenn., Danville, Ky., Louisville, Ky., and Chicago, Ill. It has operated coal yards at Louisville, Ky., at first directly, and afterwards through a corporation whose stock it owned.

Reference is made in the evidence to traveling salesmen. It might have been made clearer than it was just where they came in. would have been well, had counsel made this plain, rather than take time to introduce in evidence so much irrelevant stuff as they did. Possibly these traveling salesmen were its agents stationed at those several points, or they may have operated independently of them. All orders for coal were sent to the Chattanooga office. They were passed on by the sales manager, and, if accepted, copies thereof were sent to the office at the mines to be filled, and remittances for coal purchased were made to the Chattanooga office and deposited in the bank there. It has sold a great deal of coal bought from other concerns, with which the Kentucky operations had nothing to do. The extent of this, and when it was sold, might have been made more definite. The bankrupt had complied with the requirements of the Kentucky statutes as a prerequisite of its right to do business therein, but had not complied with the requirements of the Tennessee statute.

Such, then, are the facts from which it is to be determined where the principal place of business of the bankrupt was, and I proceed now more directly to a consideration of that question. It is to be noted, in the first place, that the question is, where was the bankrupt's principal place of business? and not where its stockholders, directors, and officers lived. Again it is to be noted that the question is where was the bankrupt's principal place of business, and not where was its principal office? The bankrupt act says principal place of business, and not principal office. The principal office of a corporation may be of significance in determining where it resides, but it is not of significance in determining its principal place of business. The principal office of a corporation is where its books are kept and its corporate business transacted. In the case of Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248, Mr. Justice Brown said:

"In the case of a corporation, the question of inhabitancy must be determined, not by the residence of any particular officer, but by the principal offices of the corporation, where its books are kept and its corporate business is transacted, even though it may transact its most important business in another place."

Of course, this is subject to the qualification that, for a corporation's inhabitancy to be so determined, its principal office must be in the state of its incorporation. It cannot have inhabitancy or residence elsewhere. The Bankruptcy Act contemplates residence and principal place of business as distinct conceptions. In the case of corporations, principal office, in the state of incorporation, determines residence. To allow it a hand in determining the principal place of business of a corporation is to confuse the two conceptions.

Still again it is to be noted that the words "principal place of business" imply that there may be more places of business than one, and call for the principal—i. e., the most important—of such places. This would indicate that what is had in mind is a place where business is actually done or transacted, rather than a place from which business is supervised, directed, or controlled. For, whilst persons often do or transact business in more places than one, they rarely, if ever, supervise, direct, or control it from more than one place. And a comparison of the place where business is done or transacted with the place from which it is supervised, directed, or controlled, to determine as between them which was the more important, could hardly have been intended. If such is the case, then, in determining where the bankrupt's principal place of business is, the places where it did or transacted business should be compared, and not such place and that from which it supervised, directed, and controlled it. Suppose, for instance, a person owns and operates a large department store in Cincinnati, Ohio, at which all purchases or sales are made, but lives in Covington, Ky., and has an office there, from which, by means of a telephone connection, he supervises, directs, and controls the business, no one would contend that his principal place of business was in Covington, and not in Cincinnati.

And still further it would seem that what is had in mind is not any business, but only such as is of an ultimate character. The act of 1867 fixed the district in which the debtor has "resided or carried on business" as that in which bankruptcy proceedings could be instituted. In the case of In re Alabama & C. R. R. Co., Fed. Cas. No. 124, which arose under that act, the question was whether an Alabama corporation, which owned and operated a railroad in Alabama, Georgia, Mississippi, and Tennessee, but had an office in New York City, where its officers acted and its board of directors met, and where it contracted debts and made loans, purchases, and payments, could be said to have carried on business in New York City, in the meaning of the Bankruptcy Act, so as to give the District Court of the Southern district of New York jurisdiction of an involuntary proceeding in bankruptcy against it, and it was held that it could not. I quote rather extensively from Judge Woodruff's opinion, because of the persuasiveness of his reasoning. He said:

"Do the facts here show that the corporation, the alleged debtor, carried on business in this district, within the meaning of the said eleventh section of the bankrupt law? In its broadest sense, the term 'business' includes nearly all the affairs in which either an individual or a corporation can be actors. Indulgence in pleasure, participation in domestic enjoyment, and engagement in the offices of merely personal religion, may be exceptions, in the case of an individual. But the employment of means to secure or provide for these

would, to him, be business; and, to a corporation, these exceptions can have no application. The conduct of any and all of the affairs of a corporation is Does, then, the doing of any acts whatever pertaining to the affairs of a railroad corporation constitute 'carrying on business,' in the sense of the act? Has the term, 'carrying on business,' the same meaning as 'transacting any of its business? If the necessities or interests of a railroad company require that an agent should be sent to a timber region to purchase or otherwise procure (e. g., by cutting, sawing, etc.) materials for its superstructure, is that carrying on business there? If it send an agent or agents to a city, the center of capital, to negotiate its bonds and raise money in aid of the construction of its road, and such agency be continued for that purpose, and for receiving subsequent remittances and making payments of interest or other indebtedness, at an office provided therefor, is that carrying on business in such city, within the meaning of the act? I am constrained, not only by considerations already suggested, but by what, upon the words themselves, should be deemed their proper interpretation, to answer these questions in the negative. There are, in the carrying on of a business, many affairs which are merely incidental, and which may be, and often are, transacted elsewhere than at the place where the business—that which is the real design and purpose or object in view-is located; and such transactions may be of such frequent, or even daily, occurrence as to require an agency of considerable duration. It would seem to me greatly unjust and unreasonable to regard such transactions as a carrying on of business, in the sense of the law. 'Carrying on business' looks to the scheme and purpose to which such transactions tend, and not to the incidental transactions themselves. Thus the business of a rail and corporation is, by its charter, the construction, maintenance, and operation of a railroad. That is its business. In aid thereof, it may be necessary or expedient to employ agents and agencies—since it can only act by agents-in other places than those in which its business of constructing, maintaining, and operating the road can be done. But the transactions of such agents are only collateral or incidental. They do not, in a just sense, constitute the business of the railroad company. That business cannot be removed. The company itself cannot transfer it. Agents, or officers who are agents, and only agents, may, from a distance, advise therein, give rules or directions to other agents for its management, but the business of the railroad company can only be done where the railroad is, or is to be, constructed, maintained, and operated."

There is no reason to think that the word "business" in the present act has any different meaning from what it had in the act of 1867. The change in provision was brought about, no doubt, by the consideration that a person might carry on business in several districts in the meaning thus given to that word, and it was desired to limit the jurisdiction of bankruptcy proceedings to the district which was the principal place of so doing. Here the ultimate business of the bankrupt was mining and selling coal. That was the scheme and purpose to which all its transactions tended. Everything else that it did was merely incidental thereto. If this restricted meaning is to be given to the word "business" in the present act, then all that is to be considered in determining its principal place of business is, where did it mine and sell its coal; and if it mined and sold in different places, which of these was the principal? All the rest of the business transacted by it was merely incidental thereto. It seems to me that this is the true view of the matter. As the referee in the case of In re Elmira Steel Company, supra, expressed it, it is the "principal place of the principal business" that determines jurisdiction.

Where, then, did the bankrupt mine and sell its coal, and, if it did the one in this district and the other in the Tennessee district, which of the two was the principal or the most important? It is certain that its entire mining was done in this district. It is not so certain that it can be said that it did any selling of coal in the Tennessee district, except at Knoxville. And the evidence is that very little coal was sold there. If it is to be said that any of the coal actually sold at its several agencies and by its traveling salesmen were sold at its head office, this was constructively so only. But, take it that all its coal was sold there, how does the matter stand? I leave out of consideration any coal that may have been bought from other concerns. It cannot be said that any of it was sold within six months preceding the filing of the petition herein. It may be thought that there are no considerations for determining whether the mining or the selling end of the bankrupt's business was the principal. Neither could get along without the other. If no coal was mined, there would be none to sell. And if no coal was sold, the bankrupt would soon run short of money to pay for the mining. The only possible considerations which occur to me favor the mining end. The mining came first. The operations in connection with the mining were of much greater magnitude than those in connection with the selling. Where the mining was, there were its assets in the main. The mining was actual, whereas the selling, so far as the Tennessee district was concerned, was constructive only. But in this line of reasoning I cannot help but feel that I am bordering on the unreal, if not actually in it. It would seem that the comparison to be made in determining the principal place of business is not between successive, but parallel, business operations. In case of successive business operations, no comparison is to be made; but it is the more prominent feature thereof which gives name to the business that is determinable. A merchant both buys and sells. But it is the selling end that is the prominent feature of his business and is expressed in his name. In the case of a manufacturer or mine operator, he produces and sells. But it is the production end of his business that is the prominent feature, and is expressed in his name. No one ever speaks of a manufacturer or mine operator as a merchant or seller of goods, but always as a manufacturer or mine operator.

The discussion, then, comes to this: Within the meaning of the act, the place of business of a merchant is at his store, of a manufacturer at his factory, and of a mine operator at his mine. If the merchant has but one store, such is his principal place of business. It can never be anywhere else. So if the manufacturer has but one factory, such is his principal place of business. It can never be anywhere else. And so if a mine operator has but one mine, such is his principal place of business. It can never be anywhere else. It is only in case the merchant has more than one store, the manufacturer more than one factory, or the mine operator more than one mine, or a person follows two or all three of these occupations, that any occasion arises for a comparison of places of business to determine which is the principal, i. e., the most important, or of greatest consequence; and then

the comparison is between the two stores, two factories, or two mines, or the several occupations, as the case may be. This would seem to be the common-sense view of the matter. And it has the merit of simplicity and reality. It avoids a comparison between the main object and that which is directed to it and essential to its accomplishment, between directing a thing to be done or supervising its doing, and the doing of it, and between successive main operations, each of which is essential to the other, to determine which is the most important or of greatest consequence. Such comparisons raise questions of like order to that as to how many angels can stand on the point of a needle.

As, then, all the mining of the bankrupt was done in this district, it must be held that it was its principal place of business. Two considerations strengthen this conclusion: One is that such seems to have been the bankrupt's view of the matter before any trouble arose. This is to be gathered from the fact that it saw fit to comply with the conditions prescribed by the statute of Kentucky as a prerequisite to its right to do business therein, and not to comply with those prescribed by the statute of Tennessee. It is true, as held in Re Duplex Radiator Co. (D. C.) 142 Fed. 906, and In re Perry Aldrich Co. (D. C.) 165 Fed. 249, that the circumstance that the bankrupt had not complied with the Tennessee statute does not change the fact that its principal place of business was in that state, if such, indeed, was the case. But the circumstance that it complied with the one statute and not with the other is not without bearing on what the bankrupt deemed was its principal place of business, and that has a tendency to show what was in fact its principal place of business.

It is urged that it was affected by the consideration that the requirement of the Tennessee statute was more burdensome than that of Kentucky. It is not, however, shown just how more burdensome it was. This may have had something to do with its action. But it remains that it deemed the business done in Kentucky of sufficient importance to comply with its statute, and did not deem that done in Tennessee sufficient to comply with its statute.

The other consideration is that in the argument here on behalf of defendant the matters stressed are that the bankrupt's stockholders, directors, and officers lived in Tennessee, that its headquarters or principal office was in that state, and that its entire affairs were supervised, directed, and controlled therefrom. But little is said as to anything else which it did therein. All these considerations I have ruled out as without bearing on the question as to where the bankrupt's principal place of business was.

The authorities on the subject, which are so close to this case in their facts as to be pertinent, are not numerous. Those tending to support plaintiff's position are the cases of In re Elmira Steel Co., supra; In re Tygart's River Coal Co. (D. C.) 203 Fed. 178; Home Powder Co. v. Geis, 204 Fed. 568, 123 C. C. A. 94. That mainly relied on by the defendant is the case of Matthews Consolidated Coal Co., 144 Fed. 737, 75 C. C. A. 603, affirmed in Burdick v. Dillon, 144

Fed. 737, 75 C. C. A. 603. It must be conceded that the opinions in this case emphasize features which are emphasized here, and perhaps the conclusion reached was determined by them. But, as noted by the referee, the question there arose under the stress of the fact that it was not an issue between two District Courts, as here, but upon the objection to the jurisdiction made by a creditor who sought to defeat the bankruptcy proceeding in order that a lien acquired by him in the state of New York might be effective, and its plants seem to have been so nearly equally divided between New York and Vermont as to render difficult the determination in which the greater portion thereof were.

The referee has handled the question so well in his opinion that I might have contented myself with merely adopting his reasoning; but I have deemed it best to present it in my own way, thinking that possibly I might be able to do so in such a way as to reconcile the defendant to the inevitable.

The exceptions to the referee's report are overruled, and it is affirmed.

In re WULZEN.

In re DOYLE.

(District Court S. D. Ohio, E. D. August 25, 1916.)

Nos. 1846, 1847.

1. Habeas Corpus \$\iff 94\$—Scope of Inquiry—Arrest under City Ordinance.

In habeas corpus to determine jurisdiction of state courts, as opposed to military courts, to try offenses by members of the military, the fact that an arrest is under a city ordinance is immaterial, if the ordinance is valid.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 82, 92; Dec. Dig. ⊗ 94.]

2. Habeas Corpus \$\sim 45(2)\$—When Writ may Issue.

The power to issue writ of habeas corpus under Rev. St. § 753 (Comp. St. 1913, § 1281), is to be sparingly exercised, especially when directed toward release of members of the military accused of offenses against the peace of the state; the jurisdiction of the civil courts of the state over such offenses in time of peace being admitted.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38-45; Dec. Dig. \$\sim 45(2).]

3. CONSTITUTIONAL LAW \$\iiint 68(1)\$—EVIDENCE \$\iiint 48\$—JUDICIAL NOTICE—STATE OF WAR—POLITICAL QUESTIONS.

The existence of a condition of war must be determined by the political department of the government, and the courts will take judicial notice of such determination and are bound thereby.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 125; Dec. Dig. \$\infty\$=68(1); Evidence, Cent. Dig. § 70; Dec. Dig. \$\infty\$=48.]

4. Habeas Corpus \$\sim 45(4)\$—Scope of Inquiry—Jurisdiction of Federal Courts.

Under the Habeas Corpus Act (Comp. St. 1913, §§ 1279–1293), a federal court may issue a writ of habeas corpus to inquire into the cause of detention of a prisoner held by a state on a criminal charge, if the petitioner alleges that the alleged offense was committed in the performance of his duty as a soldier of the United States, and the court may determine summarily whether such allegation is true, and, if true, may discharge the prisoner on the ground that the state court is without jurisdiction.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38–45; Dec. Dig. ⊗ 45(4); Courts, Cent. Dig. §§ 804, 805.]

5. Army and Navy &=3-State and Federal Courts-Jurisdiction-Offenses by the Military.

If military authorities have the right to try members of the military for violations of state law or municipal ordinances, it is by virtue of a federal law, and if there is such a law it is paramount; nor does it deprive citizens of any rights under state law.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. § 6; Dec. Dig. ⊗=3.]

6. Army and Navy ६==3-State and Federal Courts-Jurisdiction-Offenses by the Military.

Although military authorities may have priority to try alleged offenses against state law or municipal ordinances, it does not necessarily follow

that the victims of such offenses may not by proceedings in the state courts secure redress.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. § 6; Dec. Dig. ⊗⇒3.]

7. ABMY AND NAVY \$3-STATE AND FEDERAL COURTS-JURISDICTION-OF-FENSES BY THE MILITARY.

If a member of the military is charged with disorderly conduct in violation of a municipal ordinance, a paramount remedy is provided for by punishment by the military authorities.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. § 6; Dec. Dig. ⊕=3.]

8. Army and Navy &-3-State and Federal Courts-Jurisdiction-Offenses by the Military.

Where, during mobilization of state militia, at the time of the Mexican trouble, a company of soldiers marching to a meeting for the purpose of encouraging enlistments pushed its way through the crowd there gathered, but it is not shown that it was done violently, or that the prosecuting witness was even touched, or that there was malice, wantonness, or criminal intent, the military authorities, and not the state courts, have authority to try members of the company for such alleged breaches of the peace.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. § 6; Dec. Dig. € 3.]

Habeas Corpus. Applications by Wesley G. Wulzen and by Tester Doyle to secure release from custody under state court process. On final hearing. Petitioners discharged.

Turney, Olds & Sipe, of Cleveland, Ohio (Hubert J. Turney, Advocate General, of Cleveland, Ohio, of counsel), for petitioners.

J. W. Sharts, of Dayton, Ohio, for arresting officer.

SATER, District Judge. [1] In each of the cases before me the prayer is for a writ of habeas corpus. One is brought to secure the release of Captain Wulzen, who has been arrested on the charge of disturbing the peace, good order, and quiet of the city of Hamilton, by applying abusive and indecent language to Charles Baker, contrary to the form of an ordinance of that city. The fact that the arrest is under an ordinance is immaterial, if the ordinance is valid. The other case is brought for the discharge of Sergeant Doyle, who has also been arrested, the charge against him being an unlawful attempt to provoke Baker to commit a breach of the peace, by striking him with his hand, contrary to the form of the statute. Each of the petitioners denies guilt, and avers that he is unlawfully and actually imprisoned and restrained of his liberty, and detained without legal authority, in the custody of Charles J. Norris, bailiff of the municipal court of the city of Hamilton.

Both of the petitioners are officers of the military forces of the United States. On or about the 18th of June the President called

1 On July 1, 1916, Congress adopted a resolution which, in as far as need be noted, provides: "That in the opinion of the Congress of the United States an emergency now exists which demands the use of troops in addition to the Regular Army of the United States, and that the President be, and he is

for the mobilization of the National Guard of the United States. One of the petitioners was an officer in the Guard at that time. The other, having formerly been a member of the regular army, re-enlisted. Prior to June 22, both took the oath prescribed by section 70 of the act of Congress passed June 3, 1916. To bring the company up to the requisite number, enlistments were solicited, to which there appears to have been at Hamilton certain opposition. A public meeting was held on the evening of June 22, in the courthouse square, for the purpose of considering the situation that then confronted this country -an impending war with Mexico-and to encourage the enlistment of recruits. Some addresses were delivered on that occasion. company to which these two men belonged, in military formation, were marching to the place of meeting for the purpose of assisting and participating in it. One of them was acting as guide. Some of the persons assembled pressed forward, so as to obstruct the march of the company of which the petitioners were members, and were pushed back that the company might pass. The evidence does not disclose that this was done with violence. The situation was such as frequently occurs in any city where there is a parade of fraternal orders, or of policemen, or of the military, and those in charge find it necessary to clear or widen the passageway. The evidence goes to show that if Baker, who filed complaints with the Hamilton magistrate against the petitioners, was one of the parties pushed back, it was not known at that time by either of the petitioners, or that any malice or feeling was manifested towards him. There was some conversation between him and one of the petitioners, but as detailed here it was innocent.

It is charged that Baker, following the President's order for mobilization, had issued and distributed through the mails scurrilous and treasonable matter to deter enlistments and to prevent obedience to such order, and that his purpose in causing the arrest of the peti-

hereby, authorized to draft into the military service of the United States, under the provisions of section one hundred and eleven of the National Defense Act, approved June third, nineteen hundred and sixteen, so far as the provisions of said section may be applicable and not inconsistent with the terms hereof, any or all members of the National Guard and of the Organized Militia of the several states, territories, and the District of Columbia, and any and all members of the National Guard and Organized Militia Reserves, to serve for the period of the emergency, not exceeding three years, unless sooner discharged," etc. Section 111, in so far as pertinent, is as follows: "When Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, under such regulations, including such physical examination, as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall, from the date of their draft, stand discharged from the militia, and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army, and shall be embodied in organizations corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct.'

tioners was to embarrass the United States and the military department by interfering with these officers. A consideration of this feature is not necessary in disposing of the cases. On the same evening complaint was lodged by Baker with a local magistrate. Some effort was subsequently made to arrest the petitioners. The military authorities at first resisted the efforts to arrest, but subsequently the commanding officer, following the transfer of their company and regiment, as well as other regiments, to Columbus, Ohio, where they are and have been training for actual service, ordered the surrender of Wulzen and Doyle, if the state authorities came after them. In the meantime, charges were preferred against them preparatory to their trial by military authorities, and they also invoked action by the military court to establish their innocence of wrongdoing. Both proceedings are pending. There is no evidence that such proceedings have been unduly delayed, or that the accused will not be punished, if they deserve it. Both are doing, and for some time past have been engaged in, provost duty.

[2, 3] Shall the prisoners be released, or shall the state retain them? Section 755, Rev. St. U. S. (Comp. St. 1913, § 1283), provides for a speedy hearing of an application for a writ of habeas corpus. If the writ may issue, it is under section 753, Rev. St. U. S. (Comp. St. 1913, § 1281). The power to grant the writ is to be sparingly exercised. The general jurisdiction in time of peace of the civil courts of a state over persons in the military service of the United States, who are accused of a capital crime or of any offense against the person of a citizen, committed within the state, is not denied. Drury v. Lewis, 200 U. S. 7, 26 Sup. Ct. 229, 50 L. Ed. 343. Whether there is a state of war existing now, or whether it existed on the 22d day of June, need not be decided. A definition of "war" is found in the Prize Cases, 67 U. S. (2 Black) 666, 17 L. Ed. 459. The existence of a condition of war must be determined by the political department of the government, and the courts will take judicial notice of such determination and are bound by it. Hamilton v. McClaughry, 136 Fed. (C. C.) 445, 449.

[4] Jurisdiction exists to hear these cases. Under the Habeas Corpus Act, a federal court has power to issue a writ of habeas corpus for the purpose of an inquiry into the cause of detention of a prisoner held by a state to answer to a criminal charge, where it is alleged by the petitioner that the act charged as a crime was committed by the prisoner in the performance of his duty as a soldier of the United States. It has authority to determine summarily, as a fact, whether or not such allegation is true, and, if found to be true, to discharge the prisoner on the ground that the state is without jurisdiction to try him for such act. U. S. v. Lipsett (D. C.) 156 Fed. 65.

[5, 6] The writ should issue only in urgent cases. I have endeavored to find out what have been regarded by the courts as urgent cases. In Stegall v. Thurman (D. C.) 175 Fed. 813, it appears that a store-keeper and gauger in the Internal Revenue Department refused to divulge information in regard to the business of a distillery, which in-

formation had been obtained by him in his official capacity as an internal revenue officer. His refusal extended down to and included the time when he was called as a witness in court. He was acting under a regulation of the Internal Revenue Department. It was held to be an urgent case, and jurisdiction was entertained; he was released on a writ of habeas corpus.

In Boske v. Comingore, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846, it was shown that a person was arrested, and discharged on a writ of habeas corpus later, because he was acting under a rule of the department and his arrest would have interfered with the discharge of his duties, his presence at his post of duty being important to the public interests. The petitioner in that case had refused to give up certain records and information in his possession. In Ohio v. Thomas, 173 U. S. 276, 277, 19 Sup. Ct. 453, 43 L. Ed. 699, it was held that federal officers who were discharging their duties in the state (Ohio), and who were engaged in superintending the internal government and management of a federal institution, the Soldiers' Home at Dayton, under the lawful direction of its board of managers and with the approval of Congress, were not subject to the jurisdiction of the state in regard to matters of administration approved by federal authority. The officers there were acting under federal power. There is still another case—In re Turner (D. C.) 119 Fed. 231—in which an inferior officer, acting in obedience to orders of the Secretary of War, who was executing an act of Congress, was arrested and discharged on a writ of habeas corpus.

In each of these cases a discharge was granted, for the reason that prosecution by the state authorities would interfere with the administration of federal duties. None of them was more urgent than the instant cases. The petitioners on June 22 were acting, and ever since have been acting, under orders of the President in the discharge of a high duty, and may be ordered at any time to the Mexican border to perform active military service. Who has the right to try these men, if an offense was committed—the state or the military authorities? If the military authorities have the right, it is by virtue of a federal law, not of custom. If there is such a law, it is paramount, and the enforcement of it will not deprive any citizen of any right under the state law.

We have a national bankruptcy law. We also have a state assignment law, which is local and operative only in the state of Ohio; but the bankruptcy law supersedes the state law in the administration of a bankrupt's estate. If an insolvent person finds his way by deed of assignment into the probate court of any county, even if his estate might be as well or even better administered in that court, it cannot be kept there, if later a proper proceeding in bankruptcy is commenced in the federal court. We have laws, both state and federal, relating to safety appliances, to boiler inspection, and to employers' liability in case of accident by interstate carriers. Proceedings under the state statute may be had (in cases properly arising) in the state courts; but where the same ground is covered by the federal law, it takes

precedence. Three judges, sitting together in this court, held that the inspection of locomotive boilers used in interstate commerce must be under the federal and not the state law. Twice the Circuit Court of Appeals of this circuit has held that a state compensation act for the benefit of persons injured in the course of their employment must yield, if a person working for a railroad elects to prosecute his suit for personal injury under the federal statute in the federal courts, and for the simple reason that the federal law is paramount. Grand Trunk Ry. Co. v. Knapp, 233 Fed. 950, — C. C. A. —; Waters v. Guile, 234 Fed. 532, — C. C. A. —. It does not necessarily follow, if the military authorities have priority here, that some sort of a proceeding in a proper way may not yet be maintained in the state courts as to these two petitioners; but that question is not before us, and need not be decided.

[7] In Re Schlaffer (D. C.) 154 Fed. 921, 923, a soldier was arrested under a city ordinance, convicted, and punished. The offense charged was urinating on the sidewalk. It was said that, if soldiers should become drunk and disorderly, even while on leave, they are liable to punishment under the rules of war, although it be a time of peace, and it is not considered that they should be treated and held in any detention or attempted punishment, the same as if they were answerable to no other power. Their position and the requirements of their constant duty demand, in behalf of the national government, from the municipal (and, it may be added, state) authorities, such a recognition of its rights as would accomplish a preservation of the peace and the observance of the city ordinances (and state laws) as would in no way affect their duties as soldiers. Under the circumstances of that case, a writ of habeas corpus was permitted to go. It follows that, if the charge here was disorderly conduct, there is a remedy provided for punishment by the military authorities, which remedy is paramount and should be exercised by those authorities rather than by the municipality or the state.

My attention was called to the case in 1 Utah, at page 145. An ordinance against drunkenness and disorderly conduct was involved. A writ of habeas corpus issued, because the parties were subject to punishment by the military authorities, who had the prior right. In the case of U. S. v. Fuellhart (C. C.) 106 Fed. 911, a man was arrested for taking another into custody or arresting him when he had no warrant. That was an offense under the law of the state in which he aided in making the arrest; but he was released on a writ of habeas corpus. The arrests from which relief is here sought do not appear to me to be better founded than those above mentioned.

[8] Judge Knappen, now one of our Circuit Judges, in the above-mentioned Lipsett Case (D. C.) 156 Fed. 65, 69, 70, reviews certain other cases and has made the decision here comparatively easy. He quotes with approval In re Lewis (D. C.) 83 Fed. 159, and In re Fair (C. C.) 100 Fed. 149. In the Lewis Case evidence was taken, as in this. The use to be made of such evidence is stated by Judge Knappen (156 Fed. 69) to be not for the purpose of determining wheth-

er the prisoner should be found guilty or innocent, but of determining whether the act alleged to be criminal was done in the performance of duty in the service of the United States.

In the Lewis Case it is stated that an officer, who, in the performance of what he conceives to be his official duties, transcends his authority and invades private rights, he is answerable therefor to the government under whose appointment he acts and to individuals injured by his action; but, where there is no criminal intent, he is not liable to answer the criminal process of another government. It was further held in that case that the federal courts have authority in habeas corpus proceedings to inquire into the guilt or innocence of persons committed on preliminary examination by a state tribunal on a criminal charge for acts done in the service of the United States, so far as to determine whether the acts were done wantonly and with criminal intent; if not so done, the release must follow. That statement is quoted in extenso by Judge Knappen and approved.

In the Fair case, the gist of the decision is that the government of the United States and of a state, though exercised within the same territory, occupy different planes, and the criminal laws of the one have no application to acts performed under the authority of the other in respect to matters solely within its control, and that an officer or agent of the United States, who does an act which is within the scope of his authority as such officer or agent, cannot be held to answer therefor under the criminal laws of another and different government. In that case the person who was arrested was acting under the orders of an officer in command; the officer told the petitioner, who was a private, to perform a certain act. It was his duty to perform it, unless it was so clearly wrong that a man of ordinary sense and understanding would know, when the order was given, that it was illegal.

These men now before the court were in the employ of the United States as soldiers. They were mobilizing. They were in the discharge of their duty in endeavoring to get recruits. There is no evidence here of malice, wantonness, or criminal intent. Under the rulings made in the last three cases mentioned, the state is not entitled to priority. Indeed, it is not shown that any violence was done to Baker, or that he was even touched, when the crowd was pressed back from the course of the marching troops.

Running through the cases, by whatever courts decided, is the question as to what the effect will be of seizing federal officers and withholding them from the performance of their duty to the government. One of the cases best considered and much relied upon is that of In re Waite (D. C.) 81 Fed. 359. The decision rendered by Judge Shiras in that case was approved by the Circuit Court of Appeals, and was cited with approval by the Supreme Court of the United States in Ohio v. Thomas, 173 U. S. 284, 19 Sup. Ct. 453, 43 L. Ed. 699. Judge Shiras employed this language (81 Fed. 365, 366):

"If, however, it should be held that the officers of the United States, when engaged in the performance of their official duties, can be arrested by a warrant from a state magistrate, or from a court of record of the state, upon

the charge that in the performance of the duties imposed upon him the officer has violated some provision of the state statutes, it is apparent that the enforcement of the laws of the United States and the carrying on of the operations of the government may be seriously embarrassed or wholly arrested. Even though it be true that the officer, by making the defense in the state court, can ultimately obtain the protection of the laws of the United States, the injurious effect in the way of impeding the enforcement of the laws of the United States would not be obviated, for, as is pointed out by the supreme court in Tennessee v. Davis, supra, [100 U. S. 257, 25 L. Ed. 648], during the time the officer is under arrest or is engaged in defending himself in the state court he is withdrawn from the discharge of his duty, and the exercise of acknowledged federal power is arrested. Hence the justification of the true rule that it cannot be permitted to the state to assert jurisdiction over one acting under the authority of the United States for acts by him done in furtherance of the duty he owes to the federal government, upon the assumption that these acts are violations of a state statute."

In this case, these men, who are in the army, and who, for aught we know, may be called upon any day to go to the Texan border, if held by the state authorities, may not be able to accompany their regiment and discharge the patriotic duties they owe to their country. Their time would have to be given to the defense of their cases. They might be detained by some action of the court, and, if that may be done with one member of the army of the United States, it could be done with another. If it could be done in times like this, when men are subject to call and probably will have to answer the command to go, it could be done even in more dangerous times. There is no denial of any right. If these men have done a wrong, the military establishment of the United States is able to punish them. If it does not, it does not necessarily follow that at a proper time—and it seems to me this was a very inopportune time to arrest these men—the parties in interest may not be without their remedy.

The petitioners are discharged, and an order may be taken accord-

ingly.

235 F.—24

COMMERCIAL TRAVELERS' LIFE & ACCIDENT ASS'N V. RODWAY.

Collector of Internal Revenue.

(District Court, N. D. Ohio, E. D. December 3, 1913.)

No. 8292.

1. Internal Revenue \$\sim 9\$—Excise Tax on Corporations—"Insurance Company"—"Doing Business."

An association organized under the laws of a state for the purpose of collecting assessments from its members and disbursing the same in the payment of benefits on the death or injury of members and the expenses of the association, any surplus at the end of a year being paid into a reserve fund to be used in payment of losses in any succeeding year which may exceed the assessments for that year, is an "insurance company," and in exercising the functions for which it was organized is "doing business," within the meaning of those terms as used in Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, § 6300), which provides that "every corporation * * * and every insurance company * * * organized under the laws of * * * any state * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * or insurance company equivalent to one per centum upon the entire net income over and above five thousand dollars," etc.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. ६=9.

For other definitions, see Words and Phrases, First and Second Series, Insurance Company; Doing Business.]

2. Internal Revenue € EXCISE TAX ON CORPORATIONS—EXEMPTIONS—"Fraternal Beneficiary Societies."

The exemption from tax contained in the proviso of said section: "That nothing in this section contained shall apply to * * * fraternal beneficiary societies, orders or associations operating under the lodge system," does not apply to such a mutual protective association organized under Gen. Code Ohio, § 9427, "fraternal benefit societies," as distinguished from mutual protective associations, being expressly provided for in section 9462 et seq. of said Code, and defined as limited to societies having a lodge system.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. ⊕==9.]

3. Internal Revenue 59-Excise Tax on Cobporations-Exemptions.

The absence of profit in the operation of such an association is not the criterion as to whether it is within the exemption as a fraternal beneficiary society, but the want of a fraternal side and object which it is in some measure organized to promote.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. ♦ 9.]

At Law. Action by the Commercial Travelers' Life & Accident Association against A. N. Rodway, Collector of Internal Revenue for the Eighteenth District of Ohio. On demurrer to petition. Demurrer sustained.

Blandin, Hogsett & Ginn, of Cleveland, Ohio, for plaintiff. U. G. Denman, of Cleveland, Ohio, for defendant.

KILLITS, District Judge. The plaintiff has paid under protest to the collector of customs of this district the corporation excise tax required by the act of 1909 upon its net income for the year 1910, and now seeks by this action to recover back such payment. The grounds upon which it founds its right of action are stated in these parts of its complaint, upon which facts it claims the right of recoupment:

"That plaintiff company is organized by virtue of the statutes of Ohio as a mutual protective association; that its only source of revenue is the assessments paid by its members; that after the losses sustained during any year are paid by the association, and the general expenses of the company for rents, bookkeeping, salaries, etc., are paid, the surplus, if any, in the hands of the treasurer, is paid into a reserve fund, which fund is the sole and only resource of the company for the payment of losses, should any occur in excess of the amount of income during any year; that this reserve fund is the sole and only guaranty and protection that the members of the association have, after the payment of assessments, that losses sustained by members shall be paid; that it is necessary that the net income each year be paid into this reserve in order to have on hand sufficient resources to meet the outstanding liabilities of the association; that the total membership of the association on December 31, 1910, was 3,601; that the outstanding liabilities for said association for policies in force on said date was \$7,096,000; that the reserve fund on December 31, 1910, including the said net income of the year 1910 of \$40,354, was \$382,875.95; that the said net income of \$40,354 does not represent profits of this association, but a balance left in its hands from assessments on its members, after paying losses and expenses of the association for the year, 1910, and in an increment to the reserve fund, against which fund there are outstanding liabilities as before alleged; that the plaintiff is not engaged in business for profit, but the only function is to receive payments from its members and make distribution thereof to members who may sustain injuries or to representatives of members in case of death of members; that members of the plaintiff association do not share in any way in the net income of the association by way of receiving dividends or proportionate shares of said net income: that plaintiff is not subject to the provisions of the law known as the Corporation Tax Act, being the act of Congress approved August 5, 1909, and especially is not subject to the provisions of section 38 of said act (36 Stat. at Large, page 112); that plaintiff is not an organization carrying on or doing business within the meaning of said act of Congress, and by said act it is not contemplated that companies such as the plaintiff and doing the business of plaintiff should be subject to a tax on their net income."

In the brief filed in behalf of the plaintiff, two points are urged upon these facts: (1) That the company is within the exception to the operation of the excise act. (2) That the business transacted by the company is not such business as comes within the main provisions of the section.

[1] Taking the last proposition first, the statute in its parts pertinent to this situation reads as follows:

Chapter 6, 36 Statutes at Large, page 112, section 38: "that every corporation, joint-stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, * * * organized under laws of * * * any state * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-stock company or association, or insurance company," etc.

We do not understand that Congress is here using the words "corporation, joint-stock company or association organized for profit and having a capital stock represented by shares and every insurance company" in apposition, but by the use of these particular terms it is intended to define the several classifications or organizations of persons having authority and attributes of individuality given them by the operation of the law to work out corporate purposes, which are to be subject to the excise.

That the plaintiff is an insurance company, within the purview of this act, is hardly open to question. State ex rel. Graham v. Nichols, 78 Iowa, 747, 41 N. W. 4; Citizens' Life Ins. Co. v. Commissioner of Insurance, 128 Mich. 85, 87 N. W. 126. The opinion in the latter case is especially full upon this subject, and on the authorities therein relied upon the question seems to be concluded.

If the plaintiff is, therefore, an insurance company under the act, the transactions in which it admits it is engaged constitute "doing business," as the term is used in the act, for that expression unquestionably means the substantial doing of some work or the exercise of some of the functions for which the corporation was created. Beard v. Union American Publishing Company, 71 Ala. 60, 62.

[2] It follows, therefore, that, unless the plaintiff may establish itself as one of the companies or associations specifically exempt from the operation of the statute in the proviso which is now quoted, it is clearly subject to tax. The proviso reads as follows:

"Provided, however, that nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual."

By the General Code of Ohio, under which the plaintiff is organized, it appears that it cannot claim the privileges and immunities of a fraternal beneficiary society. It avers in its petition that it is a corporation organized and acting under the provisions of sections 9427 to 9461, inclusive, of the General Code of Ohio. These sections constitute chapter 3, subdivision 1, division 3, title IX, of the Code of Ohio, as officially arranged, and is the chapter which by its title provides for the organization and regulation of mutual protective associations, The initial section (9427) reads as follows:

"A company or association may be organized to transact the business of life or accident or life and accident insurance on the assessment plan, for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families, heirs, executors, adminis-

trators, or assigns of the deceased members of such company or association, as the member may direct, in the manner provided in the by-laws. The company also may receive money either by voluntary donation or contribution, or collect it by assessments on its members, and may accumulate, invest, distribute and appropriate such money in such manner as it deems proper. All accumulations and accretions thereon shall be held and used as the property of the members and in the interest of the members, and not to be loaned to, used, appropriated, or invested for the benefit of any officer or manager of such company or association. No company or association shall issue a certificate for a greater amount than it is able to pay from the proceeds of one assessment. Such company or association shall be subject to the provisions of this chapter."

We submit that the business transacted by the plaintiff, as described in the extract from the petition which we have quoted above, is precisely that outlined and authorized by this section 9427, and that plaintiff before the court stands, as it pleads, squarely under this section and the subsequent sections of that chapter. Chapter 4 of the same subdivision and title is made up of sections 9462 to 9509, inclusive, and provides for the organization and regulation of fraternal benefit societies as distinct from mutual protective associations. Its initial section (9462) reads as follows:

"Any corporation, society, order, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with section 5 hereof, is hereby declared to be a fraternal benefit society."

Can it be said that the law of the state from which the plaintiff derives its authority to exist and do business makes it possible that plaintiff, organized as a mutual protective association, can be at the same time a fraternal beneficiary association? We feel that there is but one answer to this question, and that it necessarily follows that this situation of the law of Ohio, in force when plaintiff was organized and when the act of 1909 was passed by Congress, deprives plaintiff of the right to claim to be within the exception written into section 38, which we have quoted above.

This is true whether the words "operating under the lodge system," in the proviso, modify simply "associations," or apply to each of the several classifications in the expression "fraternal beneficiary societies, orders or associations operating under the lodge system." We think that the proper construction applies the words "operating under the lodge system" to each of these classifications, but, whether it does or not, in contemplation of the law of Ohio the plaintiff is not a "fraternal beneficiary society."

It seems very plain that Congress, in using this expression, did not intend to include within its operation a mutual protective association, such as plaintiff is. A mutual protective association, operating as

plaintiff does, is nothing different from a mutual insurance company. A fraternal beneficiary association may be a mutual insurance company, and must be something more. The court shall assume that Congress used the term according to its legal significance at the time the act was passed. Grogan v. Garrison, 27 Ohio St. 50, 63. This term had been extensively defined, judicially and by statute, before 1909. Berry v. Knight Templars' & Masons' Life Indemnity Co. (C. C.) 46 Fed. 439; Knight Templars' & Masons' Life Ind. Co. v. Berry, s. c. (Eighth Circuit Court of Appeals) 50 Fed. 511, 1 C. C. A. 561; National Union v. Marlow, 74 Fed. 775, 21 C. C. A. 89; Corley v. Travelers' Protective Association, 105 Fed. 854, 46 C. C. A. 278. These cases establish the definition of a fraternal beneficiary society inconsistent with plaintiff's claim that it should be so regarded, and all of them are cases decided long anterior to the passage of the act.

Defining the words "fraternal beneficial" as used in the Missouri Revised Statutes of 1889, Judge Thayer, in National Union v. Marlow, supra, 74 Fed. on page 778, 21 C. C. A. 92, says:

"It is noteworthy that, while the phrase 'fraternal beneficial' is used in the connection above shown to designate a particular kind of societies or associations that may be incorporated, yet it was not thought necessary to otherwise define the descriptive phrase thus employed. We must accordingly assume that the words 'fraternal beneficial' were used in their ordinary sense-to designate an association or society that is engaged in some work that is of a fraternal and beneficial character. According to this view, a fraternal beneficial society, within the purview of the Missouri statute, would be one whose members have adopted the same, or a very similar, calling, avocation, or profession, or who are working in unison to accomplish some worthy object, and who for that reason have banded themselves together as an association or society to aid and assist one another, and to promote the common cause. The term 'fraternal' can properly be applied to such an association, for the reason that the pursuit of a common object, calling, or profession usually has a tendency to create a brotherly feeling among those who are thus engaged. It is a well-known fact that there are at the present time many voluntary or incorporated societies which are made up exclusively of persons who are engaged in the same avocation. As a general rule such associations have been formed for the purpose of promoting the social, moral, and intellectual welfare of the members of such associations, and their families, as well as for advancing their interests in other ways and in other respects."

In Corley v. Travelers' Protective Association, supra, our own Circuit Court of Appeals, construing section 641, Kentucky Statutes, which provides that the words "insurance company" or "insurance corporation," as used in the section, "shall not apply to secret or fraternal societies, lodges or councils which are under the supervision of a grand or supreme body and secure members through the lodge system exclusively," said:

"We think this association comes under the Kentucky statute, unless it is within the exception embodied in section 641 of the statutes. We find nothing in the organization of a secret or fraternal character. We do not find the supervision of a grand or supreme body and members secured by the lodge

system exclusively. Not all commercial travelers may become members entitled to the benefits of the insurance. An application is required, setting forth the willingness of each applicant to submit to a physical examination, and waiving all provisions of law now existing or that may hereafter exist preventing any examining or attending physician from disclosing any information acquired while acting in a professional capacity or otherwise, or rendering him incompetent to testify as a witness in any way whatever. The 'benefits' are stated at a fixed amount in case of death, and certain specific sums for various injuries. It is evident that persons not answering these questions satisfactorily, though otherwise eligible, would be rejected as members. We do not discover in this association the features which characterize associations which the statute exempts from its provisions."

States other than Ohio, Missouri, and Kentucky had written into their statutes a definition of what constitutes a fraternal beneficial society in precisely the same lines. We have noticed Connecticut Public Acts of 1895, page 592; New Hampshire Public Statutes of 1901, page 578; Oklahoma Revised Statutes of 1903, section 3236; Michigan Public Acts of 1893, No. 119. Doubtless other states, to which our investigation has not extended, have similar provisions. It seems certain, however, that no state has a definition of a fraternal beneficiary association which would include an organization doing but the business of plaintiff and organized as it is; at least, we are unable to find any such, and we think we are justified in holding that at the time this act was passed the class of corporations to which plaintiff belongs was in law entirely distinct from that of fraternal beneficiary associations.

The decision of the Supreme Court in the corporation tax cases (Flint v. Stone-Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312), in holding that the constitutional limitation requiring uniformity in cases of taxation does not require equal application of the tax to all coming within its possible operation, but is limited to geographical uniformity only throughout the United States, and in deciding that Congress may tax a distinct advantage found in carrying on business in the manner specified in this law over carrying it on by partnerships or as individuals, and that the privilege which plaintiff obtained through its incorporation is that which is the subject of the tax, makes it clear that, in passing the act of 1909, Congress was justified in observing and acting upon just such a distinction as is here made.

[3] It cannot be said on the facts before us that plaintiff is engaged in some work that is of a fraternal and beneficial character. No more is it so engaged surely than was the National Union when the case in 74 Fed., supra, was decided, or the Travelers' Protective Association, defending in the case in 105 Fed. 775, 21 C. C. A. 89, supra, whose business, as shown by the quotation from the opinion which we have made from the case, proceeded on substantially the same lines as that of the plaintiff here. The absence of profit in the operation of the association is not the criterion, but the want of a fraternal side and ob-

ject which it is in some measure organized to promote. Such an absence in plaintiff's case is vital to its claim to be within the exception to the statute.

It follows that the demurrer should be sustained, with exceptions to the plaintiff.

LEAD CITY MINERS' UNION v. MOYER et al.

(District Court, D. South Dakota, S. D. August 6, 1916.)

EASEMENTS 516-IMPLIED GRANT-SEVERANCE OF OWNERSHIP.

The owner of two adjoining lots, one back of the other, built a three-story building covering the front lot and, together with a rear porch, extending 20 feet upon the back lot. One floor is used as a theater; the dressing rooms and part of the stage being upon the back lot. The owner afterward conveyed the unoccupied portion of the back lot for a public alley. There is no way of entering the rear of the building, except by way of such alley and the porch. Later the owner mortgaged the property, describing in the mortgage only the front lot. Held, that its acts created by implication a permanent easement in so much of the back lot as was occupied by the building and porch in favor of the front lot, on which he main part of the building was situated, which easement inured to the benefit of the mortgagee and its successors in title.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 43; Dec. Dig. \$3-16.]

In Equity. Suit by the Lead City Miners' Union against Charles H. Moyer, the Western Federation of Miners, the Butte Miners' Union, and others. Decree for defendants.

Hayes & Heffron, of Deadwood, S. D., for plaintiff.

Stewart & Hodgson and W. G. Rice, all of Deadwood, S. D., for defendants.

ELLIOTT, District Judge. This is an action brought by the plaintiff to quiet title to lot 61, block 8, in the city of Lead, S. D., hereafter referred to as the "back lot." The defendants answer, and I find practically no dispute as to the material facts.

The lot fronting on Main street, referred to by all of the parties as the "front lot," is 105 feet deep, and this lot may be referred to as lot 57 in block 8. There is a three-story building on this lot, extending over onto lot 61, block 8, a distance of 10 feet, and the porch an additional 10 feet. This lot 61 is designated by the parties hereto as the "back lot."

It is conceded that this building was never constructed with reference to the lot lines and has always been used as one building, and

I find that one of the floors was used as a theater, that a part of the stage is in the end of the building on the back lot, and extends over onto the front lot, and the dressing rooms of the theater are on the porch, and that this porch extends to all three floors of the building.

I further find: That there would be no means of entering or leaving the building situated on the front lot, from the rear part of the building, except through that portion of the building standing on the back lot, and through use of said porch, and that such use has been made of the rear of the building and porch on said back lot since the completion of the building, many years prior to the giving of the mortgage and trust deeds thereon. That by such use there was an apparent permanent and obvious servitude imposed upon that part of the estate referred to herein as the back lot, and in favor of the front lot, which was absolutely necessary for the enjoyment of the use of the three-story building situated thereon.

I find that in the year 1900 plaintiff deeded to the city of Lead all of the back lot, except that portion of said lot on which the rear 10 feet of the building and the said porch stand, for use as a way or alley. April 1, 1910, plaintiff mortgaged to the Butte Miners' Union the said front lot, which mortgage contained the above description, and also the description of the same lot as contained in the Mitchell plat, and as extending back 105 feet, to secure a loan of

\$25,000.

I find from the testimony that, prior to making this loan, a committee representing the plaintiff went to Butte, Mont., and there presented the matter of securing a loan, and the security to be given, to the Butte Union; no particular description of property being mentioned, by lots or blocks, but always referring to the property as "the Lead City Miners' Union Hall or Opera House."

It further appears that a committee of the Butte Union, before the loan was made, came to Lead and examined the property. Thereafter, on the 27th day of April, 1911, this plaintiff deeded to Charles H. Moyer, as trustee of the Western Federation of Miners, the said front lot, describing it in the same manner as in the mortgage above referred to. Thereafter, on the 29th day of April, 1911, plaintiff deeded to Charles H. Moyer, as trustee of the Western Federation of Miners, all of the back lot above referred to, on which the said building stands, reserving only that portion that had been theretofore deeded to Lead City. Moyer, by virtue of the two deeds, from and after April 29, 1911, held the title to both lots in trust for the Western Federation of Miners, and the Butte Miners' Union held a mortgage on the front lot only, to secure an indebtedness from the plaintiff of \$25,000.

Nothing was done until the year 1913, when the plaintiff in this action began an action in the circuit court of the Eighth judicial circuit in and for Lawrence county, seeking a cancellation of the Butte mortgage, and also a cancellation of Moyer's deed to the front lot, al-

leging, among other grounds, that both deed and mortgage were executed without authority, and that the deed to Moyer was to secure the payment of certain advancements made and to be made to the plaintiff union by the Western Federation of Miners, which in fact had never been received by the Miners' Union, and further prayed that, in the event the deed and mortgage were not canceled, an accounting be had, and the total amount be determined by the court, and that the deed to Moyer be decreed to be a mortgage, and for general relief.

Such proceedings were had in that case that separate answers were interposed by the Butte Union, by Moyer as trustee for the Western Federation of Miners, and by Moyer and other officers of the Western Federation of Miners, and a decree was thereafter duly entered in said action sustaining the Butte mortgage for the full amount, and also ascertaining the amount due the Western Federation on account of advances made by them for this plaintiff, decreed Moyer's deed to be a mortgage, and ordered a sale of the property covered by the Butte mortgage and the deed to Mover decreed to be a mortgage, for the amount due.

This action had reference only to the mortgage to the Butte Union and the deed to Mover, trustee, to the front lot. No issue was joined with reference to the back lot, and no claim was made by any of the parties answering under or by virtue of the deed to the back lot, dated April 29, 1911, nor did plaintiff herein in that action assert any title thereto. The front lot was sold under execution issued on said decree on the 16th day of May, 1914, and at the sheriff's sale Moyer, as trustee for the Butte Union and the Western Federation, bid upon said lot the full amount of the judgment and costs of sale. Immediately thereafter this plaintiff instituted this action against these defendants to quiet title to the back lot.

The rights of the parties to this litigation must be determined in the light of these admitted facts; the defendants contending that, holding title under and by virtue of such sale, they are now entitled to a decree of this court on the rear 10 feet of the building and the porch. used in connection with the building located on the "back lot," to be appurtenant to the building on the "front lot," and ask that they have a further decree that they have a perpetual easement in the back lot to support such appurtenant, and further ask that the plaintiff and all persons claiming under it be forever enjoined and restrained from in any manner interfering with the free use and enjoyment of such right.

The plaintiff relies upon the fact that the mortgage was given upon a definite description, giving the number of the lot, the number of the block, and the length of the lot. Plaintiff further contends that under the decree of the state court the deed to Moyer, as trustee, to the front lot, was decreed a mortgage to secure the indebtedness above referred to, and further contends that his deed to the back lot was intended to secure the same indebtedness. This I find to be the fact. All parties concede this.

Plaintiff further contends that the defendants had a right to elect to foreclose the mortgage on the front lot, given to the Butte Union, and the mortgage in the form of trust deed given to Moyer, and, having established their lien, to sell upon execution the front lot for the entire amount secured by both mortgages, together with costs. That, having elected to do this, there is nothing due upon the indebtedness secured by the deed upon the back lot, and that they are entitled to have it canceled.

It is further insisted by the plaintiff that the second deed was given to Moyer for the purpose of covering that portion of the building situated thereon, and was a recognition of the fact that it was not intended to cover that portion of the building by the first deed or the mortgage. Plaintiff insists that no easement passed by implied grant outside of the boundary lines of the front lot.

The question presented, therefore, by this record, resolves itself into a determination by the court of this issue.

"Upon the subject of easements passing by implied grant, much discussion is found, and, while substantial agreement exists as to general rules, considerable uncertainty prevails in their application to particular cases. must be conceded that, during the unity of title, the owner may subject one of several tenements or adjoining parcels of land, to such arrangements, incidents or uses, with respect to the other, as may suit his taste or convenience, without creating an easement in favor of one as against the other. Where during the unity of title an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which, at the time of the severance, is in use, and is reasonably necessary for the fair enjoyment of the other, then upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage in substantially the same condition in which it appeared and was used when the grant was made." John Hancock Mut. Life Ins. Co. v. Patterson, 103 Ind. 582, 2 N. E. 188, 53 Am. Rep. 550; Lampman v. Milks, 21 N. Y. 505; Kieffer v. Imhoff, 26 Pa. 438; Pennsylvania R. Co. v. Jones, 50 Pa. 417; Phillips v. Phillips, 48 Pa. 178, 86 Am. Dec. 577; McCarty v. Kitchenman, 47 Pa. 243, 86 Am. Dec. 538.

I am satisfied that the application of this rule depends entirely upon the character of the improvement, the nature of the use of the building, the arrangement of the building, and therefore the use of the several parts, and that it was the owner's purpose, in adopting the existing arrangement, to create a permanent and common use in that part of the back lot upon which the end of the building and the porch was situated, for the benefit of the larger portion of the structure situated upon the front lot.

In my judgment, the undisputed facts in the case, as above stated, force the determination of this issue in favor of the defendants and against the plaintiff. I am satisfied that, considering the character

of this building and its arrangement, the use to which it was put, and the fact that all of the land was deeded to the city, except that covered by the porch and 10 feet of the end of the building, it was designed by the plaintiff to be permanent, that it is necessary to the enjoyment of the main building on the front lot, and that the parties contracted with reference to the condition of the property at the time of the giving of the mortgage, and therefore that neither has a right to alter arrangements then openly existing, so as to change materially the relative value of the respective parts. Curtiss v. Ayrault, 47 N. Y. 73; Butterworth v. Crawford, 46 N. Y. 349, 7 Am. Rep. 352; Cave v. Crafts, 53 Cal. 135.

In reaching this determination, I have considered the permanency of the building, the nature of the arrangement, the apparent purpose and use made by the plaintiff during the ownership of both of these lots, rather than the consideration of a possible use that might be made of the front lot and that portion of the building situated thereon.

Judgment may therefore be entered in favor of the defendants and against the plaintiff, subjecting plaintiff's ownership in the back lot to a perpetual easement to support defendants' appurtenant, and that the plaintiff and assigns be enjoined and restrained from interfering with the free use and enjoyment of such right.

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UNITED STATES v. SCHLATTER et al.

(District Court, S. D. California, S. D. July 3, 1916.)

No. 1110.

POST OFFICE \$\infty 48(4) - OFFENSE-WHAT CONSTITUTES.

Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), declares that whoever, having devised any scheme to defraud or of obtaining money or property by means of false or fraudulent pretenses, shall, for the purpose of executing such scheme, use the mails, is guilty of an offense. An indictment averred that defendants conspired together to contrive and consummate a scheme through which, by the medium of alleged divine healing, they could obtain money from afficted persons, and that in pursuance of such scheme they used the mails, well knowing that their claims were false. Held that, while mental or divine healing is legal, the indictment charged an offense; it alleging that defendants knew that their claims to effect cures were wholly false.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 72; Dec. Dig. \$48(4).]

Francis Schlatter, A. Schrader, and Gus Algard were indicted for violating the postal laws. On demurrer to the indictment by A. Schrader. Demurrer overruled.

Defendant Schrader demurs both generally and specially, to the indictment herein. He is charged, along with the two other individuals above named, with the crime of conspiracy, to violate section 215 of the federal Penal Code, and it is alleged at some considerable length, owing to the nature of the conspiracy, that he and his coconspirators, together with others not known to the grand jury, combined, conspired, and confederated together to defraud numerous persons, many of them unknown to the grand jury, and being such persons as could be induced to believe the false and fraudulent misrepresentations of defendants, and to cause them to yield up to the said defendants their money and property in virtue and because of the fraudulent representations to be made by the defendants.

Briefly, the scheme devised and contrived by the defendants, as alleged in the indictment, was that they would induce any and all persons whom they could induce to communicate with them to believe that they could and would cure almost all manner of known diseases by and through the medium of divine power. Specifically, for instance, it was alleged that the defendants conspired to represent to credulous ones, with whom they could get into communication, that they could and would bless a handkerchief, and that, if a person afflicted would apply such handkerchief to the afflicted portion of such person's body, he or she would thereby become cured. This, of course, was to be for a quid pro quo; not necessarily certain or definite in amount, but such a sum as the one seeking a cure felt justified in contributing.

The indictment specifically alleges that the defendants could not cure any kind or sort of disease by divine power, and that they knew they could not effect such cures in such wise, and that they knew that persons affected with disease could not be cured by the placing of a blessed or other handkerchief upon their afflicted parts. It is also alleged that the defendants represented that they had cured many people of various kinds of disease, whereas in truth and in fact that they had not cured any person of any disease. It is further alleged that the defendants well knew that the scheme which they had contrived, and which they were executing, as alleged in the indictment, was in-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

tended by them to be used for the sole purpose of obtaining money and property from the persons intended to be defrauded, by means of the false and fraudulent representations set out in the indictment so that the defendants could convert such money and property, so obtained, to their own use and benefit, and without returning anything of value to the persons so intended to be defrauded.

Apt allegations are made with reference to the intention to use the mails of the United States in furtherance of the scheme to defraud, and of the actual use of such mails, and of the commission of overt acts in furtherance of the conspiracy, and necessary to bring it within the inhibitory provisions of the Penal Code of the United States.

Albert Schoonover, U. S. Dist. Atty., and J. Robert O'Connor, Asst. U. S. Dist. Atty., both of Los Angeles, Cal.

A. A. Sturges, of Los Angeles, Cal., for defendant Schrader.

BLEDSOE, District Judge (after stating the facts as above). Substantially, then, the charge against the defendants is that, with the knowledge that they could accomplish no cures, and with the deliberate intention to defraud, they conspired together to contrive and consummate a scheme wherein and whereby, through the medium of alleged divine healing, they would obtain and convert to their own enrichment the money and property of such persons as might be sufficiently gullible as to be attracted by their specious and alluring promises of relief, all the while intending that such persons should receive no return for their money and property, save that comprehended in a dismal and costly experience. As a part and parcel of the scheme, and in furtherance thereof, it is alleged that they intended to, and actually did, make use of the mails of the United States. This, in my judgment, states a complete offense (Durland v. United States, 161 U. S. 306, 313, 16 Sup. Ct. 508, 40 L. Ed. 709); and, if the proofs be made in adequate support of the allegations in the indictment, there is no doubt, in my mind, but that the defendants should suffer punishment therefor.

The point made in the brief of defendant's counsel apparently is that the defendant is and professed to be nothing more than a Divine Healer, and that divine healing has been practiced since the time of Christ, and in some form or other is practiced now by many reputable and widely recognized individuals and cults. That mental healing, or even divine healing, per se, is, under the laws of the land, as lawful as healing with drugs, or by massage, or other media, is true. Post v. United States, 135 Fed. 1, 9, 67 C. C. A. 569, 70 L. R. A. 989. But it is not true, never has been true, and never will be true, that fraud can be glossed over or rendered reputable in the eyes of the community merely because it is associated with, or a feature of, some undertaking otherwise lawful in its nature and innocuous in its effect. In other words, the mere fact that a fraudulent scheme centers about divine or other healing does not in any wise or sense serve to take it out of the domain of a fraudulent scheme, and if, in furtherance of such a scheme conceived in fraud, the mails of the United States are made use of, without doubt, by whomsoever conceived or consummated, the perpetrators of such schemes should receive prompt and merited condemnation and punishment. It is therefore no answer to the crime charged in this indictment to assert that the defendants were engaged in the praiseworthy vocation of divine healing. That in no wise answers the charge that, with a knowledge that they were rendering no service at all to their "patients," and with the deliberate intention on their part to defraud their patients, they were using the mails of the United States in aid of their scheme to separate their

patients from their money.

The whole question, without doubt, revolves around the proposition as to the good faith of these defendants. If they were acting in good faith in their promise to bring the bloom of health back to the cheek of him who might make use of one of their blessed handkerchiefs, then, as this court had occasion to charge the jury in United States v. Elder et al., "no matter how visionary their view may have been, no matter how ill-founded their conclusions may have been, no matter how much sheer incompetence in the exercise of judgment may have been their portion," they are not liable to prosecution as for the perpetration of a fraud upon those who became their dupes. The simple query in the case is: Were they actuated by good faith? The indictment says they were not, but, on the contrary, were moved by an intent to defraud. In the face of such an allegation, they cannot claim that no crime is charged against them.

The demurrer to the indictment is overruled.

In re ROMM.

(District Court, D. Massachusetts. August 14, 1916.)

No. 22136.

BANKRUPTCY \$\infty\$ 317-Provable Claims-Priority.

Costs made on a writ of attachment against a bankrupt prior to the bankruptcy proceedings are provable, and entitled to preference, although the writ was not entered, but was released after such proceedings, where such costs would have been provable and privileged under the state insolvency law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 493-495: Dec. Dig. €=317.]

In Bankruptcy. In the matter of Alexander Romm, alleged bankrupt. On review of order of referee. Affirmed.

Horblit & Wasserman, of Boston, Mass., for alleged bankrupt. James W. Murdock, of Brockton, Mass., pro se.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

MORTON, District Judge. The costs here in question accrued on a superior court writ against the alleged bankrupt which was issued and served before the filing of the petition. Before the return day of the writ arrived, these bankruptcy proceedings had been instituted, and the offer in composition had been made. The writ was not entered. There has been no adjudication. Property was attached under the writ as belonging to the defendant therein, and a considerable part of the costs here claimed arose in connection with that attachment, which later was voluntarily released on the appointment of receivers by this court. It is contended by the alleged bankrupt that the property attached did not in fact belong to him and that the attachment was invalid. But that issue seems to me, as apparently it did to the referee, to be immaterial to the present question.

It is further contended by the alleged bankrupt that, by reason of the nonentry of the writ, the plaintiff is not entitled to prove the costs on it. If the plaintiff had entered the writ, he could clearly have proved his costs, if his claim was allowed, and they would be entitled to priority. It would seem unfortunate for the law to require him, in order to obtain his costs to the beginning of the bankruptcy proceedings, to pile up further costs by entering the writ. Under the state insolvency law such action would not be required; costs up to the institution of such proceedings are provable and privileged. Rev. Laws Mass. c. 163, § 174; section 118, cl. 7. Under the Bankruptcy Act a debt which has priority under the state laws is a preferred claim. Act July 1, 1898, c. 541, § 64b (5), 30 Stat. 563 (Comp. St. 1913, § 9648).

The order of Referee Stetson, allowing the claims as entitled to

priority, was right, and is affirmed.

UNION FISH CO. v. ERICKSON.*

(Circuit Court of Appeals, Ninth Circuit. August 14, 1916.)

No. 2680.

4. Admiralty \$\infty 13-Jurisdiction-Maritime Contract.

A court of admiralty has jurisdiction of a suit for breach of a contract by which the libelant was employed for a year as master of a vessel, notwithstanding the fact that he was also required to assist at a fish-packing plant on shore when possible "without interfering with his duties as such master."

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 164-176; Dec. Dig. ⊕ 13.]

2. Courts \$\infty 489(1)\$—Concurbent Remedies—Effect of Local Statutes.

A local statute of frauds cannot deprive one of the right to relief in a case where redress is afforded by the maritime law, and is sought to be availed of in a cause of action maritime in its nature, and depending in a court of admiralty of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1326; Dec. Dig. \$ 320(1).]

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Suit in admiralty by John W. Erickson against the Union Fish Company. Decree for libelant, and respondent appeals. Affirmed.

H. W. Hutton, of San Francisco, Cal., for appellant.

F. R. Wall, of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The appellant, as shown by the record, is a California corporation having its principal place of business at the city of San Francisco, engaged in fishing, and having a salting station at Pirate Cove, Alaska, and owning at the times in question a certain American vessel called the Martha. The ground of the libel, which was filed in the court below by the appellee, is as follows:

"That in the month of May, 1914, at said San Francisco, said respondent and said libelant entered into an oral contract or agreement of hiring, wherein and whereby it was mutually agreed that said libelant was to proceed to Pirate Cove, Alaska, and after arrival there to serve the respondent as master of said schooner Martha for a period of not less than one year, and also during said time to assist the manager of said respondent's salting station at said Pirate Cove when possible to do so without interfering with libelant's duties as said master of said schooner; that it was further agreed by said respondent and said libelant that said libelant was, during said time, to receive for said services wages at the rate of \$55 a month and board and lodging for himself and his wife, and, at the end of not less than one year, transportation from said Pirate Cove to said San Francisco; that in accordance with said agreement said libelant proceeded to said Pirate Cove, where he arrived on or about the 12th day of June, 1914, and thereupon entered upon the performance of his duties as aforesaid, and continued to perform the same until the 18th day of July, 1914, when libelant was, by said respondent without fault on libelant's part, discharged from the services of said respondent, and libelant and his wife were thereupon by said respondent furnished with

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 235 F.—25 *Rehearing denied October 9, 1916.

transportation from said Pirate Cove to said San Francisco; that said respondent has paid libelant the aforesaid wages at the rate of \$55 a month up to and including the 15th day of July, 1914, and furnished board and lodging to said libelant and his wife up to August 5, 1914, and for no further or other time; that on said 18th day of July, and at all times since then, said libelant was and has been and still is ready, willing, and able to perform his part of said contract of hiring; that because of the breach of said contract of hiring as aforesaid libelant has been damaged in a sum of not less than \$1,430, which sum he asks this court to award to him."

[1] Certain of the points relied upon by the appellant are based upon its contention that a part of the contract is maritime in character and a part nonmaritime. We see no merit in the contention. It is conceded, as a matter of course, that the employment of the appellee by the appellant as master of the schooner was a maritime contract; but it is said that, because by the terms of the contract the libelant was also to help the company's agent at Pirate Cove in certain work on shore, there was no jurisdiction in admiralty.

In Alaska Packers' Ass'n v. Domenico, 117 Fed. 99, 54 C. C. A. 485, this court affirmed the jurisdiction in admiralty of a contract made by men who acted as seamen to and from salmon fishing grounds in Alaska, to work as fishermen during the season, and assist in canning fish on shore, and in loading them on board for transportation, and notwithstanding that the men while engaged in fishing slept on shore

and mended their nets and cared for the fish on shore.

In North Alaska Salmon Co. v. Larsen, 220 Fed. 93, 135 C. C. A. 661, the contract which was the basis of the libel provided for the services of the libelant as a seaman, fisherman, beachman, trapman, "and such other services as might be required" by the appellant's superintendent; and the contention there made was that the above-quoted clause of that contract rendered it nonmaritime. In holding against that contention we cited with approval the case of Alaska Packers' Ass'n v. Domenico, supra, and also that of The Minna (D. C.) 11 Fed. 759, decided by Judge Brown, afterwards an Associate Justice of the Supreme Court, where he said:

"All hands employed upon a vessel, except the master, are entitled to a lien if their services are in furtherance of the main object of the enterprise in which he is engaged. * * * I do not regard the fact that libelant slept upon shore at night, and there reeled out and mended the nets, as qualifying in any way the nature of his contract. These services were merely incidental and subsidiary to his main contract."

In Keyser v. Blue Star S. S. Co., Ltd., 91 Fed. 267, 33 C. C. A. 496, it was held, among other things, that:

"Where a provision of a charter party for a foreign vessel, though not in itself maritime in character, is so connected with the other stipulations therein as to render it an essential part of the contract, and it appears probable that without it the contract would not have been entered into by the owners, a court of admiralty has jurisdiction of an action for an alleged breach of such a provision."

In Church v. Shelton, 2 Curt. 271, 274, Fed. Cas. No. 2,714, Judge Curtis said that, the contract being maritime, the admiralty—

"will proceed to inquire into all its breaches, and all the damages suffered thereby, however peculiar they may be, and whatever issues they may involve."

And in Ben. Adm. (4th Ed.) § 143, it is said:

"If a contract is maritime in itself, it carries all its incidentals with it, and the latter, though nonmaritime in themselves, will be heard and decided."

See, also, Id. § 16.

It is perfectly apparent from the present contract that the main employment of the appellee by the appellant was for services as master of the schooner, and that his additional services in aid of the appellant's manager at Pirate Cove were purely incidental thereto, for it is in express terms declared that after arriving at that station the appellee should serve as master of the schooner for a period not less than one year, and during such time should also assist the appellant's manager there when possible to do so without interfering with his duties as such master.

It is also contended on the part of the appellant that the finding of the court below to the effect that the libelant was discharged without cause on July 18, 1914, was not sustained by the evidence, but an examination of it satisfies us that it is.

[2] The appellant's main point, however, is that the contract was absolutely void because of the then provision of the Civil Code of California which reads as follows:

"The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent: 1. An agreement that by its terms is not to be performed within a year from the making thereof. * * * " Section 1624.

Alaska Code, § 1044, contains the same provision. It is insisted that courts of admiralty are bound by that statutory provision, and therefore that there was no basis for the present libel.

In the case of Workman v. New York City, Mayor, etc., 179 U. S. 552, 560, 21 Sup. Ct. 212, 215 (45 L. Ed. 314), the court (four of the justices dissenting) distinctly adjudged that neither the local law nor any of the decisions of a state can deprive one of the right to relief—

"in a case where redress is afforded by the maritime law, and is sought to be availed of in a cause of action maritime in its nature and depending in a court of admiralty of the United States."

The judgment is affirmed.

THE JULIA LUCKENBACH.

(Circuit Court of Appeals, Second Circuit. June 6, 1916.)

No. 277.

 Shipping ← 121(2)—Liability for Loss of Cargo—Unseaworthiness of Vessel.

The sugar cargo of an iron steamer under charter to the carrier was damaged by sea water, which entered through a hole in the half-inch iron sheathing near the keel, where it had become rusted through from the inside by the action of sugar and salt water, which had reached the plates because the cement lining had either been broken or become loose. The vessel had been carrying sugar cargoes for several years, and the corrosion must have been going on for months or years. The hull at that place had not been thoroughly inspected for more than a year. Held, that the loss was due to the unseaworthiness of the vessel, that due diligence had not been exercised by the owner to make her seaworthy, and that neither the vessel, owner, nor charterer was protected from liability by Harter Act Feb. 13, 1893, c. 105, §§ 2, 3, 27 Stat. 445 (Comp. St. 1913, §§ 8030, 8031), although the charterer's bill of lading contained an exception of unseaworthiness.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 450, 451; Dec. Dig. \$\infty 121(2).]

2. CARRIERS \$\infty\$ 125—Liability for Loss of Cargo—Exceptions in Bill of Lading—Provision for Benefit of Insurance.

A bill of lading, providing that in case of loss or damage for which the carrier is liable it shall have the benefit of any insurance effected by the shipper, is not effective to protect the carrier from such liability to the extent of the insurance, where the contract of insurance limits the liability of the insurer for loss or damage to goods in possession of a carrier to so much as cannot be recovered from the carrier, although it requires the insurer to "advance" or "lend" to the insured the full amount of the loss until such recovery can be had, and in effect provides that action against the carrier shall be maintained for the benefit of the insurer and at its expense.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 552-556; Dec. Dig. ⇔=125.]

3. Shipping \$\infty\$=141(4)-Limitation of Liability-Effect of Charter.

The owner of a vessel who by a time charter has contracted to deliver her in a seaworthy condition and to maintain her in a thoroughly efficient state in hull and machinery during the charter term, cannot limit his liability for a loss occurring during such term due to her unseaworthiness.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 493; Dec. Dig. ©—141(4).]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the W. J. McCahan Sugar Refining Company against the steamship Julia Luckenbach, with the Insular Line, Edgar F. Luckenbach and others, owners of the Julia Luckenbach impleaded. Decree for libelant in the sum of \$100,774.87 against all respondents, with limitation of liability to claimants of the Luckenbach, and the Insular Line appeals. Modified.

See, also, 200 Fed. 976.

The following are the opinions of Hough, District Judge, in the court below:

On Final Hearing in Admiralty-Libel for Loss of Cargo.

The owners of sugar laden on the Julia Luckenbach brought action in rem against the vessel, and in personam against charterers, for the loss in question. Charterers appeared, the Luckenbach was claimed, and stipulation given in \$60,000, which for the purpose of this case is her agreed value. Subsequently libelant's damages were raised by amendment to \$87,000, whereupon the charterers petitioned in the Luckenbach's owners, in order that they might respond for so much of the recoverable loss as exceeds the agreed value of the steamer. The issues presented are therefore (1) whether the libelant can recover at all; and (2) whether the ship and owners, or charterers, or both, are responsible for recoverable damages.

For some years prior to April, 1912, the Julia Luckenbach, an iron steamer then about 30 years old, had carried sugar (during the season) between Porto Rico and Atlantic ports. In the month named she was under charter to the Insular Line, and on and before April 25th had loaded a partial cargo of sugar in San Juan harbor. At 2 a. m. of April 26th she left her pier, and at 7 a. m. arrived at Arecibo, where she completed cargo by taking on additional sugar. At 8:30 p. m. of April 27th she left Arecibo (where she had lain offshore loading from lighters) and proceeded on her voyage to Philadelphia. She encountered strong winds and rough seas, so that the vessel rolled and pitched a good deal, and shipped water in and over decks. She encountered that degree of strain to be expected in frequent Atlantic weather, and no more. It is not asserted that any injury received is due to peril of the sea, in the legal sense of that phrase.

At 7:40 p. m. on April 28th—i. e., after about 24 hours of rough weather—she was found to have 7 feet of water in her after hold, and was thereafter with great difficulty kept afloat (the after hold being of unusual size), until refuge was found in San Juan harbor. A hole was then discovered in a plate on her starboard side (strake B), very nearly, if not accurately, 1¾ by ¾ of an inch. At the edges of the hole the original ¼ inch of iron had worn to a knife edge; the plate in the immediate neighborhood was much decayed.

Temporary repairs were made, which naturally removed all cement from the vicinity of the hole. It is clear from the testimony of the vessel's officers that when examined in San Juan the cement backing was gone; but there is naturally no direct evidence as to the condition of said cement at and just

prior to the breaking away of the iron plate.

There is satisfactory testimony that the outside paint showed no signs of scratching or abrasion in the vicinity of the hole, and that the hole itself was from 15 to 18 inches above the keel. This disposes of one issue raised in the pleading; i. e., that the Luckenbach lay aground at San Juan and was punctured or weakened by so doing. I think it is quite plain that the Luckenbach was in the mud in San Juan harbor; how much mud it is impossible to say with certainty, but it was soft. Vessels go in it a foot or more without requiring tugs to get them out. The Luckenbach was certainly not in that much, and even more certainly was never in deep enough to put the spot where the hole was found upon the ground—if soft mud is ground.

The immediate cause of flooding the hold and of the consequent destruction of sugar was the sudden breaking of the impaired plate. Such impairment of plate had evidently existed long before the beginning of the voyage, whether said voyage is held to begin at San Juan or the last port of departure from the United States. No vessel with such a thin plate is seaworthy; consequently the Luckenbach was not seaworthy, and she and her owners are responsible for the loss due to such breach of warranty, unless they exercised due diligence. This is the measure of their obligation, both

under the bill of lading and the Harter Act.

Messrs. Martin and Work (both witnesses for the Luckenbach) have put in the record a satisfactory diagram showing the position of this hole. It was in a peculiarly difficult place to observe. Admittedly the plate or its cement could not be studied thoroughly without taking up the permanent ceiling, though the region could be seen by removing boards loose for that purpose, and inserting a light behind the permanent ceiling boards.

The Luckenbach is old, but well constructed, and no criticism is made of the quality of her materials. The reason for the decay of this good iron plate is admitted; i. e., corrosion through a mixture of salt water and sugar—a subject sufficiently dwelt upon in The Alvena, 79 Fed. Rep. 973, 25 C. C. A. 261.

One witness deposes to knowledge of a substantial iron plate having been eaten away by this compound in less than 12 months. Mr. Martin would not like to say that it could be done in so short a time as 2 years, but he is quite certain that it could happen inside of 4 years. Thus neither to lawyers nor mariners is there anything novel in the danger to iron ships in the sugar trade, and the Luckenbach had long been engaged therein.

Due diligence must always be proportioned to the amount of danger reasonably anticipated, so it is evident that owners of this ship were bound to exercise special care to guard against the special danger that has produced this great loss.

The corrosive mixture of water and sugar must be in contact with metal in order to work damage; the cement backing is to prevent such contact. Evidently the Luckenbach's cement had either long been broken, or had not been tight against the plate—in the latter case forming a sort of pocket, where fluid would rest with peculiarly destructive results.

If the cement was broken, probably a thorough search with lights would have revealed it; but if it was loose nothing but taking up the ceiling and tapping the cement would reveal the hollow space. That the whole ceiling had not been up for three years is, I think, fairly shown; that it had not been possible to examine otherwise than by lowered lights for over one year is, if not plainly proven, admitted. This in my opinion was not due diligence, and I say this recognizing that the Luckenbach's defect was even more difficult to discover than that so thoroughly discussed by Brown, D. J., in The Alvena (D. C.) 74 Fed. 254, 255.

The above findings would dispose of the case, were it not for the claimants' and respondent's contention that for much, if not all, of the damage they are entitled to the benefit of shipper's insurance.

The lost sugar was shipped under bills of lading containing the familiar clause: "In case of any loss, detriment, or damage done to or sustained by said goods, or any part thereof, for which the carrier shall be liable to the shipper, owner, or consignee, the carrier shall to the extent of such liability have the full benefit of any insurance that may have been effected upon or on account of said goods."

Insurance was effected on said goods, with five separate companies, whose countervailing weapons in the long fight between shipper and carrier (or, rather, their underwriters) were not identical.

Some policies contained the words: "Warranted by the assured free from any liability for merchandise in the possession of any carrier or other bailee who may be liable for any loss or damage thereto, and for merchandise shipped under a bill of lading containing a stipulation that the carrier may have the benefit of any insurance thereon." 1

Others provided: "In case any agreement be made or accepted by the assured with any carrier or bailee by which it is stipulated that such or any carrier or bailee shall have, in case of any loss for which any carrier or bailee (or their underwriters) may be liable, the benefit of any insurance effected by the assured, then and in that event this policy shall be void as regards any liability for such loss hereunder." ²

Down to this point the two forms are alike in effect. All the policies antedated the shipment, and were (pro tanto) voided by the issuance and acceptance of the bill of lading. The policies last referred to continue as follows: "But this company, in these and all cases of loss or damage by perli insured against, shall be liable and owe actual payment for (only) what cannot (and could not in the absence of this insurance) be collected from carriers

 $^{^1}$ Federal Insurance Company, ½ risk; Thames & Mersey Company, ½ risk; Ætna Insurance Company, $^3/_{32}$ risk.

² St. Paul Fire & Marine Company, ²/₁₈ risk; Manheim Insurance Company, ²/₂₈ risk.

and/or bailees of property lost or damaged, and shall also be chargeable with the direct pecuniary loss to the assured temporarily arising from delay in collecting from said carriers and/or bailees; and the advancing (for the purpose of avoiding only of such pecuniary loss) of funds to the assured for his protection pending such delay, shall in no case be considered as affecting the question of the final liability of this company, but as soon as collection is made from carriers and/or bailees, the assured shall retain only such proportion of the sum or sums so advanced by this company as will with the amount collected from carriers and/or bailees, make up the sum of the assured's loss, and the balance of the sum or sums as may have been advanced by this company shall thereupon be paid back to this company; but if no such collection can be made from carriers and/or bailees, the assured shall retain so much of said sum or sums so advanced by this company as shall not exceed the actual liability of this company thereby established (provided always the loss shall constitute in other respects a claim under this insurance).

These clauses amount to a contract by insurers to advance sufficient funds to the insured to protect him from the pecuniary loss temporarily arising from delay in collecting from carriers, and to an agreement to pay the difference between actual loss and recovery from carriers, not exceeding the amount of the insurance nullified by the earlier words of the policy.

When libelants lost their sugar, this libel was filed by counsel for the underwriters, and a few days later receipts were signed by libelants evidencing large payments, to them by their several insurers. The form of these receipts varies slightly. The variances are of no importance, and the material points may be shown by the receipt taken by the St. Paul Fire & Marine Company, which is one of the underwriters covenanting to advance money.

This receipt reads: "Borrowed and received of the [insurer] \$18,583.30 as a loan, and not as a payment of any claim which we may have against said insurance company. This amount is loaned to us and is to be returned by us to the [insurer] when and to the same extent which we recover from any other person or corporation the value of [the lost sugar]. In consideration of said loan we hereby agree to use our best endeavors to recover the value of the sugar from all persons or corporations who may be liable therefor, and that we will institute and prosecute all suits in our name for that purpose, as we may be requested by the [insurers] but at their expense and not ours." It is signed by libelant.

As a compliance with the terms of its own policy, this receipt is a curiosity. But whether or not bound to do anything by their policies' terms, the receipts all show payments called loans, which the lenders are to get back as best they can by suing somebody at their own expense, but in the name of the insured. Sometimes the claim in suit, or the bills of lading for the lost merchandise, are specifically pledged for "repayment" of this "loan"; but all the receipts would leave the uninitiated with the belief that the "loan" had no other origin than a desire to buy a lawsuit.

The foregoing lengthy statement can be justified only by a desire that this case be taken further, and some settlement reached in a matter wherein the fictions and subterfuges of the law would excite the admiration of a casual ejector. It is not necessary to go beyond this circuit for instances. The decisions in Pennsylvania Railroad v. Manheim Ins. Co. (D. C.) 56 Fed. 301, Pennsylvania Railroad v. Burr, 130 Fed. 847, 65 C. C. A. 331, and Bradley v. Lehigh Valley Railroad, 153 Fed. 350, 82 C. C. A. 426, give a very fair picture of the sort of thing which has rendered the decision in Phœnix Insurance Co. v. Erie & Western Tr. Co., 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873, only useful among fools.

What was done in this case, the course of business pursued, the anticipated, agreed upon, and paid-for insurance schemes, differs from that pursued, investigated, and approved in the Burr and Bradley Cases in no material particular. The sole difference in the record is that these carriers have produced

^{*}How large cannot be fixed, as all the receipts have not been filed. Apparently more was "advanced" than is sued for.

[•] Federal Insurance Company; Ætna Insurance Company.

in court the man behind the apparatus of papers, and Mr. Ogden has naturally told the truth.

This record contains proof that, when a shipper gets insurance he (or his broker) knows that by the policy he pays for he is left (pro tanto) without insurance whenever he accepts a bill of ladding requiring him to give the carrier the benefit of his contract; but he is contemporaneously assured that by a gentleman's agreement, paid for by his premiums, he will receive against usual proofs of loss the amount he would have gotten had there been no bill of lading, that he will never be called on to pay back any of the money, and that as far as he is concerned his insurance protection is as absolute as though one clause in the policy did not exist, because he is assured beforehand that in consideration of his premium that solemn warranty will not be practically enforced.

To say that a man in this condition is not insured, is nonsense; any insurance company that refused to make the so-called "loan" could be successfully sued, the complaint sounding in fraud and deceit. Indeed, recourse need not be had to a pleading in tort, for the real contract is not expressed in policy and riders. The actual and enforceable agreement is to pay the loss, provided it be always called a "loan." To say that what one must pay and does pay, parts with for a consideration, and can never recover from the recipient, is a "loan," insults understanding. Unless shams are loved for themselves, they must be encouraged for a reason. Such reason exists here; i. e., there has always been a settled hostility to the Erie & Western Case among the lower courts.

Nor do I suppose that all the shams above described were not patent to Wallace, J., when he wrote in the Bradley Case. It never needed Mr. Ogden's admissions to enable that judge to see what he wished to perceive behind the machinery of misbranded papers. There has never been any desire to pierce through pretense to truth, and that which defeated the carrier's defense has been almost uniformly viewed with approval. But Wallace, J., saw that the time must come when the truth would come before some court, and how far he was prepared to go is shown in 153 Fed. 353, 82 C. C. A. 429: "It is not important that the [insured] may not have expressly consented to receive the payment as one not made by the insurance company in recognition of its liability. It suffices if the insurance company did not intend to recognize its liability." And again: "The parties were at liberty to agree that the payment * * should be regarded as a loan or as a gratuity."

Even on the papers the learned court found the word "loan" a little difficult; gratuity certainly goes far enough. Of course the assured will agree to any form of papers which gets him his money quickest, so that it has been solemnly held in this circuit that, whatever the payment is called, whatever the label put on it, controls, at least sufficiently to close the mouth of the carrier tort-feasor. Mr. Ogden assuredly put on the labels, he has doubtless read the cases, and what his companies can never recover is consistently called a "loan," and at present this seems enough to make it a loan for legal purposes.

The damages and costs are recoverable against shipowners and charterers—the latter, however, only if execution fails against ship and owners.

The first inquiry is as to the value of the Luckenbach in her injured condition in May, 1912. The libel was originally filed for \$60,000, and the vessel was discharged on a stipulation for value for that amount. The next month the ad damnum of the libel was raised to substantially the amount proven and admitted at this hearing. Several months later the claimants and owners filed their answer, claiming limitation and asserting a value of \$60,000.

No effort was ever made to reseize the vessel or get further security. There never was an appraisement of the vessel herein, and no evidence as to her value has been introduced by the parties, who now object to a \$60,000 valuation. So far as opinion evidence goes, it is all to the effect that \$60,000 was her value; the acts of the objecting parties confirm that view. The history of the vessel is that she was first the Zaandam of the Holland-American Line, then the Styria, and finally, about ten years before this disaster, the Julia Luckenbach. These names are so familiar in the records of this court that judicial notice might almost be taken of the fact that she was a

very old vessel, built of iron, which obtained an American registry under the wreck statutes, and cost about \$80,000 10 years before her owners valued her at \$60,000. She was wholly lost at sea about eight months after the injury which gave rise to this litigation, and was then insured for \$100,000. In 1909 Mr. Frank S. Martin appraised her at \$70,000. On the whole, I am of opinion that the evidence is overwhelming that \$60,000 was full value for her in May, 1912. The amount of insurance is evidence of nothing but how large a premium owners were willing to pay to insurers who wanted the money.

In May, 1912, the Julia Luckenbach was, and had been since May 31, 1911, under charter to the Insular Line. By that charter party the steamer was to be placed at the disposal of the charterers on said May 31st, being then "tight, staunch, strong and in every way fitted for the service." The charter also contained the usual provision that the owner should "maintain [the steamer] in a thoroughly efficient state in hull and machinery for and during the service," and was signed "Estate of Lewis Luckenbach, per Edgar F. Luckenbach, Trustee." By the pleadings it is admitted that the Lewis Luckenbach estate did not own all the steamer, and that the charter party was made by Mr. Edgar F. Luckenbach on behalf of all the owners. All the owners, having been impleaded, have appeared and made the foregoing admission. The charter party is therefore regarded as the contract of all the owners through their duly authorized agent and managing owner, Mr. Luckenbach.

The libelant shipped its sugar under a bill of lading issued by the Insular Line. It is admitted that, under the findings of the court heretofore made, that bill of lading affords no defense to libelant's demand. It follows that since (as has been found) the loss complained of was caused by unseaworthiness of the Luckenbach, existing at the beginning of the voyage from Porto Rico to Philadelphia, the libelant must recover in rem up to the stipulated value of the vessel, and obtain the overplus from the Insular Line, which in turn has recourse against the impleaded owners of the steamer, unless said owners can obtain the limitation for which they now move.

It has been affirmatively shown that the owners of the Julia Luckenbach were not privy to, nor had they knowledge of, her unseaworthiness. The meaning of these words has been sufficiently considered in Quinlan v. Pew, 56 Fed. 111, 5 C. C. A. 438. They failed to use due diligence in keeping their vessel seaworthy, because the competent men whom they employed to supervise and inspect the steamer so failed, within the stringent rules laid down by the courts. Perhaps it is more accurate to say that their own diligence was unavailing, under the law.

But it does not follow that, because errors, omissions, or mistakes were made by their properly selected servants, they must stand ultimately responsible in solido. Primary liability is to be imputed to them, but neither privity nor knowledge is to be so imputed. It is, indeed, admitted that owners liability should under the statute be limited to the value found, were it not that such owners made a personal contract when Mr. Luckenbach signed the charter party. From this fact, and this alone, under The Loyal, 204 Fed. 930, 123 C. C. A. 252, and Benner Line v. Pendleton (C. C. A., June, 1914) 217 Fed. 497, 133 C. C. A. 349, it is confidently urged that limitation must be denied.

Ruling decisions must be followed, as long as their authority is unimpaired, but the frank expression of opinion is a professional right. I am respectfully, but firmly, convinced that The Loyal, supra, was rightly decided, for the reason given by Ward, J., viz.: The owner had not shown absence of privity or knowledge. But the reasons advanced in the prevailing opinion of Noyes, J., asserted to rest on the language of Great Lakes Towing Co. v. Mills Trans. Co., 155 Fed. 11, 83 C. C. A. 607, 22 L. R. A. (N. S.) 769, have led to the judgment entered in Benner Line v. Pendleton, supra.

⁵ The question whether owners other than Mr. Edgar F. Luckenbach are or are not entitled to limit liability has not been argued. Owners' counsel have assumed that each owner is ready and able to pay his appropriate fraction of the loss, if limitation as for a single owner is denied. The case, therefore, is considered as though there were but one owner and he had personally signed the charter party.

That a shipowner cannot limit for the consequences of his own fault or neglect is elementary, for no such act or omission can be conceived without fixing such owner with either privity or knowledge, or both. That he cannot escape fulfillment of his own contract has been often held (Richardson v. Harmon, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110, and cases cited), but never until Benner Line v. Pendleton, supra, was such a contract as a charter party considered as a contract preventing limitation.

The Great Lakes Towing Company Case arose out of a written agreement whereby respondent promised to pay libelant for (inter alia) "wrecking or bottom" work. Such work was done to a vessel of respondent, which nevertheless became almost a total loss; whereupon respondent endeavored to limit payment to the value of the remnant of its vessel. It was held upon abundant authority that the payment of a debt formally contracted for, could not be thus avoided by the contractor. Every case cited, or to be found before the Great Lakes Towing Company decision, and laying down the doctrine that a shipowner cannot limit for his own contract, shows the same kind of contract, viz.: An agreement to pay money, in such wise that an action in debt or assumpsit would have laid therefor.

There is no case before The Loyal, supra, where an owner, free of privity or knowledge, was refused limitation because he personally made a contract which had to be performed by the ship, which contemplated and required service by the ship, as a prerequisite to pecuniary reward. Nor indeed is The Loyal such a case on its facts, but the language of the court (204 Fed. 932, 123 C. C. A. 252, especially) invites to the belief that signature of an agreement to furnish a ship, not only raises the irrebutable presumption of an agreement to furnish a seaworthy ship (which no one doubts), but makes the signer liable in solido and without limitation for all the consequences of unseaworthiness, even though he employ the best men, spends all the money demanded, and is himself so unskilled in seamanship and shipbuilding as to be personally unable to ascertain the facts which condemn him to liability.

Indeed, it is not seen (the statute of frauds perhaps aside) why a written agreement or contract is necessary; the same consequences would apparently flow from a verbal charter. For this doctrine the case relied on (Great Lakes Towing Co. v. Mills Trans. Co., supra) is not authority. To make it so the facts must be inverted. If the libelant in that case had without privity or knowledge of defects furnished an unseaworthy tug, whereby respondent had received damage, there is nothing in the language of the court to show that limitation would have been refused on account of the existence of the contract.

Lurton, J., as a Circuit Judge, was of the court which decided the Great Lakes Towing Co. Case. When he referred to it in Richardson v. Harmon. supra, he said that the construction of the statute made in that and other cases "harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, * * * but leaves him liable for his own fault, neglect, and contracts." To quote this remark, or any of the cases cited by its maker, as justifying the doctrine that every contract without regard to its nature or method of performance, puts the contractor outside the limitation laws is (to say the least) singular. The master and crew of a ship when navigating or otherwise managing the vessel are acting as the agents of the owner in the fulfillment of that owner's contract. There is no magic in the word "contract," nor in the office of mariner; the logical reason why the owner is not deprived of limitation by negligence of master and crew is that he is necessarily fulfilling his contract by deputy, and the very intent of the limitation acts is to put a measure on the quantum of liability which the owner acting through well-selected agents must assume. It is necessary for an owner to employ master and crew to navigate his vessel, it is just as necessary for him to employ agents, inspectors, shipwrights, and the like to inspect his vessel in order to ascertain her condition before the voyage begins. same reason should lead to the same results in both cases.

But the matter has been considered before now and in this circuit. The petition for limitation of the owners of the Republic was denied by Benedict, J. (In re Myers Excursion & Navigation Co. [D. C.] 57 Fed. 240, 242), because

the vessel was unseaworthy. The court said: The owners "are chargeable with knowledge of what they might have known, and what they were bound to know, because of their obligation to provide a vessel fit for the employment to which it is put. An owner of a ship cannot be permitted to free himself from an obligation of this character by remaining in ignorance of what it was within his power to know." The owners of the Republic had made no written charter party; they apparently operated their boat themselves, but if there had been a written charter party into which to read a warranty of seaworthiness, this language of Benedict, J., is exactly the doctrine of Benner Line v. Pendleton.

In the Circuit Court of Appeals (In re Myers Excursion & Nav. Co., 61 Fed. 109, 9 C. C. A. 386) Wallace, J., pointed out that the ground of decision below was "an implied warranty on the part of the [shipowner] that the barge was reasonably fit for the service for which she was chartered." This doctrine was not approved of, but in affirming the judgment it was said: "The warranty of seaworthiness which is always implied on the part of the shipowner holds him to the obligation of providing a vessel which is in all respects reasonably fit for the voyage and employment in which she is to engage. Yet there may be a breach of this obligation without his knowledge, and without his personal negligence. He may have employed a most competent expert to make all necessary examination of the vessel just prior to the voyage, an expert possessing skill and experience far beyond his own, and the expert may have failed to exercise sufficient care to discover defects which ought to have been found. It would be a hard construction of the statute which would deprive the shipowner of protection under such circumstances."

Later the same court laid down as an established rule (The Tommy, 151 Fed. 573, 81 C. C. A. 53) "that where the owner has provided a suitable person or persons as his agent to inspect, or provide for the proper equipment of, the vessel, he is not deprived of the benefit of the statute limiting liability by proof of negligence of such agent, where he has had no notice or knowledge of such negligence or resultant defect."

These citations seem sufficient to justify the assertion that the officers and crew of a ship are not the only agents of an owner who may plunge him into liability, but only to the extent of ship and pending freight, and to show it as old doctrine that an implied warranty of seaworthiness does not of itself defeat limitation. Yet the Benner Line Case puts liability without limitation flatly on the ground of the existence of a contract containing that very implication, for the court concedes that the owner in that case "thought [his vessel] was in a seaworthy condition at the time she started on her voyage," and does not advert to any evidence whatever tending to show absence of privity or knowledge.

It seems, therefore, that the last judgment of the Circuit Court of Appeals for this circuit perceives a difference between an implication of seaworthiness arising from soliciting freight or passengers, and the same implication arising from a written charter, and it certainly holds that the ordinary charter party not only contains an implied warranty of seaworthiness (which is of course), but prevents the maker of said charter party from even offering to show that said unseaworthiness arose without his privity or knowledge. This is equivalent to holding that every shipowner who signs a charter party (or perhaps charters his vessel orally) is conclusively presumed to be privy and knowing to every detail of his vessel's construction, equipment or apparatus which may affect seaworthiness.

In the case of The Loyal there was no charter party, but an agreement which permitted, if it did not require, the employment of any convenient lighter. There is nothing in opinion or evidence to show whether the respondent used the same lighter once or many times.

In the Benner Line Case the charter party was for a single voyage, the unseaworthiness developed upon that voyage, and the charter maker was held for the familiar breach. In this case unseaworthiness developed or was

The owners of the Republic sold passage tickets, or hired out their barge by the day; that was their business. Why was not every ticket a personal contract, importing a warranty of a seaworthy vessel? Each daily hiring was certainly a charter.

discovered on ${f a}$ voyage which began a year after the charter party was made, and the charter was to endure for three years and seven months.

The Julia Luckenbach had made many chartered voyages before disaster overtook her. It is said that the maintenance clause in the charter party, viz., the owner's agreement to maintain the steamer "in a thoroughly efficient state in hull and machinery," must in the light of the Benner Line Case be construed as an extension of the warranty of seaworthiness at the beginning of the period of hire (admitted to inhere in every charter party) into a warranty of seaworthiness continuing throughout the entire period of the charter, viz., three years and seven months.

There could not be a better example of the extraordinary nature of the rule contended for than is afforded by the facts herein. This charter party was not a demise; the Insular Line were not owners pro hac vice, but within very wide limits they had a right to send the Julia Luckenbach wherever they wished. They could decide as to the character of cargo, and, as has been shown herein, on the character of the cargo largely depends the degree of danger to the vessel.

It is right—and has never been doubted—that the owner who time charters his vessel thereby binds his vessel to whatever lawful freight the charterers put in her, and for the safe transportation and delivery of that freight he should hazard his vessel. But to bind himself to an unlimited liability by such charter party for a period of years is a most extreme contention, and (accepting the Benner Line decision at full value) it depends solely on the meaning to be given to the language of the maintenance clause.

In a case where the demand of the charterers was far less extreme than that here propounded, this question has been considered. In Giertsen v. Turnbull, Sessions Cases 1907-1908, p. 1101, it was held that a series of voyages under time charter did not come within the stages of voyage doctrine of The Vortigern, [1898] Pr. 140, and also that in a time charter "the implied warranty of seaworthiness was complied with when the vessel was handed over to the charterer in a seaworthy condition at the commencement of the period of hire, and that the maintenance clause of the charter party is inserted merely for the purpose of laying upon the owners the burden and expense of maintaining the vessel during the period of hire in a thoroughly efficient state, including of course the expense of all necessary repairs.'

The doctrine of this case has been received without comment or objection by Messrs. Scrutton and Carver. If one accepts, therefore, the doctrine that a shipowner who charters out a vessel unseaworthy at the commencement of the hiring period is liable without limitation, it is not necessary to hold that the ordinary form of time charter here before the court contains an implied warranty of seaworthiness extending through the whole period of chartering.

At the time of voyage begun, therefore, the warranty of seaworthiness of the Julia Luckenbach had (as between charters and owners) been exhausted, and there was no contract between them by which owners bound themselves absolutely to maintain seaworthiness, and also gave up the benefit of statutes which merely embody many centuries of admiralty law.

The motion for limitation is granted.

Kirlin, Woolsey & Hickox, J. Parker Kirlin, and Mark W. Maclay, Jr., all of New York City, for appellant Insular Line.

Peter S. Carter and Charles C. Burlingham, both of New York City,

for claimants-appellants.

Kneeland, Harison & Hewitt, of New York City (Lawrence Kneeland, of New York City, of counsel), for libelant-appellee.

Before COXE and WARD, Circuit Judges, and CHATFIELD. District Judge.

PER CURIAM. [1] Judge Hough, in the two opinions delivered at final hearing and on the limitation of liability, has said practically all that it is necessary to say upon the questions now debated. We may add, however, that we are satisfied that the Luckenbach was unseaworthy as the result of gradual corrosion of the plate at a point where there was no cement or where the cement was cracked.

The contract of carriage was between the McCahan Company and the charterers. The charter not being a demise, the charterers cannot take advantage of the statute limiting the liability of vessel owners.

The cause of the accident being neither an error of navigation nor of management, they are not protected by the third section of the Har-

ter Act.

If the bill of lading contains an exception of unseaworthiness, which we believe it does, the charterers are not protected by the second section of the act, because they have not exercised due diligence in respect to the condition of the steamer.

[2] It follows that the libelant is entitled to recover in full against the charterers, unless the clause in the bill of lading as to its insurance protects them. Under prior decisions of this court (Pennsylvania R. R. Co. v. Burr, 130 Fed. 847, 65 C. C. A. 331; Bradley v. Railway Co., 153 Fed. 350, 82 C. C. A. 426), it does not, and we are not disposed to depart from these decisions. Though the purpose of the insurance company is quite apparent, we can understand a contract of loan which is to be repaid only on a certain condition—e. g., the shipper's recovering against the carrier.

[3] As between the charterers and the owners, the latter are under an express obligation to maintain the steamer in a seaworthy condition. It is not fulfilled by her being seaworthy at the beginning of the charter, or of any voyage under the charter. Our decision in The Benner Line, 217 Fed. 497, 133 C. C. A. 349, holds that the owner

cannot limit his liability against this express contract.

The decree should be modified, so as to award the libelant its full damages, payable primarily out of the steamer and the estate of Luckenbach, any deficiency to be paid by the charterer, with interest and costs.

MOTION PICTURE PATENTS CO. v. UNIVERSAL FILM MFG. CO. et al. (Circuit Court of Appeals, Second Circuit. June 15, 1916.) On Petition for Rehearing, August 4, 1916.)

No. 248.

1. Monopolies = 17(2)—Patents—Restrictive Licenses.

Under the Clayton Bill (Act Oct. 15, 1914, c. 323, § 3, 38 Stat. 731), making it unlawful to lease or sell goods, machinery, or supplies on a condition that the lessee or purchaser shall not use or deal in the goods, machinery, or supplies of a competitor of the lessor or seller, where such condition may substantially lessen competition and create a monopoly, complainant, who by virtue of patents had a monopoly for the manufacture of motion picture projecting machines, cannot, in selling or leasing such machines, require the purchaser to use films manufactured by it, its letters patent for films having expired, and such a contract is invalid, as tending to create a monopoly.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. \$17(2).]

2. Monopolies \$\infty\$ 10-Statutes-Applicability.

The Clayton Bill, leveled at monopolles, applies to contracts entered into before its enactment.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. \$10.]

3. Monopolies \$\infty\$ 10—Power of State—Clayton Bill—Applicability.

Where a contract involved and restrained interstate commerce, the Clayton bill is applicable, though the particular acts of restraint and infringement occurred in the state of New York, where the contract was made.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. 10.]

4. Monopolies == 23-Rights Under Contracts-Use of Patented Articles-Restriction.

Where the holder of a patent for motion picture projecting machines required one licensed to manufacture to impose conditions as to the use of films in the machines, in violation of the Clayton Bill, one who leased a machine sold by the manufacturer to a third person is not bound to observe such conditions, on the theory that a patent license cannot be relied on and its terms repudiated.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 16; Dec. Dig. ⊕ 23.]

On Petition for Rehearing.

5. PATENTS \$\infty 210-Sale of Patented Article-Use.

The sale of a patented motion picture projecting machine carries with it, in the absence of restriction, an implied license of use.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 301, 302; Dec. Dig. ♦ 210.]

6. Patents \$\infty 216\to Construction\to Restriction.

The fact that there was attached to a patented motion picture projecting machine a plate reciting that the sale and purchase of the machine gave only the right to use it upon other terms to be fixed does not, where it did not appear that the terms relating to royalty were ever fixed or brought to the notice of a purchaser from a licensee to manufacture, entitle the holder of the patent rights to royalties.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329; Dec. Dig. ©=216.]

7. Patents = 216—Construction—Restriction.

In such case, evidence that the purchaser had knowledge of the terms upon which the holder of the patent rights was accustomed to grant permission to use a machine manufactured by its licensees will not establish the purchaser's liability for royalties; there being nothing in the notice to prevent the holder of the patent rights from varying the royalties.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329; Dec. Dig. 216.]

Appeal from the District Court of the United States for the Southern District of New York.

Bill by the Motion Picture Patents Company against the Universal Film Manufacturing Company, the Universal Film Exchange of New York, and the Prague Amusement Company. From a decree dismissing the bill, complainant appeals. Affirmed.

This cause comes here on an appeal from a decree dismissing the complainant's bill. The complainant is the owner of the patent in suit (No. 707,934) for motion picture projecting machines, and on June 12, 1912, granted to the Precision Machine Company a license to manufacture and sell these machines for not less than \$150 per machine, and at a royalty of \$5 to the licensor each, with the further restriction that each machine put out by the licensee shall be used (1) solely for exhibiting or projecting motion pictures containing the invention of reissued letters patent No. 12,192, leased by a licensee of the licensor while it owns said patent; and (2) upon other terms to be fixed by the licensor and complied with by the user while the said machine is in use and while the licensor owns said patents (which said other terms shall only be the payment of a royalty or rental to the licensor while in use). The license also provided that a plate should be attached to each machine and such plate was attached in the following form:

"Mfr's. Serial No. 3557.

Special License No. 3666.

"Simplex "Made by the Precision Machine Company "Patented.

"No. 576,185, March 2, 1897. "No. 586,953, July 20, 1897. "No. 673,992, May 14, 1901.

No. 580,749, April 13, 1897. No. 673,329, April 30, 1901. No. 707,934, August 26, 1902.

"No. 722,382, March 10, 1903.

"The sale and purchase of this machine gives only the right to use it solely with moving pictures containing the invention of Reissued Patent No. 12,192, leased by a licensee of the Motion Picture Patents Company, the owner of the above patents and reissued patent, while it owns said patents, and upon other terms to be fixed by the Motion Picture Patents Company and complied with by the user while it is in use and while the Motion Picture Patents Company owns said patents. The removal or defacement of this plate terminates the right to use this machine.

Motion Picture Patents Company,

Reissued letters patent No. 12,192 expired subsequent to the execution of the license by the complainant to the Precision Machine Company. Thereupon the Universal Film Manufacturing Company made a film embodying that invention, and sold it to the Universal Film Exchange, who furnished it for use to the Prague Amusement Company. The Seventy-Second Street Amusement Company became the lawful possessor of a moving picture machine made by the Precision Machine Company. The defendant Prague Amusement Company leased the machine from the Seventy-Second Street Amusement Company and used the film furnished to it by the Universal Film Exchange upon the machine in question. The use of the film upon the machine is the act of infringement alleged. The defendants set up three defenses: (1) That the restrictions in the contract of license to the Prague Amusement Company are contrary to public policy, illegal and void, and the machine therefore is free from the bur-

den of them. (2) That there is no proof of joint infringement as alleged. (3) That the patent is invalid.

Melville Church, of Washington, D. C., and George F. Scull, of New York City, for appellant.

Edmund Wetmore, John B. Stanchfield, and Oscar W. Jeffery, all of New York City, for appellees.

Before COXE and ROGERS, Circuit Judges, and AUGUSTUS N. HAND, District Judge.

AUGUSTUS N. HAND, District Judge (after stating the facts as above). [1] It was held by this court in the case of Victor Talking Machine Company v. Strauss, 230 Fed. 449, — C. C. A. —, that a license to use a patented talking machine upon payment of an initial royalty to cover the life of the patent and upon condition that the licensee purchase all sound records to be used with the machine from the licensor was valid, even though the license provided that title to the machine should pass to the licensor upon the expiration of the patent if the terms of the license had been observed. The present case differs from that case because here the title to the machine at once passed by the sale of the projecting machine to the Seventy-Second Street Amusement Company. We think this case comes within the doctrine of Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, rather than that of Henry v. Dick, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880. This is especially true since the enactment of the so-called Clayton Bill, which provides:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale within the United States, or any territory thereof * * * on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Act Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

This act was not regarded as applicable either in the District Court, or in this court, in the case of Victor Talking Machine v. Strauss, supra, because that case was decided upon a demurrer to the bill upon the face of which no substantial restraint of competition or monopoly in any line of commerce appeared. Here, however, the testimony shows that the complainant has a monopoly under its patents of projecting machines so that, if no films not manufactured by complainant can be used upon these machines, the complainant will obtain an absolute monopoly of the film business, in spite of the fact that its patent on films has expired. If the prohibitions of the Clayton Act mean anything at all, this case falls within them, and the restrictions as to use of films other than complainant's with the projecting machines are therefore void. Indeed, the report of the judiciary committee of the House concerning the Clayton Act shows that its purpose is to reach

the film monopoly. A portion of this report, quoted by Judge Dyer in his opinion in United States v. United Shoe Machinery Co. (D. C.) 227 Fed. 507, is as follows:

"Where the concern making these contracts is already great and powerful, such as the United Shoe Machinery Company, the American Tobacco Company, and the General Film Company, the exclusive or 'tying' contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors, not only from trade in which they are engaged already, but from the opportunities to build up trade in any community where these great and powerful conditions are appearing under this system and practice."

[2] Judge Sessions has held in the case of Elliott Machine Co. v. Center (D. C.) 227 Fed. 126, that this act applies to contracts made before the passage of the act, and we think his opinion justified by decisions of the Supreme Court on which he relied. Louisville & Nashville Railroad Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681; Philadelphia, Baltimore & Washington R. R. v. Schubert, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911. In the case of United States v. United Shoe Machinery Company (D. C.) 227 Fed. 507, Judge Dyer reached the same conclusion in regard to the Clayton Act.

[3] Inasmuch as the contract with the Precision Machine Company involved and restrained interstate commerce, it makes no difference that the particular act of infringement occurred within the state of New York, and the prohibitions of the Clayton Act apply. Marienelli v. United Booking Offices (D. C.) 227 Fed. 170; Nash v. United

States, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232.

[4] It is urged that the defendant Prague Amusement Company cannot rely upon the license and repudiate its terms. It does not rely upon the license, but obtained a lease of the machine from the owner, the Seventy-Second Street Amusement Company, which acquired it after having paid the purchase price, and thus freed the machine from the unlawful restrictions. The remarks of this court upon the motion for a stay pending the decision of the appeal from Judge Dickinson's decree in the criminal prosecution for violation of the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209), in United States v. Motion Picture Patents Co. (D. C.) 225 Fed. 800, would be applicable to the case, if the restrictions we have held illegal had been held valid. Then it would have been true that the defendant, who was using the patented article under a license, could not question the validity of the patent, or claim it lacked invention. These remarks are not applicable when the restrictions are held invalid, and the article, having been thus freed from all restrictions, may be used at the will of the licensee.

In view of the foregoing considerations, it is unnecessary to discuss the other defenses raised by the defendants, and the decree dis-

missing the bill is affirmed.

On Petition for Rehearing.

PER CURIAM. The appellant seeks a reargument upon the question whether the Prague Amusement Company did not infringe by not 235 F.—26

complying with the condition as to royalty or rental imposed by the appellant on users of machines manufactured under its licenses.

[5, 6] The sale of the projecting machine carried with it, in the absence of any restriction, an implied license of use. Mitchell v. Hawley, 16 Wall. 547, 21 L. Ed. 322. The notice which was attached attempted to impose the condition that it should only be used with films containing the invention of a patent which had expired "and upon other terms to be fixed by the Motion Picture Patents Company." The condition as to use only with the specified films we have held illegal for the reasons given in our opinion heretofore rendered. The condition as to which a reargument is desired relating to a continuing royalty was not brought to the notice of the defendants and cannot, therefore, be regarded as limiting the implied license which accompanied the sale of the machine. Cortelyou v. Johnson, 207 U. S. 196, 28 Sup. Ct. 105, 52 L. Ed. 167; Lovell-McConnell Mfg. Co. v. Waite Auto Supply Co. (D. C.) 198 Fed. 133. The clause "upon other terms to be fixed" in no way specified the nature of these terms and in particular in no way mentioned a continuing royalty, or the amount thereof. There is no evidence, moreover, that any "other terms" were ever fixed or demanded. We think such a vague condition insufficient to limit the implied right of user passing to the vendee of the machine, and consequently unenforceable.

[7] The appellant offered evidence at the trial, which was excluded, that the Prague Amusement Company had knowledge of the terms upon which the Motion Picture Patents Company was accustomed to grant permission to use a machine put out by its licensed manufacturers; but this evidence, had it been allowed, would not have obviated the difficulty with the form of the notice. If the terms that were customary had been known, there was nothing in the notice or elsewhere to prevent the appellant from varying the royalty as to nature or amount. Such a condition is too indefinite for enforcement, though a notice of a precise amount to be paid might be perfectly good. The notice affixed to the machine was so broad as to allow the patentee to fix any terms he might choose and to be repugnant to all rights which the owner of the machine might have obtained by his purchase and

implied license.

The motion for a reargument is denied.

ISAACS v. SUSSMAN.

(District Court, E. D. New York. September 4, 1916.)

1. Patents €=328—Validity and Infringement—Fabric-Folding Machine.

The Isaacs and Pellar patent, No. \$19,548, for a fabric-folding machine which automatically adapts itself to the height of the pile of goods when successively folded, held valid and infringed by the device made under the Sussman patent, No. 1,102,555, for an improved machine.

[Ed. Note.—For other cases, see Patents, Dec. Dig. €=328.]

2. Patents = 157(2)—Construction of Claims—Ambiguity.

A claim of a patent, although ambiguous, should, if possible, be so construed as to give it a valid meaning, rather than one which would make it purposeless.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 231; Dec. Dig. ⊕=157(2).]

In Equity. Suit by Moses Isaacs, doing business as the Shuttle Machine Company, against Charles Sussman, doing business as the Simplex Fabric-Laying Machine Company. On final hearing. Decree for complainant.

Munn & Munn, of New York City (T. Hart Anderson, of New York City, of counsel), for plaintiff.

Thomas A. Hill, of New York City, for defendant.

CHATFIELD, District Judge. Suit for infringement of patent No. 819,548, granted May 1, 1906, to Isaacs and Pellar, on application filed

June 3, 1905.

[1] The plaintiff is joint patentee with one Pellar of a device for superimposing successive folds of cloth, of any desired length, upon a cutting table. The testimony shows that Isaacs has some business arrangement, in the nature of a license, from his copatentee, and is entitled to maintain the action as sole plaintiff. It appears, also, that Isaacs, upon a suggestion from his copatentee, worked out with him a machine of this character, while actually engaged in the cutting of garments. They made a rough experimental model, and then left to a pattern maker the various mechanical devices and gears which were necessary to transmit the motions and forces which they had indicated in the model. The plaintiff furnished the money, and although the testimony is such that, as between Isaacs and Pellar, some question might have been raised as to which was entitled to be called the inventor, and as to how far Isaacs was able to assert the facts necessary to qualify as inventor upon a patent application, there is nothing in the record which is sufficient ground for an alleged infringer to question the patentee's rights; that is, there is no clear evidence that Isaacs' share in the joint invention was not exactly what he states it to have

The defendant's machine performs substantially the same work and in exactly the same way as that of the patent in suit. Some 9 years after the issuance of the patent in suit, the defendant made an application (February 3, 1914) for a patent for this machine, and the patent was issued to him July 7, 1914, under No. 1,102,555.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The issuing of the patent to the defendant by the Patent Office is prima facie evidence of patentable invention, but in the absence of the file wrapper, or of any testimony other than that shown by the patents and the machines, it is impossible to ascertain the history of proceedings in the Patent Office. Presumptively, the application is exactly in the language and equivalent to the specifications and claims as allowed. If the defendant's device is an infringement of the plaintiff's patent, assuming that the plaintiff's patent is valid, then the defendant's patent could be presumptively valid only as an *improvement*, and the plaintiff would still be entitled to an injunction. If the defendant's device is not an infringement, then it would follow that the defendant has a patentable combination, without reference to the plaintiff's claims.

The patents offered as anticipations, or as a part of the prior art, to limit the plaintiff's claims, are few in number. The earliest of these, to Spalding, was issued August 28, 1841, and was for a machine to fold and measure cloth as produced in a loom or mill. It should be borne in mind, as recognized by Spalding, that the folding of cloth, back and forth, would give exact lengths to each fold, and this could be taken advantage of in counting the number of lengths, and hence obtaining the measurement. But a device to accomplish this result would require comparatively small horizontal movement, as each fold or length would be only that of the standard of measurement. This is shown also by Wadsworth, No. 592,264, of October 26, 1897. When the object desired was to fold the cloth in long pieces, upon an extended table, for the purpose of cutting, then the necessity of making the pieces exactly alike in size, of registering the edges and ends accurately, and of locating the fold at such a point as to save as much waste at the end of each piece as possible, would be accomplished by such a machine as that planned by Spalding, but the horizontal movement of the folding mechanism could not be extended to any length of cutting table which might be necessary. Also, when the cutting of cloth for garments was concerned, other obvious difficulties arose, which are fully explained in the patents to Warth, No. 137,041, issued March 18, 1873, on a specification dated January 13, 1873, and No. 137,518, issued April 1, 1873, on an application filed March 21, 1873.

This patentee (Warth) states that, if two layers of cloth are formed by laying back one length upon itself, then the nap of the second layer would run up one leg of a pair of pantaloons and down the other, if the fabric should be cut with one pattern placed upon the top of the pile. This inventor also points out that, in order to form the two sides of the pair of pantaloons from one cutting, the two layers of cloth just referred to must be so placed that the one side or face of the cloth will be opposed to the same face upon the next fold, in order that one leg of the pantaloons shall not be inside out, when the two pieces are placed in position in a garment. Warth accomplished this by turning over the cloth in his carrier, at the end of each fold, when this was necessary, or by turning around the carrier, so as to reverse the sides, at the end of each fold, if that was necessary.

It thus appears from these old patents that the idea of a machine for folding, measuring, and placing strips of cloth in a pile, in such shape as to economically allow them to be used for cutting all of the folds with one application of the pattern, was open to the use of any one.

The plaintiff patented a machine which did not cut off successive strips or folds, like the Warth devices, or Couzineau, No. 604,605, of May 24, 1898. But he was seeking to construct a machine which, like those shown in the English patent, No. 2,792, of 1869, to Worrall and Kershaw, and to Cox, No. 573,448, December 22, 1896, would fold back and forth a continuous strip, upon a long table, with a device for holding the ends of the long strips as each was laid down, and for raising or adjusting the parts to meet the increasing height of a pile.

The Spalding, Wadsworth, Cox and Warth patents all show the idea of carrying the fold of cloth under a spring or clamp resting upon the extreme end of the fold. In such patents as Cox and Warth, these springs or clamps were to be put in place and adjusted by hand. In Spalding, the whole of the work was within reach of the operator, and whatever adjustment was necessary was apparently accomplished

by hand.

The Isaacs and Pellar patent arranged a traveling folder or spreader. with wedge-shaped bars or rulers, hung upon rock shafts, which would by appropriate gears be gradually raised as the pile increased, and which would be capable of equipment with a tabulator, as in the Spalding and Wadsworth patents. Upon the approach of the carriage to the end of the fold, a bar (maintained so as to rock or tilt upon a horizontal axis, placed at the proper position as desired, and having teeth or needles upon the under side to catch and hold the fold of cloth) contacts with an iron arm, which swings, out of the way, that spreader which is not in contact with the fabric, and then by another bar is itself tilted sufficient to allow the second spreader, which is in contact with the cloth, to pass under the edge of this bar which carries the needles or points. Contact with another stop then terminates the course of the machine, and the reversal of motion allows the bar with the teeth to fall, from the force of gravity, and to hold the strip last laid upon the top of the pile.

The plaintiff did not provide for the turning or the cutting of the strips, as the work for which his machine was designed does not seem to involve the difficulties presented by the pantaloon making of Warth, and upon reaching the opposite end of the table, exactly the reverse motion to that just described would be had. Thus, within the limits of the powers of adjustment of this machine, a pile of any desired height of cloth could be accurately formed, and with any length to each fold in the pile.

The defendant pursues exactly the same plan to accomplish exactly the same result, so far as his general purposes and results are concerned. He has, however, this difference in the arrangement of the device to hold the end of each fold. He forms the bar, which carries the needles or teeth upon its under side, out of two plates, each carried by a set of arms rotating upon the same horizontal shaft. A latch holds these two bars together until the carriage passes. Then

pressure against the tilting arm raises both bars and allows the presser or spreader bar to pass beneath, with the folded cloth. At this point contact with an arm adjusted in a position to accomplish this purpose trips the latch and allows the lower of the two plates forming the toothed bar to fall upon the fold of the cloth, but upon the upper side of the spreader bar, which has not yet been withdrawn. Spaces or openings in the upper side of this bar are left to give room for the teeth of this toothed bar. Then the carrier, striking a block and being reversed, withdraws the spreader bar, and the process is reversed at the other end of the fold.

The plaintiff has claims which are general in language, and claims infringement of Nos. 1 and 2, 5 and 6, 11 and 12. Claims 1, 5, and 11 are as follows, and present the issue in question:

"1. In a fabric-folding machine, a table, a carriage movable along the table, carrier bars supported by the carriage, and means for automatically shifting the carrier bars upward."

"5. In a fabric-folding machine, a table, a carriage movable on the table, fabric-clamping devices at the ends of the table and mounted to swing vertically, carrier bars mounted on the carriage, and devices on the carrier bars

for swinging the clamping plates upward."

"11. In a fabric-folding machine, a table, fabric-clamping devices mounted to swing at the ends of the table, a carriage movable on the table, carrier bars mounted to swing on the carriage, devices on the carrier bars for swinging the said clamping plates upward, a table on the carriage for supporting the fabric, and a guide roller at the under side of said table supported by the carriage over which the fabric passes to the carrier bars."

[2] It is contended by the defendant that the words "automatically shifting the carrier bars upward," in claim 1, refer to the possible rocking of the presser bar, and that this idea was old in the art. The plaintiff contends, however, that claim 1 refers to the idea of adjusting the spreader or presser bar so as to correspond with the height of the pile.

While this claim may be ambiguous, it should, if it is capable of construction establishing some valid meaning, be so interpreted, as distinguished from a meaning which would make the claim ambiguous and purposeless. It should be assumed, therefore, that the Patent Office

in allowing the claim had the plaintiff's construction in mind.

It will be seen that the defendant is plainly an infringer, even though the defendant's patent may be valid as an improvement. If the plaintiff is entitled to a broad enough construction of the claims to give them the general meaning indicated, in other words, if the plaintiff was the inventor of the idea of a traveling carrier which could automatically adapt itself to the height of the pile of cloth, and at the same time automatically carry the folds under some fastening device, which should automatically be made to seize the end of the folds when the machine was reversed, these claims are not only valid, but can be read upon the defendant's structure.

The English patent has the idea of the traveling carrier and an adjustable mechanism for laying the folds at each end of the pile, but it is entirely different in principle from a carrier which will lay a pile of folds of any length, by a spreader or ruler, and which shall auto-

matically insert each fold under a bar which acts as a holder.

None of the patents in the record contain any such idea. The plaintiff's device is a combination of the old Spalding idea, of forming the fold, with the carrier of Warth, and the addition of the automatic adjustment, as well as the automatic trip of the holding bar at each end of the fold.

Claim 1 is valid only as a cloth-spreading machine, as distinguished from a folding machine; that is, it necessarily involves the traveling carrier. But, with this limitation, the claims of the patent would seem to be valid. The defendant, starting 8 or 9 years after the plaintiff, and building a machine for the identical purpose, and making use of mechanically identical devices, cannot ask that the court declare to have been obvious to Isaacs and Pellar, 8 years before, what was obvious to him with their patent before him.

While the defendant's patent shows certain novelties or improvements upon the plaintiff's machine, it is not the duty of the court to recognize those improvements, nor the patentability of the improvements, as a defense, in the form of an attack upon the accomplishment of the earlier inventor in constructing the machine which has been im-

proved.

The claims of the plaintiff can be read upon the defendant's machine. The claims of the defendant's patent could not be read, in all details, upon the plaintiff's machine. But this is essentially true of any improvement patent. That which would be an anticipation, if earlier in date, must be held an infringement, if later in date, even though it contains additional details or changes, which show some patentable advance, by way of a combination, which is only an improvement. Where the original patentable combination covers, as an entirety, the idea involved in the combination, and where the equivalents do no more than perform the functions of the parts of the original combination, as claimed in the original patent, then, if that patent be valid, the new combination is still an infringement, and its improved parts are but equivalents of the parts of the original patent. During the life of that original patent, the idea of the combination is the property of the original inventor, and no one has a right to improve upon some step, and to claim the right to a patent upon the whole combination, or whole idea (with the improvement included), unless he can successfully attack the idea of the combination itself, or show that the improved device is not covered by the patent for the combination as issued to the original inventor.

In the present case the absence of the file wrapper and the brevity of the record leave much to be drawn as conclusion from the paper patents and the models. But both sides are bound by such inferences as can properly be drawn from the record as it stands, and upon this record the plaintiff's patent would seem to be valid. The claims involved in this action are broad enough to cover the defendant's machine, and this machine should be held to be an infringement, even though the defendant's patent be also held valid, as showing patentable invention in certain details, the use of which may be limited by the

plaintiff's rights.

The plaintiff may have a decree.

COCA-COLA CO. v. KOKE CO. OF AMERICA et al.

(District Court, D. Arizona. July 6, 1916.)

1. Trade-Marks and Trade-Names &==68—Unfair Competition—Rights of Manufacturer.

One manufacturer has no right to dispose of its goods as though they were the goods of another, and if the facts show such a disposal, relief will be granted.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. € 68.]

2. Trade-Marks and Trade-Names \$\infty 70(1)\$—Unfair Competition—Actions —Right of.

The Coca-Cola Company, having a valid trade-mark in the name "Coca-Cola," spent large sums in advertising its beverage, and the drink acquired the name, as among users, "Koke" and "Dope." Defendants began to manufacture beverages similar in appearance and taste to that of the Coca-Cola Company, selling them under the names "Koke" and "Dope." Defendants used bottles and receptacles similar in appearance to those used by the Coca-Cola Company, and their salesmen attempted to substitute their beverages with the trade for that of the Coca-Cola Company, inducing proprietors of soda fountains to furnish their beverages when customers called for "Koke" or "Dope." Held, that defendants were guilty of attempting to dispose of their beverages as that of the Coca-Cola Company and will be enjoined.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. & \$20(1).]

3. TRADE-MARKS AND TRADE-NAMES \$\iff 99\$—Unfair Competition—Relief.

No one is entitled to pass off his goods as those of enother: but it

No one is entitled to pass off his goods as those of another; but, in a suit to enjoin unfair competition, the question whether defendant has passed off his goods as those of another is one of fact, depending on all the circumstances.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 113; Dec. Dig. \$299.]

In Equity. Bill by the Coca-Cola Company against the Koke Company of America and others. Decree for complainant.

Harold Hirsch, of Atlanta, Ga., Edward S. Rogers, of Chicago, Ill., and Joseph E. Morrison, of Phœnix, Ariz. (Frank F. Reed, of Chicago, Ill., and Candler, Thomson & Hirsch, of Atlanta, Ga., of counsel), for complainant.

Richard E. Sloan and James Westervelt, both of Phœnix, Ariz., and Augustine B. Littleton, of Chattanooga, Tenn. (Littleton, Littleton & Littleton, of Chattanooga, Tenn., of counsel), for defendants.

SAWTELLE, District Judge. The bill in this case seeks relief by injunction, both preliminary and perpetual, against the defendants because of their joint and several infringement of the plaintiff's trademark, "Coca-Cola," and for unfair competition on their part. It also asks an accounting of the profits received by defendants, and the assessment of damages sustained by plaintiff.

The material allegations of the bill, so far as they are necessary to be set forth for the determination of the issues made, are as follows: The first section of the bill recites the initial manufacture of the syrup known as "Coca-Cola" by J. S. Pemberton in the year 1886, and traces the title through its various transfers into the plaintiff company on February 22, 1892. It is alleged that the process and formula for the manufacture of the beverage and syrup styled "Coca-Cola" was new and original, and was invented and discovered by plaintiff and its predecessors as a trade and business formula, process, and secret, and is now a secret formula and process, and not known to the public or others than the plaintiff and its officers and employés and the predecessors of plaintiff.

The second section of the bill charges the continued manufacture of syrup made under the Pemberton formula; alleges that the trademark, "Coca-Cola," was, at the time of its adoption by the predecessors of plaintiff, characteristic and distinctive, and had never before been used by any one, and has continuously been used for the purpose of distinguishing the product of plaintiff and its predecessors from the similar product of others, and that said trade-mark does now identify and distinguish plaintiff's product. It is further charged that plaintiff's product has been given by the purchasers and consumers thereof certain nicknames, to wit, "Koke" and "Dope," and that each of these words are now, and for many years past and prior to the application of either of them to any other beverage, recognized and commonly and familiarly used as nicknames for Coca-Cola, and that a request for either is understood, both by the seller and the purchaser, to be a specific and definite request for Coca-Cola, and has been so understood and regarded and acted on, both by the seller and purchaser, for many years prior to the manufacture or sale of any other preparation under either of said names, and that at the present time both dispensers and consumers use these words as a descriptive of the product of plaintiff. and for no other beverage.

The third section of the bill alleges the application to the patent office for the registration of the words "Coca-Cola" as a trade-mark on May 14, 1892, and the allowance of said application on January 31, 1893, and the issuance of a certificate of registration on that day, which is alleged to be in full force and wholly unrevoked and uncanceled. It is also alleged that on April 23, 1905, under and by virtue of Act Cong. Feb. 20, 1905, c. 592, 35 Stat. 592 (Comp. St. 1913. §§ 9485–9516), the plaintiff duly applied to the Patent Office of the United States for the registration of the said trade-mark "Coca-Cola." and complied in all respects with said act and the regulations of the Commissioner of Patents, and thereupon the registration of said trademark "Coca-Cola" was duly allowed for tonic beverages and syrups for the manufacture of such beverages and a certificate of registration, No. 47,189, was duly granted to the plaintiff on October 31, 1905, and is still in full force and effect, and that plaintiff is entitled to the sale and exclusive right, both generally and in interstate commerce, to use and employ said trade-mark on its goods.

The fourth section of the bill alleges the sale of both the syrup and of an aerated beverage, permitted to be manufactured from the syrup by certain licenses of plaintiff, under the trade-name, in distinctive receptacles, bottles, and barrels and labels, all of which were adopted by plaintiff for the purpose of distinguishing the product of plaintiff from that of other manufacturers in the same lines.

The fifth paragraph sets up that the plaintiff has expended much time, labor, and money in advertising its product. It is alleged that the Koke Company of America was organized under the laws of the state of Arizona about September 15, 1911, and thereafter proceeded in the city of St. Louis to manufacture an unnecessary and deliberate imitation of plaintiff's Coca-Cola syrup, but different therefrom and greatly inferior thereto, and placed the same in barrels and packages similar to those of plaintiff; that said extract is designated by the defendants sometimes as "Koke," and sometimes as "Dope"; that the Koke Company of America ships said imitative extract from the city of St. Louis, usually under the name of "Koke," to the other defendants; and that said extract is used by said defendants as a basis for making a syrup for sale to soda fountains, and in bottles which resemble the articles produced by plaintiff, and that the defendants, as a matter of fact, do sell, substitute, and palm off the said syrup and extract as and for the Coca-Cola products of plaintiff. It is alleged that the said imitation product is, with the consent of defendants, sold to the public in substitution for genuine Coca-Cola. It is further charged that the defendants adopted the words "Koke" and "Dope" as a name for their product many years after the words were commonly used to describe the plaintiff's product, and that said adoption was a means to enable them to substitute their product for that of the plaintiff, and to reap the benefit of its advertising and labor in dispensing and selling said product. It is also alleged that the defendants stated, both to bottlers and dispensers, that the syrup they made was produced under the same formula as Coca-Cola, and instructed both dispensers and bottlers to substitute their product when the purchaser desired and intended to obtain Coca-Cola.

It is further alleged that the registration in the patent office of the words "Koke" and "Dope" claimed by defendants was in fraud of the rights of plaintiff, and that the defendants threaten to sue dealers and dispensers who deliver Coca-Cola when "Koke" and "Dope" are called for, and when both the dispenser and purchaser design to sell and receive Coca-Cola.

The answer denies all the material allegations of the bill, and, after setting up the manner of acquiring title to the trade-names "Koke" and "Dope," denies that, at the time they were adopted by their predecessors, they were generally used as a synonym or nickname of plaintiff's product. The answer then alleges that the plaintiff has been and is now, engaged in establishing a monopoly, and that the business of defendants and their patrons is being subjected to a system of espionage by plaintiff and its officers and agents, and agents are using the information thus acquired to impede and harass the customers of defendants, representing that the business of defendants is fraudulent and dishonest and its product inferior imitations of Coca-Cola, and threatening prosecutions if defendants' products are dealt in by its customers. The answer then alleges that by reason of these representations and threats

many of its customers have ceased to deal in its product, to its damage. It is also contended in the answer that the name "Coca-Cola" was deceptive as a trade-mark, and for that reason was fraudulent, and was but a descriptive name for a product which the plaintiff does not now produce.

Numerous authorities have been cited by both sides, with variant facts; but, as each case must be determined on all the facts that surround it, the facts in any prior case cannot be a guide to the decision of the subsequent. This view is cogently pointed out on page 3 of lectures of John Cutler, of King's College, entitled "Passing Off."

[1, 2] The fundamental principle of the law applicable to this class of cases is well established. It may be thus stated:

"No man has a right to pass off his goods as though they were the goods of another."

"The essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another." Canal Company v. Clark, 13 Wall. 311, 20 L. Ed. 581.

The difficulties which arise are in the application of this principle to the facts of the particular case, and the question which the court has to decide is always a question of fact. The decision of the court depends upon all the circumstances affecting the plaintiff and his trade and the circumstances affecting the defendant and his trade, and both alike must be considered in arriving at a conclusion. I quote from a few of the leading cases both English and American. In the case of Burgess v. Burgess, 3 Deg. M. & G. 896, Lord Justice Turner said:

"No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another."

In the case of Reddaway v. Banham, A. C. 199, 13 R. P. C. 224, the Lord Chancellor said:

"My lords, I believe that this case turns upon a question of fact. The question of law is so constantly mixed up with the various questions of fact which arise on an inquiry of the character in which your lordships have been engaged, that it is sometimes difficult, when examining former decisions, to disentangle what is decided as fact and what is laid down as a principle of law. For myself, I believe the principle of law may be very plainly stated, and that is that nobody has any right to represent his goods as the goods of somebody else. How far the use of particular words, signs, or pictures does or does not come up to the proposition which I have enunciated in each particular case must always be a question of evidence, and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof, but if the proof establishes the fact, the legal consequence appears to follow."

In a later case in the House of Lords, referring to Burgess v. Burgess, the Lord Chancellor made this statement:

"The proposition of law is one which, I think, has been accepted by the highest judicial authority, and acted upon for a great number of years. It is that of Lord Justice Turner, who says, in terms: 'No man can have any right to represent his goods as the goods of another person. In the application of this kind, it must be made out that the defendant is selling his own goods as the goods of another.' That is the only question of law which, as it appears to me, can arise in these cases. All the rest are questions of fact. The most obvious way in which a man would be infringing the rule laid down

by Lord Justice Turner is if he were to say in terms, 'These are the goods manufactured by' a rival tradesman; and it seems to be assumed that, unless he says something equivalent to that, no action will lie. It appears to me that that is an entire delusion. By the course of trade, by the existence and technology of trade, and by the mode in which things are sold, a man may utter that same proposition, but in different words and without using the name of the rival tradesman at all. A familiar example, of course, is when, without using any name, by the identity of the form of the bottle or the form of the label, or the nature of the thing sold in the package, he is making the statement, not in express words, but in one of those different forms in which the statement can be made by something that he knows will be so understood by the public. In each case it comes to be a question whether or not there is the statement made; and, if the statement is made, there can be no doubt of the legal conclusion that he must be restrained from representing that the goods that he makes are the goods of the rival tradesman. Then you get back to the proposition which I have read from Lord Justice Turner," Powell v. Birmingham Vinegar Co., A. C. 710, 14 R. P. C. 727.

"In all cases where rights to the exclusive right of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the authorities." Canal Co. v. Clark, 13 Wall. 311, 322 (20 L. Ed. 581).

"Equity gives relief in such a case, upon the ground that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity. Suppose the latter has obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price the public are willing to give for the article, rather than for the goods of the other manufacturer, whose reputation is not so high as a manufacturer. Where, therefore, a party has been in the habit of stamping his goods with a particular mark or brand, so that the purchasers of his goods having that mark or brand know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp, because, by doing so, he would be substantially representing the goods to be the manufacture of the person who first adopted the stamp, and so would or might be depriving him of the profit he might make by the sale of the goods which the purchaser intended to buy. Seixo v. Provezende Law Rep. 1 Ch. 195." McLean v. Fleming, 96 U. S. 245, 251 (24 L. Ed. 828).

"The first appropriator of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator, or manufacturer, of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is in effect representing falsely that the productions of the latter are those of the former. Thus the custom and advantages to which the enterprise and skill of the first appropriator had given him a just right are abstracted for another's use, and this is done by deceiving the public, by inducing the public to purchase the goods and manufactures of one person, supposing them to be those of another. The trade-mark must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association." Lawrence Mfg. Co. v. Tenn. Mfg. Co., 138 U. S. 537, 546, 11 Sup. Ct. 396, 400 (34 L. Ed. 997).

Every one has the right to use his own name, but he may not lawfully apply it to the purpose of filching his property from another of the same name. The use of a geographical or descriptive term confers no better right to perpetrate a fraud than the use of any other expression. The principle of law is general, and without exception. It is that no one may so exercise his own rights as to inflict unnecessary injury upon his neighbor. It is that no one may lawfully palm off the goods of one manufacturer or dealer as those of another to the latter's injury. It prohibits the perpetration of such a fraud by the use of descriptive and geographical terms which are not sus-

ceptible of monopolization as trade-marks as effectually as it prohibits its commission by the use of any other expressions." Shaver v. Heller & Merz

Co., 108 Fed. 821, 827, 48 C. C. A. 48, 55 (65 L. R. A. 878).

"No person other than the owner of a trade-mark has a right, without the consent of such owner, to use the same on like articles, because by so doing he would in substance, falsely represent to the public that his goods were of the manufacture or selection of the owner of the trade-mark, and thereby would or might deprive the latter of the profit he otherwise might make by the sale of the goods which the purchaser intended to buy. Where a trademark is infringed the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and it is on this ground that a court of equity protects trade-marks. It is not necessary that a trademark should, on its face, show the origin, manufacture, or ownership of the articles to which it is applied. It is sufficient that by association with such articles in trade it has acquired with the public an understood reference to such origin, etc. This doctrine has repeatedly been declared by the Supreme Court. Canal Co. v. Clark, 13 Wall. 311, 323 [20 L. Ed. 581]; Manufacturing Co. v. Trainer, 101 U. S. 51, 54 [25 L. Ed. 993]; Medicine Co. v. Wood, 108 Co. v. Trainer, 101 C. S. 51, 54 [25 L. Ed. 995]; Medicine Co. v. Wood, 105 U. S. 218, 223, 2 Sup. Ct. 436 [27 L. Ed. 706]; Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143 [32 L. Ed. 526]; Goodyear's India-Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598, 603, 9 Sup. Ct. 166 [32 L. Ed. 535]; Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537, 546, 11 Sup. Ct. 396 [34 L. Ed. 997]; Mill Co. v. Alcorn, 150 U. S. 460, 462, 14 Sup. Ct. 151 [37 L. Ed. 1154]." Dennison v. Thomas (C. C.) 94 Fed. 651, 656.

[3] I think it has been established by the evidence in this case that the plaintiff is the owner of and alone entitled to use the trade-mark "Coca-Cola," and that its goods alone can lawfully be sold under that name.

It is insisted by the defendants that the words "Coca-Cola" are a mere description of a product, and that it does not describe the product of plaintiff, and consequently does not constitute a valid trademark. This contention was considered in the case of Coca-Cola Company v. Nashville Syrup Company, 215 Fed. 527, 132 C. C. A. 39, and was there decided adversely to such contention. I think that decision is decisive of the question.

The question of the validity of the trade-mark, "Coca-Cola," and the right of plaintiff to its exclusive use since its registration under the act of Congress of February 20, 1905, would seem to be placed beyond the pale of contention by the case of Coca-Cola Company v.

Deacon Brown Bottling Company (D. C.) 200 Fed. 105.

I find as a matter of fact from the evidence that the defendant Koke Company of America was organized for the purpose of manufacturing and selling a syrup in imitation of that produced by the plaintiff, and that it aided the persons, to whom it sold its product, in the substitution of its product for that of plaintiff, that the name selected was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff, and that the defendants, Koke Company of America and its predecessors, did not adopt or make use of the name "Koke" until the year 1909, and the use of said name by said defendants and its predecessors was not sufficient to create any right to its use as against the plaintiff. Parker v. Stebler, 177 Fed. 210, 101 C. C. A. 380 (9th Circuit); The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154; Deering v. Winona Harvester Works, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153.

I am convinced that when the witness Mayfield adopted the name "Koke," he did so with the deliberate purpose of representing his goods to be the product and manufacture of the Coca-Cola Company. I further find that the purchase of the trade-mark "Koke" from the Murphressboro Bottling Works and from Bitting was made with a knowledge that same was being used to imitate plaintiff's product, and were acquired, not because they distinguished the product sold under such name, but because it would permit defendants to better dispose of their product as and for Coca-Cola, especially in view of the fact that the label of plaintiff was copied and imitated and the barrels in which its products were shipped were colored as nearly like those of plaintiff as possible.

It may be that these resemblances, standing alone, would not, in themselves, justify any relief against a person using them in good faith, but, when considered in the light of all the evidence in this case, I cannot reconcile them with fairness. The opinion of the Circuit Court of Appeals of the Sixth Circuit in Coca-Cola Company v. Gay-Ola Company, in 200 Fed. on page 723, 119 C. C. A. on page 167, contains a forcible comment on the state of facts here shown to exist:

"It is first to be observed that defendant is, at the best, on a narrow ground of legality. The name which it has adopted does not negative an intent to confuse. The product is identical, both in appearance and taste; and the form of script used in printing the 'trade-mark' names is the same. Even if the use of each of these items of similarity was lawful, when accompanied by good faith and no intent to deceive, they put the product near that dividing line where good or bad faith is the criterion, and their presence puts upon the user a burden of care to see that deception does not naturally result. Conversely, when we find, as a fact, from the other conduct of the defendant, that the underlying intent is to perpetrate a fraud upon the consumer, this intent must color the accompanying acts, and some which otherwise might be innocent become guilty. So here. The red color used by complainant on its barrels and kegs is not a color which it discovered, or to which it had any abstract monopoly; but this color has long been used by complainant in a way that was exclusive in this trade. No other manufacturer of analogous or competing drinks uses that color of package, and its adoption by defendant is one of the constituent parts of defendant's scheme of fraud. So, too, with defendant's failure to mark its packages with anything to indicate the place of manufacture. Ordinarily a man may mark his goods, or not, as he pleases; but when he has his marks and labels, which he uses on occasions, and can have no motive for sending out unmarked packages except to aid in a fraudulent substitution, the act, otherwise permissible, becomes forbidden."

The witness Wright of the Southern Koke Company justified the use of the name "Koke," for he says that the name "Koke" was adopted to take advantage of the demand for soft drinks in that name, and I conclude from the evidence in this case that the word "Dope" was adopted for the same purpose. I also find that the defendants' salesmen were instructed to sell, and did sell, both products as and for Coca-Cola. I find that both words are an abbreviation of the words "Coca-Cola" and are used by the public and by purchasers in designating the plaintiff's product, Coca-Cola.

A decree is ordered for complainant. Counsel will prepare and tender a decree in accordance with this opinion.

ECKERSON et al. v. TANNEY et al.

(District Court, S. D. New York. July 25, 1916.)

1. Pleading \$\sim 406(8)\$—Misjoinder of Actions—Waivek.

Under Code Civ. Proc. N. Y. § 488, specifying as grounds for objection the improper joinder of causes of action, and section 499, declaring that, if the objections specified in such section be not taken by demurrer or answer, they are waived, the failure to object by demurrer or answer to the joinder of three mortgages in one complaint seeking foreclosure is waived. [Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1370, 1371; Dec. Dig. \$\simeq 406(8).]

2. Mortgages €==497(1)—Foreclosure—Effect.

A decree directing the sale of mortgaged lands for foreclosure does not, until deed is made, divest the mortgagee of his lien, or the mortgagor of his right to possession and profits.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1469, 1471, 1473; Dec. Dig. \$\sim 497(1).]

3. Mortgages 585-Foreclosure-Judgment-Invalidity.

Code Civ. Proc. N. Y. § 1626, provides for sale of mortgage lands on foreclosure, while section 1632 provides that a deed on foreclosure sale shall divest the mortgagor of his equity of redemption and the mortgagee of his lien. Mortgages were foreclosed, but no sale was had under the judgment, and 40 years later the mortgages were again foreclosed and sale made. Held, that as, until the deed is made in foreclosure, the mortgagor remains the owner of the equity of redemption, and as the deed, and not the foreclosure, destroys the mortgagee's lien, the second foreclosure was not void, and, not having been objected to, good title passed to a purchaser at the sale under the second judgment.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1683; Dec. Dig. &=585.]

4. Pleading \$\infty 422\$\to\$Complaint\$\to\$Verification.

Under Code Civ. Proc. N. Y. § 528, an objection that the complaint was not properly verified is cured by failure to object and does not invalidate the judgment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1414–1417; Dec. Dig. € 422.]

5. Mortgages €=39-Defect of Parties-Effect.

The failure to join in foreclosure proceedings one having an interest in the land does not invalidate the judgment, but merely renders it ineffective as to him.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1292–1297; Dec. Dig. ♦ 439.]

6. Judgment \$\sim 525\$—Scope of Judgment—Recitals.

The judgment is contained, not in the recitals, but in the mandatory portions.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 568, 968, 982½; Dec. Dig. \Longrightarrow 525.]

7. Mortgages \$\infty 494\to Judgment of Foreclosure\to Validity\to Harmless Error.

The complaint set out three several mortgages, praying foreclosure of all of them. The referee found the sum due on each mortgage separately, the aggregate of which was stated. The recitals of the judgment which decreed sale for foreclosure did not separate the amounts, and the land was sold for an amount insufficient to satisfy the first mortgage having priority. Held that regardless of any defect in the judgment recitals which do not

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

constitute the judgment itself, such judgment was not void as failing to follow the complaint, and title passed to a purchaser at foreclosure sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1441–1445; Dec. Dig. ⊗ 3494.]

8. JUDGMENT \$\infty 28-Validity-Partial Invalidity.

That a deficiency judgment was rendered, though not prayed for in the complaint, does not render the entire judgment void; only the deficiency judgment is void.

9. Mortgages 538-Foreclosure-Title.

Title acquired on purchase at sale of land for mortgage foreclosure is not subject to objections because of irregularities, in that the judgment did not exactly follow the complaint, where such defects might have been cured by amendment and the proceeds were distributed according to order of court.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1470, 1525, 1559; Dec. Dig. \$\sim 538.]

10. Vendor and Purchaser = 197—Contracts—Construction.

Where land subject to mortgages was sold, and the vendors agreed to accept a purchase-money mortgage for part of the purchase price, a clause in the contract reciting that as fast as payments were made both liens should be reduced by such amounts meant that payments should be applied to the reduction both of the prior mortgages and the purchase-money mortgages, and gave the purchasers right to withhold payment of any installment until they were assured a reduction of prior liens on the property would be effected.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 407; Dec. Dig. ६ 197.]

11. VENDOR AND PURCHASER 5-182-CONTRACTS-PAYMENTS.

Where purchasers were bound to pay not more than a fixed amount in any one year, they are entitled, there being prior liens on the property as to which the vendors could not necessarily obtain an extension, to insist that their payments be applied to the discharge of such liens, and cannot be forced to make the agreed payments where a collection of such a mortgage would result in an increase of the yearly installments.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 352; Dec. Dig. € 182.]

12. VENDOR AND PURCHASER \$\infty\$174\to Contracts\to Protection.

Where land subject to prior mortgages was sold, and the trustee under one of the mortgages was dead, so that court proceedings would be necessary to enable the purchasers to discharge it, the purchasers are entitled to reserve from the first payment a sum sufficient to reimburse them for necessary expenses.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 358, 359; Dec. Dig. €=174.]

In Equity. Bill by Sarah C. Eckerson and others against Thomas F. Tanney and others. On motion to confirm the report of a special master directing specific performance of a contract to sell land. Report confirmed, with modifications.

The case comes on upon a motion to confirm the report of a special master in a suit for specific performance of a contract for the sale of land. An interlocutory decree on January 12, 1916, directed that on February 1st of that year the defendants should accept a deed provided the deed gave good title. The closing was to be before the special master, and he was at that time to pass upon any questions which the title raised. On the closing day

the plaintiffs presented their title, which was objected to by the defendants. The report of the special master is very complete and shows the title in detail. It is not necessary to repeat the facts here. The special master found the title was good, and directed the defendants to take it and pay the sums due, which they declined to do. Exceptions were afterwards filed to the report of the special master, and the plaintiffs moved to confirm.

Abram F. Servin, of Middletown, N. Y., and Abram J. Rose, of New York City, for plaintiffs.

George A. Blauvelt, of New York City, for defendants.

LEARNED HAND, District Judge (after stating the facts as above). The first question is of the title of the plaintiffs. The simplest way to consider this title is through the suit of foreclosure begun in June, 1913. There were three mortgages foreclosed in one complaint at that time, a mortgage of January 4, 1870, by James Eckerson and wife to John Butler, for \$30,000, upon all the premises, except block E, not in controversy, a mortgage of December 26, 1871, by James Eckerson and wife to Sallie A. F. Servin, upon a part of the premises mortgaged to Butler, and a mortgage on June 24, 1874, by James Eckerson and wife to J. Esler Eckerson, upon all the premises mortgaged to Butler. All these mortgages had come to the ownership of Sarah C. Eckerson and Harriet A. Eckerson prior to the commencement of the suit of foreclosure. This suit went through to judgment of foreclosure and sale, and the referee appointed tendered his deed at the closing day, subject to the payment of \$6,960.08. The title coming from this foreclosure is challenged for several reasons, each of which I shall take up in detail.

- [1] The first objection is that there were joined in one complaint three mortgages which did not cover the same pieces of real property. Assuming that this was a defect, it was waived, because none of the defendants raised it at the time. Section 499 of the New York Code of Civil Procedure provides that, if an objection mentioned in section 488 is not taken by answer or demurrer, it is waived, with some exceptions of which this is not one. Section 488 provides, among other grounds for objection, the improper joinder of causes of action. The objection was not taken, so it was waived; hence this objection to the title is frivolous.
- [2, 3] The second objection to the title is that the Butler mortgage had already been foreclosed by judgment of foreclosure and sale in 1872. This objection misconceives the nature of the foreclosure suit. At common law the failure to pay the bond on the due date terminated the condition subsequent by which the title could be revested in the mortgagor. The suit in foreclosure only allowed an added period within which the mortgagor might still redeem, and resulted in a reconveyance of the legal absolute title vested in the mortgagee; the important point is that the decree did not change the title. Now that a mortgage is only a lien upon the land, the mortgagee's remedy in New York, as elsewhere, is to obtain a decree directing the property to be sold and providing for the application of the proceeds to the debt. New York Code, § 1626. Yet it is the deed, and that alone, which con-

veys the title of the mortgagor and mortgagee, and which changes the title to the property. New York Code, § 1632. Until the deed the mortgagor remains the owner of the equity of redemption and entitled to the profits (Mitchell v. Bartlett, 51 N. Y. 447), and the mortgagee only a lienor. The judgment only directs a sale and bars the right of redemption, but the mortgage as an interest in the real property remains quite as unaffected as did the title of the mortgagee at common law. This was the effect of the ruling in Barnard v. Onderdonk, 98 N. Y. 158, which proceeded upon the theory that the mortgage continued as a lien notwithstanding the decree of foreclosure. The judgment, so far as it touches the land, is no more than a direction that the interests of all parties shall be sold; it is the sale that changes any such interests

Now it may very well be that the former judgment is a good bar to a second complaint for foreclosure, and that defendants could have defeated the second suit, if they had raised the point. That is, however, quite another matter from saying that the second judgment was void, or that no title could come through it. As I have shown, the lien of the mortgage still remained until sale, notwithstanding the first decree. Nothing was changed, yet it would have resulted in a more questionable title than the present to have attempted to sell under a decree more than 40 years old. When, therefore, the court, having all the parties before it, made the second decree, it did no more than make a second direction to sell, and the sale would pass the title under section 1632, under whichever decree it proceeded.

- [4] The next objection is that the complaint was not properly verified, but this is a defect which is cured by failure to object, under New York Code, § 528. Therefore this objection is frivolous.
- [5] The fourth objection is that action was discontinued against Zundel. The only effect of omitting this party is not to conclude him by the judgment. The plaintiffs concede that he must be paid, and are prepared to pay him. The omission has no other effect than this.

The fifth objection was that Catherine M. J. Eckerson was not made a party, but this the defendants concede was cured by a later deed.

[6-6] The sixth and final objection is that the judgment did not follow the complaint, which is said to be a jurisdictional defect where the judgment was by default. The supposed defect I am not sure that I understand. The complaint set out the three several mortgages, which were given at separate times, as already appears. The referee found the sum due upon each of the three mortgages separately, the aggregate of which was \$98,981.14. This total amount due was not separated in the recitals of the judgment, and the defendants' objection may be that this recital spoils the judgment. Now the judgment itself does not reside in its recitals, but in the mandatory portions. That portion reads:

"That the report be and the same hereby is confirmed, and that the mortgaged premises described in the complaint in this action as hereinbefore set forth, or so much thereof as may be sufficient to raise the amount due to the claimants for principal, interest, costs, etc., be sold."

There can be no defect in this judgment so far as it confirms the report and directs the sale of the property. It is suggested that the complaint did not allege that the total sum of \$98,981.14 was due on the Butler mortgage alone, and that it was erroneous to have the judgment read as though it did. I think that the judgment, even in its recitals, should not be so interpreted, but that it must be read with the complaint. Let me suppose, however, for argument's sake, that this is not true. What difference does it make? The land concededly did not sell for enough to pay the Butler mortgage alone, and the direction to sell under that mortgage was certainly in accordance with the complaint. Had there been more land than enough to pay that mortgage, still the sale would have had to proceed to pay the other two mortgages, but whether this would have affected any rights is academic. The point is that the judgment followed the complaint to the necessary extent to convey title. If, on the other hand, as the defendants' brief seems to suggest, the supposed defect is that a deficiency judgment was granted, though none was asked, it is hardly credible that the objection should be seriously made. If the judgment was irregular on that account, the most that could be said is that it was void pro tanto. I cannot conceive how any one could suppose that it affected the decree of foreclosure, which was prayed in the complaint.

[9] Finally, it is to be remembered that the defect, if there was a defect, did not make the judgment void. I do not mean that a complaint which did not ask for foreclosure might be followed on default by a decree in foreclosure, but that is not this case. Here the complaint asked that the property be sold to pay the mortgages, and the defendants were therefore advised of all the relief which it is necessary to this case to support. The property has been sold and the proceeds are to be distributed according to the decree. All the intermediate steps, if defective, are merely irregularities; they might have been corrected by the defendants, but they do not affect the title. Matter of

Stilwell, 139 N. Y. 337, 34 N. E. 777.

Therefore I agree with the master that none of the objections to the title which come through the foreclosure suit are valid; and I find that the deed of the referee in foreclosure conveyed a valid title to the property in question. This discussion obviates the necessity of considering any of the conveyances of J. Esler Eckerson as executor to his sisters of a two-thirds interest in the property. He was a party to the foreclosure, both individually and as executor of James Eckerson, and his title was foreclosed; it also obviates any difficulty in respect of the conveyances made by him individually to his sisters of his one-third interest on March 21 and August 2, 1912. All the existing judgment creditors were joined in the foreclosure suit and have been barred, except Zundel, of whom, as I have already said, care was taken in the closing papers. I may say, however, that the last conveyance by J. Esler Eckerson as executor to his sisters was beyond question valid.

[10, 11] The next question raised is of the four mortgages left upon the property. The first of these questions is whether the contract

required by implication that the mortgages should not fall due in the aggregate at the rate of more than \$12,000 a year. This depends upon the contract. The language relied on to produce this result is as follows:

"As fast as paid and by which payments both liens shall be reduced by said amounts."

This clause is hung in the air and has no grammatical structure, but I think that it none the less clearly means that as fast as the installments are paid the lien both of the purchase-money mortgage and of the prior mortgages shall be reduced. It gave the right to the vendees, who would be the mortgagors, to withhold payment of any installment until they were assured that it would effect an equal reduction in the prior liens upon the property. There is, however, no word in any part of the contract which requires the vendors to procure an extension of the underlying mortgages, so that they should not fall due before the installments of the purchase-money mortgages. Now it is true that, in Exhibit DD, De Baun asked for an extension and estoppel certificate of the mortgages to Andrew X. Fallon for \$15,000, to Jasper H. Allison for \$12,000, to John I. Cole for \$20,000, and of that to Emily C. Jennings for \$2,000. Yet it is not urged that the contract was modified at that time, so as to make an extension necessary.

I directed, however, in the earlier decree, that the purchase-money mortgage should provide that the plaintiffs might not call the underlying mortgages upon the premises held by them, so as to accelerate payments at greater sums than \$12,000 per annum. The point now arises whether the defendants are not further entitled to a direction that the first payments should be held in reserve against these mortgages as the plaintiffs do not themselves hold. The question concerns the marshaling of the installments. I agree that the defendants must in any case pay \$12,000 a year, but it seems to me, if they wish to do so, they should have the option of paying first those underlying mortgages which are in the hands of outsiders, and of which, therefore, I have no power to compel the holders to give extensions. If this be not so, then the defendants are subject to the peril in any year of paying \$12,000 to the plaintiffs and being called upon at once to pay the whole sum of an underlying mortgage in addition. I think that the defendants should have the right to apportion the installments so as to secure the falling due of only \$12,000 a year, so far as possible. I shall not, therefore, direct them to pay the installment due on April 1, 1916, to the plaintiffs, but at their option to pay the same, with interest from April 1, 1916, either to the plaintiffs or upon any of the four mortgages left upon the property. Since one of the mortgages has no present payee it will be sufficient, if the plaintiffs do not secure the appointment of a trustee, if they start proceedings to secure the appointment of a trustee within 30 days after the decree is entered, press the same through with diligence, and make the payment, with interest, within 10 days after he is appointed. While, therefore, I do not think that under the contract they are entitled to an extension, I think they are entitled to protect themselves against a double

payment in any one year by reducing mortgages already due. The plaintiffs may avoid this option of the defendants by securing proper extensions.

[12] The only other question arises from the fact that Fallon, as trustee, was the mortgagee of one of the outstanding mortgages, and, as he is dead, the title to the mortgage is in the Supreme Court. If the mortgagees wish to pay off this mortgage as indicated, they will be obliged to bring some sort of suit to secure a trustee. The only burden which this imposes upon them is that, in order to pay it off at once, some expense would be necessary. If they are allowed to retain an added sum of \$1,000 against such an expense, they will be amply secured; but they must decide within 30 days. Should they institute a proceeding for that purpose, they will be allowed their expenses. In Wacht v. Hart, 120 App. Div. 189, 105 N. Y. Supp. 78, affirmed 198 N. Y. 629, 92 N. E. 1105, it appeared that the mortgage was in foreclosure which was to be an incumbrance under the contract; but the court suggested that, if the expenses of foreclosure had been provided for, the title might have been good. The question is one which money can answer, and there is ample margin within the sum of \$86,000 for the allowance suggested.

As to the supposed assignment of the Emily C. Jennings mortgage, it does not appear that there is any difficulty in learning the actual mortgagee. They must also elect within 30 days if they wish to pay

this mortgage.

The objection that the Finegan judgment was on appeal is not good, unless the judgment was stayed. Howard Ins. Co. v. Silverberg, 94 Fed. 921, 925, 36 C. C. A. 549. It does not appear that it was. Mere appeal does not toll the statute.

The only objection to the title which I do not overrule is that arising from the possible claim of a fraudulent conveyance by J. Esler Eckerson in the deeds to his sister of his one-third. I do not mean that this is good. I simply find it unnecessary to consider that question, and decline to pass upon the exception, as it is immaterial to a disposition of the case.

The interest calculated by the referee is subject to a modification. The purchase-money mortgage was to be "collateral," as it was called, to the underlying mortgages. So much of the interest upon the purchase-money mortgage as equals the interest upon those underlying mortgages, which the plaintiffs do not hold, is not in my judgment payable. So much as is due upon mortgages held by them is payable, if they give receipts for a corresponding amount of interest upon such mortgages. So much interest as is due upon any surplus of the purchase-money mortgage above all the underlying mortgages, with interest to the time of the contract, is immediately payable. The plaintiffs are not, however, to have the right to collect interest upon the purchase-money mortgage and add a corresponding sum to the principal of the underlying mortgages for any period after the contract was made.

The decree will therefore be as follows: The special master will hold the closing papers in escrow until the defendants make the proper payments, and, when they do, he will use them, together with

the plaintiffs' deposit to clear the title, and then deliver the papers as each is entitled, together with any overplus to the plaintiffs. The interest due will be calculated as follows: The defendants will be charged with interest upon the principal sum, \$88,000, and later \$86,000, from the date of the contract till the date of decree. They will be credited with the interest during the same period upon all underlying mortgages not held by the plaintiffs, and if the plaintiffs, before the decree is entered, do not deliver receipts for the interest due under their own underlying mortgages for the same period, then they will be credited with so much interest. They will also be credited with such interest as they have paid. For the balance a decree will pass, upon which execution will issue forthwith; but the marshal will pay the proceeds to the special master, not to the plaintiffs.

The decree will likewise provide that the defendants shall have 30 days in which to pay \$12,000, with interest from April 1, 1916, upon any of the underlying mortgages not owned by the plaintiffs. If within that time there is no person in being entitled to receive such payment, and the defendants shall have commenced proper proceedings to secure the appointment of such person, the time of payment is extended until 10 days after his appointment, if the prosecution be diligent. The defendants in such case shall be allowed credit upon the purchase-money mortgage, not only for such payments, but for their expenses, including counsel fee in securing such appointment, to be fixed by this court, up to \$1,000. If within 30 days the plaintiffs secure extensions of such mortgages, or if within the time specified above the defendants do not pay such installment upon such mortgages, then the defendants shall pay said installment to the plaintiffs, and execution shall issue forthwith as above provided. The decree will provide that there be no costs or disbursements taxed, but that the special master shall take his fee, when allowed by the court or fixed by agreement, out of the funds in his hands. The cause will stand before him to carry out the provisions of the decree, and his report will come up later to be confirmed.

UNITED STATES ex rel. MARSHALL v. GORDON, Serjeant at Arms of House of Representatives.

(District Court, S. D. New York, July 19, 1916.)

1. United States = 23—House of Representatives—Powers of—Impeachment Proceedings.

A subcommittee of the House of Representatives, acting under a resolution for the impeachment of a United States district attorney, is acting within constitutional limits when it investigates the attorney's acts.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 15; Dec. Dig. \$23.]

2. United States \$\iff 21\$—Congress—House of Representatives—Contempt.

While the House of Representatives has not the power of the English House of Commons of punishing contempts, yet it may punish a federal district attorney for insulting language or contumacious conduct directed

towards a subcommittee of the House investigating a resolution for his impeachment.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 13; Dec. Dig. ⊗ 21.]

3. United States \$\iff 21\$—Congress—House of Representatives—Powers of. As the House of Representatives, in preferring charges for impeachment, is acting in a judicial capacity, the courts will not interfere with its act in punishing one for contempt on the ground that his insulting charges or contumacious conduct impeded the investigation of a resolution for impeachment.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 13; Dec. Dig. ⊚ 21.]

Application by the United States of America, on the relation of H. Snowden Marshall, for writ of habeas corpus against Robert B. Gordon, Serjeant at Arms of the House of Representatives. Writ dismissed, and relator remanded.

This is a writ of habeas corpus, sued out by the relator to relieve him from an arrest made by the respondent, the serjeant at arms of the House of Representatives. The relator was arrested on June 26, 1916, and is still in custody. The respondent justifies in his return by virtue of a warrant issued by the Speaker of the House, under the seal of the House, attested by the clerk, on the 22d day of June, 1916. This warrant recited a resolution of the House on June 20, 1916, directing the Speaker to issue his warrant, directed to the serjeant at arms to take the relator in custody and bring him to the bar of the House to answer the charge that on March 4, 1916, he violated the privileges of the House by writing and publishing a letter. The letter in question was incorporated into the resolution and is as follows:

"Department of Justice, United States Attorney's Office.

"New York, March 4, 1916.

"Sir: Yesterday afternoon, as I am informed, your honorable committee ordered the arrest of Mr. L. R. Holme, a representative of a newspaper which had published an article at which you took offense. The unfortunate gentleman of the press was placed in custody under your orders. He was taken to the United States marshal to be placed in confinement (I do not understand whether his sentence was to be one day or a dozen years). The marshal very properly declined to receive the prisoner. This left you at a loss, and I am advised that you tried to work your way out of the awkward situation by having Mr. Holme brought back and telling him that you were disposed to be 'kind' to him and then discharged him for the purpose of avoiding unpleasant consequences to yourselves.

"You are exploiting charges against me of oppressive conduct toward a member of your honorable body who is charged with a violation of law and of oppressive conduct on my part toward shysters in the blackmailing and

bankruptcy business.

"I may be able to lighten your labors by offering to resign if you can indicate anything I ever did that remotely approximates the lawless tyranny of your order of arrest of Mr. Holme.

"The supposed justification of your order that Mr. Holme be placed in custody was his refusal to answer the question you asked as to where he got the information on which was based the article which displeased you.

"It is not necessary for you to place any one under arrest in order to get the answers to the question which you asked Mr. Holme, because I can and will answer it. I gave Mr. Holme information, part of which he published and from which he made deductions, so that, if your honorable committee has a grievance, it is against me, and not against him.

"What I told him was about as follows:

"I said that your expedition to this town was not an investigation conducted in good faith, but was a deliberate effort to intimidate any district attorney who had the temerity to present charges against one of your honorable body.
"I said that your whole proceeding here was irregular and extraordinary; that I had never heard of such conduct of an impeachment proceeding; that charges of this sort were not usually heard in public until the House of Repre-

charges of this sort were not usually heard in public until the House of Representatives had considered them and were willing to stand back of them.

"I pointed out to him that you, contrary to the usual practice, had come here and had held public hearings; that among your witnesses you had invited every rogue that you could lay your hands on to come before you and blackguard and slander me and my assistants under the full privilege of testifying before a congressional committee.

"I told him that you had called one of my junior assistants before you and had attempted to make it publicly appear that his refusal to answer your questions as to what occurred in the grand jury room in the Buchanan case was due solely to my orders. I said that at the time you attempted to convey this public impression you knew that it was misleading, because I had been asked by you to produce the minutes of the grand jury and had been instructed by the Attorney General not to comply with your request, as you well knew. I showed him the telegram of the Attorney General to me, and showed him a copy of my letter to you, dated February 29, 1916, in which I sent you a copy of the telegram of the Attorney General instructing me not to give you the grand jury minutes.

"I told him that you were traveling around in your alleged investigation of me with Buchanan's counsel, Walsh and David Slade, in constant conference with you. I said that I believed that every word of the evidence, whether in so-called secret sessions or not, had been placed at the disposal of these worthies, and that I would be just as willing to give the grand jury minutes

to a defendant as to give them to your honorable subcommittee.

"I told him that I did not share the views which seemed to prevail in your subcommittee on this subject. I said that I regarded a member of Congress who would take money for an unlawful purpose from any foreign agent as a traitor, and that it was a great pity that such a person could only be indicted under the Sherman Law, which carried only one year in jail as punishment.

"I said that it was incomprehensible to me how your honorable subcommittee should rush to the assistance of an indicted defendant—how you had apparently resolved to prevent prosecution by causing the district attorney in

charge to be publicly slandered.

"I told him that I would not permit the prosecution of the persons whose cause you had apparently espoused to be impeded by you. I said that, if you wanted the minutes of the grand jury in any case, you would not get them as long as I remained in office.

"You will observe from the foregoing statement that what Mr. Holme published may have been based on what I said. If you have any quarrel, it is

with me, and not with him.

"It is amazing to me to think that you supposed that I did not understand what you have been attempting to do during your visit here. I realized that your effort was to ruin me and my office by publishing with your full approval the complaints of various persons who have run afoul of the criminal law under my administration. Your subcommittee has endeavored, by insulting questions to my assistants and others, by giving publicity and countenance to the charges of rascals, and by refusing to listen to the truth and refusing to examine public records to which your attention was directed, to publicly disgrace me and my office.

"I propose to make this letter public.

"Respectfully, [Signed] H. Snowden Marshall, United States Attorney. "Hon. C. C. Carlin,

"Chairman Subcommittee of the Judiciary

"Committee of the House of Representatives, "323 Federal Building, New York, N. Y."

The resolution further went on to find that in writing and publishing the letter the relator was guilty of a contempt of the House of Representatives, and that when brought to the bar the Speaker should cause to be read to him

the findings of fact and law of the special committee of the House charged with the duty of investigating into the contempt and that the relator should at that time be heard. The return then stated the circumstances, as follows:

On the 14th day of December, 1915, one Frank Buchanan, a member of the House, preferred charges against the relator herein of the commission of certain high crimes and misdemeanors. On the 28th day of December a grand jury in the Southern district of New York, which had been in deliberation at the time the said Buchanan made his charges, brought in an indictment against the said Buchanan and others, charging them with a violation of the provisions of the Sherman Anti-Trust law. On the 12th day of January, 1916, the said Buchanan submitted a resolution to the House that the committee on judiciary be directed to inquire into the alleged misconduct of the relator in certain particulars, authorizing the committee to send for persons and papers, to take testimony, etc., in pursuance of such inquiry. This resolution was referred to the committee on the judiciary, which proceeded to act upon Thereafter, on the 27th day of January, 1916, the chairman of the judiciary committee offered a resolution in the House that said committee be authorized to appoint a special committee to act on behalf of the whole committee to take testimony, with the same powers respecting testimony as the committee at large. This resolution of January 27, 1916, was passed by the House and on the 1st day of February, 1916, the chairman of the judiciary committee appointed three members, constituting a subcommittee, to investigate said charges.

The subcommittee, when organized, heard the testimony of certain witnesses, and determined to take testimony of other witnesses in the city of New York, which they did, among them one Leonard R. Holme, a reporter, who, on being questioned about a certain statement derogatory to the committee, published in a newspaper and emanating from him, declined to answer as to the sources of his supposed information. On the 4th day of March, 1916, the relator wrote the letter heretofore set forth and delivered it to the chairman of the subcommittee. Shortly thereafter on the same day he delivered it to the newspapers in the city of New York, wherein it obtained a large and wide circulation, not only in that city, but in the District of Columbia and other parts of the United States. The House took action upon this letter on the 5th day of April, 1916, by a resolution appointing a select committee of five to consider the conduct of the relator in writing and publishing the letter. This committee invited the relator to appear before them at the Capitol in Washington, which he did, at which time he admitted that he wrote the letter and stated that all of it was true, and that under the same circumstances he would write it again. The committee reported to the House that in their judgment the letter as a whole and in detail was defamatory and insulting, and that the relator had been guilty of a contempt of the House in publishing it, whereupon the resolution of June 20th, heretofore stated, was passed and the warrant issued as aforesaid.

The report of the select committee to investigate the contempt, which was made to the House on April 14, 1916, is annexed to the return. It contains its findings of fact as already stated, and also the consideration of the law and facts, including a review of the authorities. The relator does not traverse the return.

John C. Spooner and Charles P. Spooner, both of New York City, for petitioner.

D. Cady Herrick, Martin W. Littleton, and Henry M. Goldfogle, all of New York City, for respondent.

LEARNED HAND, District Judge (after stating the facts as above). [1-3] It was early settled that a commitment by the House of Commons for a contempt and breach of privilege was not examinable by any court. Reg. v. Paty, 2 Ld. Ray. 1105; Alexander Murray's Cases, 1 Wils. 299; Brass Crosby's Case, 3 Wils. 188; Rex. v. Hob-

house, 2 Chit. Rep. 207; Burdett v. Abbott, 14 East, 1; Case of the Sheriff of Middlesex, 11 Ad. & E. 273. These cases came up in two ways, either by action of trespass against the serieant at arms, as Burdett v. Abbott, supra, or more generally by habeas corpus, either after judgment, as Brass Crosby's Case, or after arrest, as Reg. v. Paty, supra, Alexander Murray's Case, supra, and the Case of the Sheriff of Middlesex, supra. It was even unnecessary to state, so high did the Commons carry their prerogative, the grounds of the commitment. Reg. v. Paty, supra, page 1106, per Gould, J. Indeed, the contempt in that case was for precisely the same act which the House of Lords had declared to be legal in Ashby v. White, 2 Ld. Raym. 938. Perhaps the strongest assertion of the immunity of the Commons in their judgments for contempt is to be found in the litigation of which the great case of Stockdale v. Hansard, 9 Ad. & E. 1, was the beginning. There the Oueen's Bench decided that a resolution of the Commons directing Hansard, their printer, to distribute generally their proceedings, would not protect him in an action of libel. The question was argued and considered at great length, in the judgments of all the judges, how far the resolution of the House of Commons was beyond their scrutiny, and whether their prerogative was exempt from judicial control. After judgment the Commons did not appeal, and the sheriff levied and collected from Hansard, but had not paid over to the plaintiff, when the Commons issued a warrant for the Sheriff of Middlesex as for a contempt in making the levy. and committed both gentlemen to the Tower. The unhappy sheriff applied to the court thereupon for habeas corpus, to which the lieutenant of the Tower returned that he held them by warrant of the Speaker for contempt and a breach of privilege. He set out the warrant, which did not specify the nature of the contempt, and after full consideration the same court, with one exception, that decided Stockdale v. Hansard, supra, remanded the prisoners to the Tower. Case of the Sheriff of Middlesex, supra. Certainly the prerogative of the House had been vindicated.

The grounds repeatedly given for this immunity from control are that the House is a court, and a high court, with whose judgments no other court can interfere. At times the prerogative is merely put upon the traditional custom of the House—"lex et consuetudo Parliamenti." Some judges, as De Grey, C. J., in Brass Crosby's Case, supra, went so far as to say generally that the Commons were a final judge of all their prerogative; a dictum clearly overruled in Stockdale v. Hansard. supra. I do not, however, understand the language, which rests the power of the House of Commons in contempt, to indicate that they need be in the discharge of a judicial duty when the contumacious act occurs. The passages in Mr. Justice Miller's opinion in Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377, which refer to this language, are not to be so understood. It is rather that in the exercise of their power to punish for contempt they act as a court, and as such cannot be reviewed by another court. In none of the cases does it appear that the House was engaged in judicial duties, except perhaps in Reg. v. Paty, supra. The right of the House to be so regarded itself

rests upon immemorial custom.

That the power to punish for contempt is not inherent, according to English notions, in any legislative assembly, is, however, shown by the treatment of contempts of provincial assemblies by the Privy Council. At first it seems to have been supposed that they had such powers. An editor in the island of Jamaica published matter which was held by the Assembly to be a "breach of privilege"—just what does not appear. For this he was committed by that body, and afterwards sued the serieant at arms and the Speaker. Baron Parke, who delivered the judgment upon appeal (Beaumont v. Barrett, 1 Moo. P. C. 59), rested the power, which the court upheld, upon the inherent right of all legislative assemblies to protect themselves, not only against direct impediments to the exercise of their duties, but against libels reflecting upon their authority. This decision was overruled, however, in Kielly v. Carson, 4 Moo. P. C. 63. where Baron Parke also delivered the judgment of the court. In that case Kielly had threatened a member of the Newfoundland House of Assembly outside the meeting place itself. When brought before the House he repeated his contumelious conduct, and indeed seems to have redoubled it. He was committed, and he sued in trespass on his release. Baron Parke excluded from consideration so much of the contempt as occurred before the House, because the justification was in bar, and, if the original arrest was illegal, it was no bar. He thought that such an assembly had the power to protect themselves against impediments to their proceedings, but not to punish past misconduct. This decision was followed in Fenton v. Hampton, 11 Moo. P. C. 347, where the Supreme Legislative Assembly of Van Diemen's Land had committed for contempt a witness who refused to testify at an inquiry, instituted, apparently with full authority, by that body. It was also followed in Doyle v. Falconer, L. R. 1 P. C. 328, where the Assembly of the island of Dominica had committed a member for abusive language before the House directed to the Speaker. The right of a provincial assembly to protect itself from "direct impediment" would seem, therefore, to go hardly further than to remove the offender.

The first case in this country appears to be Anderson v. Dunn, 6 Wheat. 204, 5 L. Ed. 242, where in an action of trespass against the serjeant at arms of the House of Representatives the Supreme Court held good a plea in bar justifying under the warrant of the Speaker directing the arrest of the plaintiff generally for a breach of privilege of the House and for a contempt of its dignity and authority. The plea recited that the imprisonment under the warrant continued till the House had concluded its inquiry and had found the plaintiff guilty, after which he was reprimanded and discharged. The plea did not show the nature of the contempt, and the decision is open to several possible explanations, one of which may be that since the House had the power of a court to punish for some contempts, and in so doing acted judicially, no other court could examine the judgment. If so, it is certainly overruled by Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377. In that case, however, the plea stated the

nature of the contempt, and possibly Anderson v. Dunn is to be therefore distinguished, as indicated on page 229 of the opinion in 6 Wheat. (5 L. Ed. 242), upon the theory that the plea was consistent with a contempt in the presence of the House. Whether the plea ought not to have been invalid, unless it alleged a good defense under all the possible cases covered by its broad language, is a question of pleading which is, with deference, extremely doubtful, but nevertheless that may have been the basis of the decision. In any case the power, however broad, was sustained upon its inherent necessity to protect the House in the exercise of its duties. I do not regard it as deciding more than that there are some cases in which such a power exists.

Ex parte Nugent, Fed. Cas. No. 10,375, was a case of habeas corpus to release the relator under the following circumstances: The Senate was deliberating upon a treaty in secret session, and some one unknown disclosed certain particulars to the relator, a reporter for the New York Herald. The reporter was summoned before the bar of the Senate, was sworn, and refused to answer certain questions relevant to the discovery of the person from whom he got his information. For this he was committed to the serjeant at arms until further order. The court, the Circuit Court of the District of Columbia in banc, held that the commitment of the Senate was not reviewable by a court, in analogy with the practises of the Houses of Parliament, but that, if it were, at least it appeared that the Senate was acting in a matter over which it had full powers, and that the inquiry and contempt as a means of effecting the inquiry were incidents to the discharge of its constitutional powers.

Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377, was an action of trespass against the serjeant at arms, the Speaker, and several members of the House of Representatives. The House had instituted an inquiry into the existence of a "real estate pool" which it thought to be connected with a debt due the United States. The debtor, Jay Cooke & Co., had become bankrupt, and its trustee had effected a settlement of its affairs. The House passed a resolution appointing a committee to inquire into the settlement in question and into the relation of the "pool" with the debtor's property. The committee summoned the plaintiff before them and asked him the names of the "pool" members and to produce certain records. He refused, and was committed to the serjeant at arms, who held him for about six weeks, and then delivered him to the marshal of the District Court. These facts being set up in bar, the plaintiff demurred. The Supreme Court sustained the demurrer in an opinion by Mr. Justice Miller.

The exact scope of the decision is no more than to hold that the House's commitment was not conclusive upon the court, at least until it appeared that the House was engaged upon an inquiry within its constitutional powers, and that the inquiry in question was not such. In the discussion it was said that the privileges of the House were not to be gathered in any way from English parliamentary precedents, which depended upon the customs of the several houses, and especially upon the fact, recited in many of the opinions of English judges, that the House of Commons, as well as the House of Lords, was a court,

and as such enjoyed the immunity from review of its proceedings by another court which was always accorded to judicial proceedings.

The question whether the House of Representatives had any powers to commit as for a contempt in the exercise of its legislative duties was expressly reserved from consideration (103 U. S. 189, 26 L. Ed. 377); but it was thought (103 U. S. 190, 26 L. Ed. 377) that in proceedings for impeachment either House would have the same powers as a court in relation to the production of testimony, and perhaps, also, if engaged in a contested election of its members, as to which it was given full judicial powers. That the court supposed the action of the House in preferring articles of impeachment, including the preliminary inquiry for that purpose, to be judicial in its character, seems to me clearly indicated in the opinion. 103 U. S. 184, 190, 191, 26 L. Ed. 377. This ought perhaps to foreclose any further discussion; but, as the language was certainly obiter, I shall discuss the question later.

In Interstate Commerce Commission v. Brimson, 154 U. S. 447, 485, 155 U. S. 3, 14 Sup. Ct. 1125, 15 Sup. Ct. 19, 38 L. Ed. 1047, 39 L. Ed. 49, the court obiter likewise said that the powers of Congress to impose a fine and imprisonment were confined to the exercise by either House of its right to punish disorderly behavior of its members and to procure testimony in election and impeachment cases and in cases which might involve the existence of the Houses themselves. In Re Chapman, 166 U. S. 661, it was said obiter, on pages 671 and 672, 17 Sup. Ct. 677, 41 L. Ed. 1154, that both Houses had the unquestioned right to treat as a contempt a refusal to answer proper questions put

to a witness in a constitutional inquiry instituted by them.

The state of the law, so far as decided, therefore, seems to be only this: That the House of Representatives has not inherited the prerogative in matters of contempt of the House of Commons, and that its commitments are open to inquiry, at least to the extent of discovering whether the commitment was an incident to the exercise of some constitutional power. Nevertheless it has a limited power to commit, and in the exercise of that power it enjoys immunity from review by a court which necessarily has no appellate jurisdiction. The last statement is certainly the law, if any part of Anderson v. Dunn, supra, survives, which I think it does. The question in this case, therefore, is of first impression in spite of all the decisions which have been cited. It turns, I think, upon three considerations: First, whether the House was engaged upon a constitutional duty; second, whether in that duty it had any powers to punish for contempt; third, whether that power went beyond compulsion to produce testimony, and included the power to punish contumacious language directed against itself, and published while the matter was still under consideration.

That the House was in fact engaged in a constitutional inquiry admits of no doubt. The resolution submitted to the judiciary committee was aimed at the impeachment of the relator, and the subcommittee was charged with duties ancillary to that inquiry. Of course, the manner of the discharge of those duties by the subcommittee is not relevant to the case now at bar, so long as they assumed to be acting under the resolution. It was faintly suggested on the argu-

ment that contumelious language directed towards the subcommittee was different from that directed to the House as a whole; but I scarcely think that question deserves much discussion, and I pass it by.

The next question is whether the House has any powers of punishing contempts, and that I deem settled by the uniform expressions of the Supreme Court. It is true that, except Anderson v. Dunn, supra, there has been no decision upon that question; but the power has always been presupposed in all the discussions, and the question throughout has concerned its limitations. Therefore it would altogether misconceive the effect of those decisions to take them as going so far as Fenton v. Hampton, supra, or Doyle v. Falconer, supra. There may, indeed, be some question even of the power to compel the production of evidence when engaged in a purely legislative matter, though even then the reservation made in Kilbourn v. Thompson, supra, seems matched by the language in Re Chapman, supra. When engaged in an impeachment, however, there can be no question that the House has some such powers, at least for the production of evidence, unless the language is to be disregarded, even of Kilbourn v. Thompson, supra, which most straitly confined its powers.

The case at bar does not, however, concern the House's power to compel the production of evidence, but the power to protect itself against the pressure which may arise from insult, abuse, or clamor while deliberating upon the finding of articles of impeachment. will not, I think, be questioned that at common law it was a contempt of court to assail the motives and conduct of a court, at least while the matter was pending and open. Such was early held to be the rule in federal courts. Hollingsworth v. Duane, Fed. Cas. No. 6,616; United States v. Duane, Fed. Cas. No. 14,997. And such, indeed, has been held, even after Revised Statutes, § 725, in United States v. Toledo Newspaper Co. (D. C.) 220 Fed. 458, provided the publication be calculated to obstruct the administration of justice. I should not doubt that if Revised Statutes, § 725, does not apply a court has such a power. The question here is, therefore, whether the House while so engaged has the powers of a court. Suppose, for example, that, during the trial of an impeachment in the Senate, some one should publicly threaten the members unless they decided as he thought just, and suppose such threats were spread broadcast and greatly inflamed public feeling; I should have no question of the Senate's power to inquire into the case and punish the offender. The Senate in such a case is clearly a court, and by analogy would have the common powers of a court when not legally abridged. If so, the letter of the relator, if addressed to the Senate, or to a Senator, while engaged in such a trial, would be cognizable in the same way, because the question as to how far it in fact touched the court in the exercise of its duties would be involved in the power to decide the case at all, nor would a coordinate court undertake to determine whether the gravity of the aspersions upon the Senate was enough to affect its conduct, assuming that that is the heart of the evil.

Now there is no difference between the case supposed and that at bar, except that the House was not engaged in a trial, but in considering the preferring of articles. The relator insists that in that capacity they have none of the powers of a court, for their function is not judicial. I take it that when trying their own members for expulsion or admission, or for misconduct, there could be no doubt, unless they are not to have the common-law powers of a court; but the case at bar is not quite that. It is, indeed, unwise to attempt any rigid definition of what is executive, or legislative, or judicial. The distribution of such functions has in no country, not even our own, been by à priori rules of political dogmatism. Executives make ordinances and try and dismiss their inferiors; Legislatures determine facts from evidence and try their members; judges constantly make new rules of law with prospective validity. Yet it is true that in the main courts are concerned with the determination of existing facts, and with deciding how far they fit into existing authoritative rules.

But it by no means follows that courts must always dispose of the controversy before them; they may at times do no more than determine that a trial must go on elsewhere. A judge who hears a criminal complaint, and decides only that the defendant shall be held for trial, acts as much as a court as when later he sits with a jury, and both finally dispose of the matter. He hears the evidence, decides what it proves, and whether the facts count in law. A grand jury performs exactly the same duties as a petit jury, except that its hearing is ex parte, and it need not be so clear in its convictions. It has always been treated as a part of the court, and its presentments lay the foundation for contempts. An impeaching body is in this class; its duties require it to do what the tribunal of trial must do, though the consequences be different. It is true that it may only put the respondent to a trial; but this is not always the limit of its powers. There is, for example, in the Constitution of the state of New York (article 6, § 13) a provision which suspends an impeached judge until he is acquitted. It would be an extreme position to assert that a House whose impeachment had that result was not acting judicially, yet it would be capricious to say that if the judge was not suspended, but must only stand trial, the character of the duties is

That the finding of such articles is a judicial undertaking, indeed, seems to me too clear for question. Still it does not follow that the House has the powers of a court whenever it acts judicially. As suggested by the relator, a district attorney who is examining into a proposed prosecution may be acting judicially, but he certainly has not the powers of a court. In the absence of any precedents it might, indeed, be a matter of doubt, though I confess that it would seem to me arbitrary to deny the powers customary to courts to a body of equal dignity with any court while it was acting judicially. But the case is not bare of precedents, because the presupposition in all cases is that the House, when judicially engaged, has the powers of a court. The question about which differences have arisen is only whether there can be any scrutiny of the nature of the duties upon which it is engaged. I can see no reason for curtailing the customary extent of the power to commit in the case of the House below what courts them-

changed.

selves enjoyed at common law, unless it were based upon suspicion of the possible greater abuses of such powers. That would be, of course, an inadmissible consideration, if it were true, and it is happily not justified in history. While, therefore, as I have said, there is no actual decision upon the point raised, it seems to me that there is both reason and precedent for the position that the House, while deliberating upon articles of impeachment, has jurisdiction to determine whether a publication is a contumacious assault upon its freedom of action. If so, the warrant in the case at bar was within its jurisdiction. I should have no right to express any opinion upon the letter, or whether it justifies any punitive action by the House; that lies within its own exclusive determination. It certainly touched the conduct of certain of its members in their judicial duties, and it may be judged to be of a character likely to affect them in the discharge of those duties. The questions whether the conduct of those members was such as justified the comment, and, if so, whether the dignity of the House suffers more by the punishment of a just indignation, than by a recognition of its justice, are quite without the scope of this inquiry; once the power be recognized, they are comprised in its exercise.

I am, of course, aware that the implications of such a holding are to make it possible for the House to treat as a contempt criticism of its conduct pending impeachments by the press generally. Such a power involves the possibility of abuse like every other power, especially when in the hands of one who is at once the judge and the victim. On the other hand, it must be conceded that the absence of such power puts the House at the mercy of a public pressure that may at times actually prevent a fair and impartial determination of an individual's rights. It may be better that such offenses should come before a separate tribunal, unaffected by the sting of personal insult; but there is at present no such tribunal. It has been the traditional method of the law we have inherited to trust to the magnanimity of courts to disabuse themselves of such motives. Perhaps that policy is too trustful of human nature; but I certainly have no right to assume that the House of Representatives are less capable of exercising as much self-restraint as any other official charged with kindred duties. Indeed, the public resentment which an abuse of such powers is apt to bring may well be a more effective means of control upon a popular body than upon courts whose tenure exempts them from the immediate effects of their conduct.

Finally, it must be remembered that public criticism of courts has in any event no propriety until the case be decided. The ruling in the case at bar does not imply the right of the House to treat as a contempt statements made while legislative questions are pending before it. At such times discussion and criticism are indispensable; it is useful that the conflict of public interests, of which legislation is a legitimate resultant, should be vocal and free. Where, however, the duty is judicial, the case is quite different. In such cases a habit of public appeal breeds a state of mind in the tribunal at variance with the first duties of a judge, and any value it could have, even in ex-

treme cases, is not a counterweight to the dangers of its recognition as lawful.

In fact, however, all such matters are beside the point, if the power be fairly deducible from the existing law. This I think it is, and, if so, speculation upon its value is irrelevant.

The relator will be remanded to the custody of the serjeant at arms,

and the writ dismissed.

THE ZULIA.

(District Court, E. D. New York. May 29, 1916.)

1. Shipping ⇐=132(3)—Liability for Damage to Cargo—Burden of Proof.

The burden of proof to show that damage to cargo after it had been delivered to the ship was from a cause within an exception in the bills of lading rests on the carrier.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 479–481; Dec. Dig. ⊗⇒132(3).]

 SHIPPING \$\infty\$ 122—LIABILITY FOR DAMAGE TO CARGO—NEGLIGENCE OF STEVE-DORE.

As between shipper and carrier, a stevedore, although an independent contractor, is a servant of the shipowner, for whose negligence, resulting in damage to the cargo, he is responsible.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 452, 453, 456, 457; Dec. Dig. ⇐=122.]

3. Shipping \$\iffsim 141(3)\$—Liability for Damage to Cargo—Perils of the Sea. Damage to cargo, which had been loaded, by reason of the slipping of a heavy steel rod from the sling while being lowered through a hatchway, which broke through the bottom and caused the sinking of the ship, was not from a peril of the sea, within an exception in the bills of lading.

4. Shipping \$\inside 141(1)\top-Liability for Damage to Cargo\top-Exceptions in Bills of Lading.

Neither is such damage within exceptions relieving the carrier from liability for damage caused by "dangerous goods shipped without full disclosure of their nature," or by "insufficiency of packages"; the ship-owner and stevedore having full knowledge of the nature of the shipment and method of packing.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 493, 497, 499; Dec. Dig. \$\infty\$=141(1).]

5. Shipping \$\infty\$ 138—Liability for Damage to Cargo—Harter Act.

Damage resulting to cargo while the vessel is being loaded at her pier is not damage resulting from "faults or errors in navigation or in the management of the vessel," within the exemption of Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (Comp. St. 1913, § 8031).

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. \$138.]

6. Negligence = 121(2)—Actions for Negligence—Evidence—Res Ipsa Loquitur.

When a thing which causes damage is under the exclusive control of a person, and the occurrence is such as in the ordinary course of things does not happen if the person having such control uses proper care, it affords

[&]amp; For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes $235~\mathrm{F.}{-}28$

reasonable evidence, in the absence of explanation, that the damage arose from that person's want of care.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 218, 225, 271; Dec. Dig. \Longrightarrow 121(2).]

7. Shipping \$\infty\$ 132(5)—Liability for Damage to Cargo—Negligence in Loading.

A shipper of a number of steel drill stems for oil wells, each 35 feet long and weighing 3,500 pounds, packed each in a wooden box. The loading was under the joint management of the shipowner and a contracting stevedore. In loading, one of the rods broke through the end and slipped from the box. Thereafter a portion of the box was cut away, so that the hoisting chains could grip the rod, and a block, called a "preventer," was also attached to one end of the box to prevent it from breaking out. However, one of the rods slipped from the sling while being lowered through the hatch, and broke a hole in the bottom of the ship, causing it to sink and other cargo to be damaged. Held, that the shipper was not liable because of the manner of boxing, which was usual and also known to the shipowner and stevedore, and that on the evidence the stevedore was not chargeable with negligence which would exonerate the shipowner from liability for the damage to other cargo.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 483, 484; Dec. Dig. &=132(5).]

In Admiralty. Suits by the Transatlantische Güterversicherungs Gesellschaft, in Berlin, by Laura Moore (two cases), and by Edward A. Meyer and others against the steamship Zulia (the Atlantic & Caribbean Steam Navigation Company, claimant), with the F. & J. Auditore Company, Incorporated, and the Caribbean Petroleum Company, impleaded. Decree for libelants against the claimant alone.

Harrington, Bigham & Englar, of New York City (D. Roger Englar, of New York City, of counsel), for libelants.

Kirlin, Woolsey & Hickox, of New York City (J. Parker Kirlin, John M. Woolsey, and George W. Prettyman, all of New York City, of counsel), for claimant-petitioner.

Cass & Apfel, of New York City (Alvin C. Cass, of New York City,

of counsel), for respondent F. & J. Auditore & Co., Inc.

Burlingham, Montgomery & Beecher, of New York City (Roscoe H. Hupper and Norman B. Beecher, both of New York City, of counsel), for respondent Caribbean Petroleum Co.

VEEDER, District Judge. These libels are brought to recover damage to cargo by sea water in the sinking of the steamship Zulia, on December 8, 1913, at Pier 11, Pierrepont street, Brooklyn, N. Y., while she was being loaded with cargo by the F. & J. Auditore Company, Incorporated, a contracting stevedore, impleaded by petition. The stevedore was engaged at the time in taking on board a case or box 35 feet long containing an iron shaft weighing 3,500 pounds, which was part of an equipment of an oil well shipped by the Caribbean Petroleum Company, one of the respondents impleaded by petition. When the shaft in its box was suspended over No. 2 hatch of the steamship, the shaft slipped out of the box and sling into the hold, tearing a hole in the bottom of the steamship and causing her to sink.

The loss complained of relates to cargo which had been loaded prior to this event.

There are four parties before the court in this litigation: The innocent cargo owners, hereinafter called the libelants; the steamship Zulia and her owner, hereinafter called the shipowner; F. & J. Auditore Company, Incorporated, contracting stevedore, hereinafter called the stevedore; and the Caribbean Petroleum Company, the shipper of the shaft which caused the damage, hereinafter called the shipper.

The bills of lading had not been issued for the cargo at the time of the accident, but dock receipts had been delivered to the several shippers, which would have been exchanged in regular course of business for a line bill of lading of the Red D Line, the trade-name under which the claimant operated the steamship Zulia. This receipt contained the following provision:

"No responsibility being assumed while awaiting loading for loss or damage by flood, fire, strikes, boycott or any other cause specified in the Red D Line steamship's bill of lading, which is hereby made part hereof."

The Red D Line bill of lading contained the following clauses:

"That the carrier shall not be liable for loss or damage occasioned by perils of the sea or other waters, * * * by any latent defect in hull or machinery or appurtenances or unseaworthiness of the steamer, whether existing at the time of shipment or at the beginning of the voyage, provided the owners have exercised due diligence to make the steamer seaworthy, * * * rust, * * * or any loss or damage arising from the nature of the goods or insufficiency of packages."

"That shippers shall be liable for any loss or damage to steamer or cargo caused by * * * dangerous goods shipped without full disclosure of their

nature, whether such shipper be principal or agent."

It was alleged in the answers and petitions in the several cases that the case of shafting, above mentioned, was by reason of its weight, the improper nature and construction of the case or box in which it was packed, and by reason of the fact that the shafting or pipe was not properly secured in the box, "dangerous goods" within the meaning of the bill of lading clause. It was further pleaded that, inasmuch as the box or shafting was shipped without full disclosure to the ship, her owner or agents, of the danger involved in its handling, the shipper was responsible for any damage caused by the shaft.

The Harter Act was also pleaded, to the effect that a steamer properly manned, equipped, and supplied is not liable for losses resulting from faults or errors in navigation or management thereof, or for

losses arising from—

"dangers of the sea or other navigable waters, * * * or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, * * or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative."

It appears from the evidence that the shaft in question was 35 feet in length, 6 inches in diameter throughout its main length, and weighed 3,500 pounds. For some space at both ends the diameter of the shaft was 8½ inches. As delivered on the dock for shipment, it was inclosed in a wooden box made of 2-inch material, with 2-inch end pieces secured by 20-penny nails 4 or 5 inches long. At the ends and at reg-

ular intervals along its length the box was reinforced with metal bands. As packed the $8\frac{1}{4}$ -inch ends fitted snugly in the interior of the box. Apparently the shaft was 2 inches shorter than the interior length of the box. This shaft was one of 16 which had been supplied by another company on an order from the shipper for "16 drill stems properly packed for sea shipment." They were delivered at the Red D Line dock without ever having been seen by the shipper.

The stevedore proceeded to load the packages by means of a chain around the box. By means of the ship's winch the boxes were first dragged up a gangway, then suspended over the hatch, and finally tilted and lowered through the hatch into the steamer's hold. In this method of loading, the box was relied upon for support, and when the package was suspended over the hatch the weight of the shaft was thrown upon the lower end piece. When the third package was being lowered in this way into the hold, the end piece gave way and the shaft slipped out of the box. Thereupon, after an investigation by the stevedore and the shipowner's pier superintendent, a new method of operation was employed by the stevedore. About a third of the distance from one end of the box the covering was cut away for a considerable space; that is, within such space two of the four sides of the box were entirely removed, as were also half the width of the remaining two sides. This left the parts of the box above and below this point connected only by the remaining triangular strip of one corner of the box. Two pieces of wood were laid upon the surface of the exposed portion of the shaft, and then a chain was wound around the shaft and box at this point. At the end of the box farthest removed from the place where the box covering had been cut away, a heavy wooden block, called a "preventer," substantially the width of the bottom of the box, and extending beyond the end on two sides, was secured by heavy ropes leading up to and fastened upon the chain around the shaft. By means of a tackle secured to the chain the package was then dragged up the inclined skid or gangway, suspended over the hatch, tilted, and lowered into the hold. In this method of operation, when the package was lowered through the hatch, the weight of the shaft was substantially thrown upon the preventer at the lower end. The only additional support was dependent upon the possible grip of the chain around the shaft. In this way five more of these packages were safely loaded. When the sixth was being lowered through the hatch, the shaft somehow got free, ran out of the lower end of the box and off the preventer, stove a hole in the bottom of the ship, and caused her to sink. In the fall the box was broken in two pieces at the point where it had been cut into, but nothing else gave way; the chain, ropes, and preventer were all intact. There was no direct proof of the cause of the mishap. None of the witnesses actually saw the whole operation.

[1] First in order of consideration comes the case of the libelants. It is admitted that the shipowner is a common carrier, and that libelants' goods were damaged while in its custody. Under these circumstances the only question to be determined as between the libelants and the shipowner is whether the case falls within any of the

exceptions in the bill of lading. The burden of showing that the damage arose from one of the excepted causes is upon the carrier. The Folmina, 212 U. S. 354, 29 Sup. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748.

- [2] Of the three exceptions relied upon by the shipowner, the first is that the loss in this case resulted from a peril of the sea. In the consideration of this question the libelants are in no way concerned with any question of negligence on the part of the stevedore. The loading of the cargo is a duty which the shipowner is bound to perform as part of the contract of carriage. Consequently, it is wholly immaterial to the shipper whether the shipowner performs this duty through its own general employés or through an independent contractor. The shipper's contract is with the shipowner; so far as he is concerned the stevedore is the servant of the ship.
- [3] It is unnecessary to attempt to define a peril of the sea. Each case must be determined upon its own facts. It does not seem to me that the shipowner's contention derives any substantial support from the English authorities. In any event the decision of the Supreme Court in the case of The G. R. Booth, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234, is conclusive of this issue. In that case it appears that a steamer was lying at a dock in the harbor of New York, discharging a general cargo which consisted in part of several cases of detonators. Without any negligence on the part of any one concerned in the transportation or discharging of the cargo, one of the cases of detonators exploded, tearing a hole in the side of the ship, in consequence of which water rushed into the ship and caused extensive damage to other cargo. An action was brought by the consignee of a quantity of sugar which was on board the vessel. The bill of lading under which the sugar was carried contained a provision that the carrier should not be liable "for loss or damage occasioned by the perils of the sea or other waters." The court, after an exhaustive review of the authorities. held that the loss did not fall within the exception, saying:

"The explosion, in consequence of which, and through the hole made by which, the water immediately entered the ship, must be considered as the predominant, the efficient, the proximate, the responsible cause of the damage to the sugar, according to each of the tests laid down in the judgments of this court, above referred to. The damage to the sugar was an effect which proceeded inevitably, and of absolute necessity, from the explosion, and must therefore be ascribed to that cause. The explosion concurred, as the efficient agent, with the water, at the instant when the water entered the ship. The inflow of the water, seeking a level by the mere force of gravitation, was not a new and independent cause but was a necessary and instantaneous result and effect of the bursting open of the ship's side by the explosion. There being two concurrent causes of the damage—the explosion of the detonators, and the inflow of the water—without any appreciable interval of time, or any possibility of distinguishing the amount of damage done by each, the explosion, as the cause which set the water in motion, and gave it its efficiency for harm at the time of the disaster, must be regarded as the predominant cause. It was the primary and efficient cause, the one that necessarily set the force of the water in operation; it was the superior or controlling agency, of which the water was the incident or instrument. The inflow of the sea water was not an intermediate cause, disconnected from the primary cause, and selfoperating; it was not a new and independent cause of damage; but, on the contrary, it was an incident, a necessary incident and consequence, of the explosion; and it was one of a continuous chain of events brought into being by the explosion—events so linked together as to form one continuous whole."

According to the recent English case of Stott (Baltic) Steamers, Ltd., v. Marten, [1914] 3 K. B. 1262, it cannot be said that:

"Merely because the recipient of goods is a thing which is going to engage, or if you please is at the moment engaged, in a marine adventure, the fact that she is injured by putting goods on board is a peril of the sea."

It is settled in this country by the case of The G. R. Booth, supra, that if the predominant cause is not in itself a peril of the sea, the

simultaneous entry of sea water does not make it such.

[4] The shipowner's contentions that the damage was caused by "dangerous goods shipped without full disclosure of their nature," or "arose from insufficiency of packages," are obviously untenable. It would involve a violent construction of the language quoted to say that an ordinary steel shaft inclosed in a wooden box comes under the head of dangerous goods. Even if it could be so construed, there was in this instance a full disclosure, inasmuch as the shipowner and the stevedore were fully aware of the nature of the shipment and of the method of package before the accident occurred. With respect to insufficiency of packages, it is sufficient to point out that this provision obviously refers to the insufficiency of the packages which contain the goods damaged. But I may also refer to my conclusion, infra, that the character of the package containing the shaft was not a cause which contributed to the sinking of the steamer.

[5] The shipowner's final contention is that, inasmuch as the Zulia was seaworthy and in all respects properly manned, equipped, and supplied, the libelants' damage, if due to any fault, was "damage or loss resulting from faults or errors in navigation or in the management of said vessel," and therefore the shipowner is exempt from liability under section 3 of the Harter Act. In view of the conclusion at which I have arrived that the evidence does not disclose any fault, this contention need not be discussed in detail. But it may be pointed out that it is disposed of by what the Supreme Court said in the case of The Germanic, 196 U. S. 589, 25 Sup. Ct. 317, 49 L. Ed. 610, where

the damage was due to negligence in unloading cargo:

"Nevertheless, in a practical sense, the ship was not under management at the time, but was the inert ground or floor of activities that looked not to her, but to getting the cargo ashore. And this consideration brings to light the limitation of the section, adopted by the court in The Glenochil, [1896] Prob. 10, and sanctioned by this court in Knott v. Botany Mills, 179 U. S. 69, 73, 74 [21 Sup. Ct. 30, 45 L. Ed. 90], to faults 'primarily connected with the navigation or the management of the vessel and not with the cargo.'"

Upon established principles of law, therefore, the libelants are entitled to decrees against the ship under their contracts for carriage. Beyond this point, the question of ultimate liability, raised by the shipowner's petition, can only be determined upon a finding of negligence. Upon all the evidence I am unable to find either of the respondents impleaded guilty of any fault contributing to this accident.

[6] The loading of this shaft was under the joint management and control of the shipowner and the stevedore. The stevedore deter-

mined the method of operation and carried it out; the hoisting was done by the ship's winch. When a thing which causes damage, without fault on the part of the complainant, is under the exclusive control of a person, and the occurrence is such as in the ordinary course of things does not happen if the person having such control uses proper care, it affords reasonable evidence in the absence of explanation that the damage arose from that person's want of care. "Res ipsa loquitur." This doctrine means, as stated in the recent case of Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D. 905:

"That the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence, where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff."

[7] The maxim is based in part upon the consideration that, where the exclusive control of the thing that caused the damage is in a person, it is within his power, and not in the power of the complainant, to produce evidence of the actual cause. Here neither the stevedore nor the shipowner was in exclusive control of the loading; the control was joint. The record is barren of direct proof of the cause of this mishap. It would seem that an immediate inquiry must have disclosed the facts. No such investigation was made. However, even if the failure to explain the event as fully as the means then available would seem to permit should be deemed conclusive, the shipowner cannot shift its liability to the stevedore, for it is in pari delicto. The shipowner's pier superintendent was present and on duty, and all available means of ascertaining the facts were available to him.

So far as the evidence goes, neither the shipowner nor the stevedore was negligent in the premises. In the absence of direct proof as to what really caused the shaft to fall, various theories have been advanced as to what may have happened. It is suggested that the winch may have jerked, and that the shaft may have swung against the side of the hatch. But these excursions into the realm of speculation derive no support from the evidence. Evidence of negligence must be sufficiently clear, distinct, and preponderating to convince, without resort to conjecture. As Judge Thomas said in The Baron Innerdale (D. C.) 93 Fed. 493, courts are required to examine, compare, analyze, infer, weigh, and strike the balance of probabilities; but they are not required to hazard opinions that a person has been negligent, without the presentation of intelligible and substantial facts tending to establish the accusation. A question of fact may be refined to such a degree that an accurate solution is beyond any reliable intellectual process.

The stevedore seems to have taken every reasonable precaution. After his first experience with a shaft breaking loose he adopted, after careful examination, a method of loading in which practically no reli-

ance was placed upon the box inclosing the shaft. Apparently it differed in no substantial particular from the method usually employed by stevedores in hoisting a bare shaft. Certainly it was calculated, so far as I can see, to conform to every reasonable requirement of the situation.

Finally, the shipowner and the stevedore combine in urging that the ultimate responsibility should be fixed upon the shipper. They assert that the shaft was not securely packed, and that, no affirmative negligence on their part intervening, this was the real cause of the fall of the shaft and resulting damage. While the evidence shows that the shaft could have been more securely boxed, the method actually used was known both to the shipowner and the stevedore, and measures which were deemed sufficient were taken to deal with the situation actually presented. If the method of handling the shaft, which was finally adopted in view of the known circumstances, proved insufficient, it is futile to suggest that the resulting damage should be attributed to anything so remote as the method of packing adopted by the shipper.

I may add, however, that proof concerning more secure methods of packing related to packages which were usually handled intact, as the first three packages were handled. Where a shaft of this weight is hoisted simply by a chain around the box, the efficacy, or, if you please, the necessity, of inside cleats and heavy end supports is apparent. But after the first shaft came out of its case, the stevedore placed no further reliance upon the box as a support for the shaft. He slung it as he would have slung a bare shaft, carrying the weight on a heavy block preventer. With respect only to the play of two inches inside the box can it be contended with effect that the stevedore had not been apprised of the actual condition of the boxed shaft. Upon this fact an elaborate theory has been constructed. It is asserted that the grip of the chain upon the shaft as the package was dragged up the skid would pull the shaft against the top of the box, where it would be held until the shaft was hoisted over the hatch; then, when it was necessarily tilted toward a perpendicular position in order to get it through the hatch into the hold, the shaft would drop to the bottom of the box; and the theory is that this drop of two inches forced the preventer aside and let the shaft drop. The difficulty is that this theory is not supported by the evidence. There is nothing to indicate that the grip of the chain was sufficiently tight at any time to hold the weight of the shaft. When the package was dragged up the incline to the ship's side, the shaft would naturally slide down in the case. If, however, there is any ground for questioning this inference, there can be no doubt that when the package, slung as this was for the purpose of throwing the weight upon the preventer at the lower end, was suspended over the hatch, the shaft would inevitably slide to the bottom of the box. It was subsequent to this period, in the sequence of events, that this shaft fell out of its sling.

The libelants may have decrees against the ship. The petitions are isseq. The control of the control of

dismissed.

CHAMBERS V. CONTINENTAL TRUST CO.

In re JELKS.

(District Court S. D. Georgia, W. D. July 31, 1916.)

1. BANKRUPTCY \$\infty 228-Finding of Referee-Presumption.

When there is an issue of fact, a presumption obtains in favor of the finding of the referee in bankruptcy on the facts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. ⊕ 228.]

2. BANKRUPTCY 5-175-FRAUDULENT CONVEYANCE-ACTUAL FRAUD.

A transaction between the director of an insolvent bank and another bank which took over its liabilities, whereby the director transferred property to such other bank, must be impugned, as violative of Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544, if at all, by actual fraud, as distinguished from constructive fraud.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. ⇐=175.]

3. Bankruptcy \$\instructure=166(1)\$—Conveyance by Insolvent—Validity—Statute.

Where the director of an insolvent bank must have known his own insolvency when he conveyed property to the trust company which had undertaken to liquidate the affairs of his bank, not to benefit his own creditors, but to secure the trust company against loss in case the assets of the bank proved insufficient to pay its liabilities, the trust company being ignorant of the insolvency of the director and having no reason to believe that a preference was intended, there was no violation of Bankruptcy Act, § 67e (Comp. St. 1913, § 9651), providing that all conveyances, transfers, etc., made by the bankrupt within four months prior to the filing of the petition with the intent to hinder, delay, or defraud his creditors, shall be void as against such creditors, except as to purchasers in good faith for a present and fair consideration.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251; Dec. Dig. ⇐ 166(1).]

Action by Hugh Chambers, trustee of E. N. Jelks, bankrupt, against the Continental Trust Company. On petition for review of a finding of the referee. Finding reversed, and decree ordered to be taken in accordance with the opinion.

A. W. Lane, of Macon, Ga., for bankrupt. Walter De Fore, of Macon, Ga., for trustee. Orville A. Park, of Macon, Ga., for Continental Trust Co.

SPEER, District Judge. In July, 1914, the Commercial National Bank of Macon had become seriously embarrassed. Its financial distress involved also its companion institution chartered by the state. This was the Commercial & Savings Bank. These two banking corporations had enjoyed to a large degree the confidence of the general public, and the officials of both, when the impending disaster was evident, at once undertook the most vigorous measures to save harmless their depositors and creditors. Application for assistance was promptly made to Mr. R. J. Taylor, the president of the American National Bank, and of the Continental Trust Company. The American National was, without doubt, the strongest banking institution in

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Central Georgia. The Continental Trust Company, with the same president, possessed the same relative strength.

In their distress, the officers of the Commercial National applied to the American National to assume the liabilities, take over its assets, pay depositors and other creditors, and thus liquidate its liabilities. The war in Europe was imminent. The public mind in Macon and elsewhere in high excitation, and the complete failure of the Commercial National, serving, as it did, the business community so widely, would doubtless have occasioned the most alarming results. A similar failure on the part of the Commercial & Savings would have been little less calamitous. The latter applied to the Continental Trust Company to do for it what the Commercial had sought from the American National. With the utmost generosity and public spirit, these two strong institutions flew to the assistance of their weaker brothers. Nor did the other Macon National Banks betray a spirit less broad or less judicious.

On inquiry, the governing body of the American National was of the opinion that the assets of the Commercial National were adequate to justify it in assuming the burden of liquidation, and this the American at once undertook. An investigation of the condition of the Commercial & Savings showed conditions less favorable. The Continental Trust Company, it was determined after consideration, could not undertake the liquidation of the Savings Bank unless guaranty from loss in addition to its assets was offered. The other National Banks of Macon, the Citizens', the Fourth National, the Macon National, and the American, contributed a liberal share of the \$173,000, and this they have paid.

In the successful effort to save the widespread loss and suffering which would have resulted to hundreds, possibly to thousands, of the depositors and creditors of these banks, if successful liquidation was defeated, the president and the directors of the Commercial and the Savings Bank at once pledged their personal means. They held back They even mortgaged their homes, and in some instances their wives and children surrendered their all; they did everything that men of probity could do to save from great loss those who had trusted them, of whom, many were in humble life, doubtless many, in danger of the direst penury. The result has been that every creditor and every depositor in the Commercial National and in the Commercial & Savings has been paid to the uttermost farthing. It is however, most regrettable that large loss has fallen upon the American National and the Continental Trust Company because of their liberal and effective efforts to save the depositors and creditors of the failing banks from conditions only in part here described. Among the directors of the Commercial National and the Savings Bank who pledged their all in aid of this most commendable effort was Mr. E. N. Jelks. Conveying much else, he executed a deed to the Continental Trust Company to his home at Rivoli, a suburb of Macon. The deed was to secure a demand note dated August 3, 1914, for \$25,000. The proceeds of this note were at once placed to the credit of the Commercial & Savings

Bank. Mr. Jelks had, shortly before, raised \$25,000 by pledging all the interest he had in a large and apparently profitable business in the state of Florida, the proceeds of which he used to reduce his indebtedness to the Commercial National. This conveyance by Mr. Jelks has been sustained by the referee, and, on petition for review, has been affirmed by this court.

The transfer to the Continental Trust Company of his Rivoli home property, as a part of the guaranty fund to secure the Continental Trust Company for payment of the depositors and creditors of the Commercial & Savings Bank, the referee, upon consideration, annulled as violative of section 67e of the Bankruptcy Act. That section in substance provides that all conveyances, transfers, etc., made by the bankrupt within four months prior to the filing of the petition, with the intent or purpose on his part to hinder, delay, or defraud his creditors, shall be null and void as against the creditors of such debtors, except as to purchasers in good faith and for a present and fair consideration. This finding of the referee was brought here by this petition for review. Therefore the question to be determined is, Was the Continental Trust Company a purchaser in good faith and for a present and fair consideration?

There is no issue raised as to the fairness of the consideration. The referee finds that the Rivoli property will probably bring \$10,000 less than the note of guaranty it was given to secure. Nor is it denied that the consideration was present and immediate. The transaction was between Jelks and the Continental Trust Company, and to that company Jelks was in no sense indebted. The Continental Trust Company, then, could have had no selfish or sinister motive in lending the money. It does not appear from the evidence that the status of Jelks' creditors was discussed in any way by the negotiating parties, or the fact that he had creditors. The sole inquiry was this, Is his guaranty to the liquidative fund satisfactory? It does not appear there were any liens recorded against him. He was regarded as one of the most prosperous members of the community by every one. It is true that he conducted a large business, and men, thus engaged, usually carry some liability; but this did not suggest insolvency. Indeed, the trustee in bankruptcy, who assails this transfer, Mr. Hugh Chambers, then a practitioner of law, a lawyer of fine intelligence and high character, now the judge of one of our important courts, testified as to Mr. Telks:

"I regarded him as one of the foremost men in the community, and worth over \$75,000."

There was much other evidence to the same effect. Mr. L. P. Hilyer, vice president of the American National, and judicially known to be a director of the Federal Reserve Bank of this district, testified:

"The American National Bank has been taking Jelks' paper right along from the Bibb Brick Company, and we have regarded it as good paper. I have heard Mr. Taylor, president of the American National Bank, say several times, 'Oh Jelks is good! He is good! That man is worth \$75,000 to \$100,000."

Mr. Taylor's view of insolvency is not an "iridescent dream."

Mr. W. R. Rogers, secretary of the Continental Trust Company, testified that at the time Jelks' guaranty was made he had no reason to believe that Jelks was not entirely solvent; and his paper in the Commercial & Savings Bank was regarded as all right; that "we would get our money."

An apparently disinterested witness was O. J. Massey, Jr., vice president of the Bibb Brick Company and the Bibb Sewer Pipe Company, whose whole output Jelks had been purchasing. Mr. Massey testified that he regarded Mr. Jelks as worth from \$150,000 to \$200,-

000, and a perfect risk financially.

Mr. Orville A. Park, whose enviable standing as a member of the bar is widely known, was present at the negotiations about liquidation, as the general counsel of the American National and the Continental Trust Company. He also was called upon to testify. "In going over the assets of the Commercial National," he states, "we kept three lists of papers. The paper was being classified by the officers as it was being called out. The Jelks' paper was put, without the slightest hesitancy, as A No. 1 prime paper, that being the highest classification." During the course of the evening, Mr. Park said the question was asked, "Whose were some of the principal loans?" Among others it was stated Mr. Jelks owed the bank somewhere about \$100,000, but that a good portion of it was secured; that a good deal of it consisted of accepted drafts, or commercial paper of that sort, bills of exchange, things like that, bills in transit and all. He further testified, "I still considered Mr. Jelks' paper as perfectly good, and so classed it." He further testified:

"The officers of the Continental Trust Company had nothing to do with determining which officers or directors would guarantee, or the amount of their individual guaranty, or how the guaranty would be secured. Mr. Jelks' guaranty was accepted right along with the rest of them."

He adds:

"There was no effort made to size up Mr. Jelks at all. There was no inventory of assets or liabilities taken. I did not know what Jelks owned. I knew, of course, he owned the Rivoli property. I knew he owned the Tampa property. I thought that Tampa property was easily worth \$60,000 or \$75,000. I knew he was doing business in Jacksonville. I knew he was doing business in Macon, but the assets he had around in one place or another I did not undertake to know."

Mr. R. J. Taylor, president of the American National Bank, testified that he took the leading part in the negotiations which led up to the liquidation of the Commercial National and the Commercial Savings Bank by the American National and the Continental Trust Company. Mr. Taylor has long been a banker. He has great experience and is a man and banker of unquestioned excellence and integrity. Indeed, all the evidence of all these witnesses is reported by the referee in his finding, without the slightest question as to its truth. "When it came to Jelks' paper," says Mr. Taylor, "I recall that some one said that Jelks' paper was secured. I said, 'In what manner?' 'By acceptances.' When you put that up to a banking man, acceptance is

considered one of the best papers taken in a bank, recognized by the Federal Reserve Board, unlimited as to what you can take of that paper. The supposition is that the man that the shipment goes to and owes for the goods is a good man. You have got an acceptance of his; that is the idea. It is really a two-name paper. * * * I knew he was doing good business; I always heard he was making money. My dealings with him were such as to lead me to believe he was. I considered that one of the best papers. I think it had a great deal to do with my taking over the bank." Of Jelks, he adds:

"I thought he was perfectly solvent. I don't think I would have touched the Commercial National if I had not thought it, because Jelks and three or four other names made about \$400,000 of their assets."

- [1, 2] There will be found in the evidence reported the testimony of no witness to contradict this general belief of the solvency, and indeed, prosperity, of Mr. Jelks. The referee does not question it. The presumption which obtains, when there is an issue of fact, in favor of the finding of the referee on the facts, is therefore not material. There is no disputed fact. It is the conclusion of that learned official of the bankruptcy court, from the undisputed facts which constitutes the grievance of the Continental Trust Company. The referee concludes that because Jelks must have known his own insolvency when he conveyed the Rivoli property to the trust company, not to benefit his own creditors, but to secure that company against loss, in case the assets of the Commercial & Savings Bank in which he was a director proved insufficient to pay its liabilities, it was a violation of the relating clause of the Bankruptcy Act above referred to. But it is true, as shown by the citation of the referee, that the transaction so far as the purchaser (here, the Continental Trust Company) is concerned must be impugned, if at all, by actual fraud as distinguished from constructive fraud. Coder v. Arts, 213 U. S. 223, 224, 29 Sup. Ct. 436, 444 (53 L. Ed. 772, 16 Ann. Cas. 1008). Now the question of fraud depends upon the motive. See, also, Kerr on Fraud and Mistake, 196-201. "We are of the opinion," continued Mr. Justice Day in Coder v. Arts, for the unanimous court, that Congress in using the terms, in section 67e, "to hinder, delay, and defraud creditors," intended to adopt them in their well-known meaning as being aimed at conveyances intended to defraud. * * * Such transfers have been held to be only those which are actually fraudulent."
- [3] It is impossible for the court to discover any actual purpose to defraud in a bank, which, on the note of a man generally believed solvent, and the pledge of property presumably adequate, proceeds to pay out thousands of dollars in order not to get a preference or benefit for itself, but to rescue another bank from utter failure, and all the banks of the city from that wild and disastrous panic which causes a "run" upon their vaults, from the incident and inevitable calamity to the business community. There were many guarantors of this fund, among them four National Banks in the city. The reasoning of the referee would have obliged the Continental Trust Company to have made close inquiry also into the assets of these banks. It would

charge the trust company with knowledge of all injurious facts which such inquiry might possibly have evolved. What greater reason was there for inquiry into the business condition of an individual guarantor whom every one deemed solvent? Besides, the logic of this reasoning on the part of the learned referee would oblige a bank to sift and investigate the assets of every indorser on its paper. With his accustomed acumen and assiduity, the referee has marshaled all the facts which such an investigation might have discovered in the business affairs of Mr. Jelks; but it is enough to support his deed if the trust company in good faith believed him solvent, and if, likewise in good faith, it had no thought of delaying or defrauding his creditors.

In connection with the leading case of Coder v. Arts, supra, we may be justified in considering the condensation of the principle as expressed in that case by the lucid and skillful editors of the Law. Edition, Supreme Court Reports:

"The necessary effect upon other creditors of a mortgage executed by an insolvent within four months of the filing of a petition in bankruptcy, to secure a pre-existing debt, does not dispense with the necessity of showing an actual intent on his part to hinder, delay, or defraud his creditors, which is essential under section 67e in order to avoid such mortgage, where the mortgage was ignorant of the insolvency of the mortgagor, and had no reason to believe that a preference was intended."

A fortiori is this applicable where there is no pre-existing debt, where the consideration is present, valid, and the parties moved by a conscientious purpose to save a wavering bank and on the validity of the deed benefit the business community. And by the law of Georgia, a consideration is valid if any benefit accrues to him who makes the promise, or any injury to him who receives the promise. Park's Ann. Code, § 4242. See, also, Kimmerle v. Farr, 189 Fed. 295, 111 C. C. A. 27, and particularly Tumlin v. Bryan, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960, opinion by the late Circuit Judge Shelby, pronounced by the Circuit Court of Appeals for the Fifth Circuit. Also, First National Bank v. Abbott, 165 Fed. 852, 91 C. C. A. 538; Grant v. First National Bank, 97 U. S. 80, 24 L. Ed. 971; Rosenman v. Coppard, 228 Fed. 114, — C. C. A. —, Circuit Court of Appeals for the Fifth Circuit, decision at the present term.

A number of authorities have been cited by the learned counsel for the trustee, which he regards as inimical to this view. The first of these is In re Pease (D. C.) 129 Fed. 447, 448. In that case, however, it is found that the purpose of the trust company was to aid the seller in perpetrating a fraud upon his creditors. The case is distinguished by the court from Tiffany v. Boatman's Institution, 18 Wall. 375, 21 L. Ed. 868. In the latter and controlling case, the court upheld the validity of the loan to one Darby, who is described as, "A man of large property and large debts," and "of wonderful energy and capacity for business." That is an accurate portraiture of Jelks at the time the deed assailed was made. Darby borrowed the money to take valuable security out of pledge, and to prevent their sacrifice; neither he nor the other contemplated any fraud upon creditors, and besides, in Pease's Case, there was an unknown country merchant doing business in a small village, confessedly and obviously unable to pay either his business indebtedness, or long-standing debts of borrowed capital.

In Re Lynden Mercantile Co. (D. C.) 156 Fed. 713, also cited for the trustee, there appeared—

"in the negotiations and in the culmination of the transaction a manifest intention to not give any opportunity for other creditors to secure a preference ahead of the bank."

Besides, there was a payment of an overdraft amounting to more than \$2,000 for a past consideration, and a note for \$130 not then due. In Toof v. Martin, 13 Wall. 48, 20 L. Ed. 481, also relied upon for the trustee, Mr. Justice Field, for the court, states:

"In the present case, the bankrupts were insolvent in both senses of the term at the time the conveyances in controversy were made. They did not then possess sufficient property, even upon their own estimation of its value as given in their schedules, to pay their debts. These exceeded the estimated value of the property by over \$20,000, and for months previous the bankrupts had failed to meet their obligations as they matured. The creditors had pressed for payment without success. Their stock of goods had been levied on, and their store closed by the sheriff under an execution on a judgment against one of them."

The learned Associate Justice appends the obvious conclusion:

"It would serve no useful purpose to state in detail the evidence contained in the record which relates to their condition. It is enough to say that it abundantly establishes their hopeless insolvency."

In the Merchants' National Bank v. Cook, 95 U. S. 344, 24 L. Ed. 412, Mr. Associate Justice Hunt, for the court, observes:

"The president of the bank testifies that there was nothing in the note sent with the securities, or in the transaction itself, that led him to suspect the insolvency of Homans."

He adds:

"While it is impossible certainly to indicate the operation of the human mind, we cannot but think the witness is largely at fault in his recollection, and that his idea at the time of testifying was not the one that controlled his action when the occurrence took place."

In Newport Bank v. Herkimer Bank, 225 U. S. 178, 32 Sup. Ct. 633, 56 L. Ed. 1042, the two concerns between which the preference was made were in the same hands. One had made the conveyance of all its assets to the other, but under the facts of the case, as set forth in the opinion by Associate Justice Hughes, it is held that the trustee failed to establish any right to recover.

Unusual stress was placed by the learned counsel for the trustee on Monroe Mercantile Co. v. Arnold, 108 Ga. 449, 34 S. E. 176. There, however, the court was construing the state statute and not the bankruptcy law. There was a verdict of a jury, in which that body answered, in a somewhat embarrassing fashion, the large number of questions propounded to it in accordance with the Georgia practice. The court proceeds, with much carefulness and clarity, to interpret the somewhat multifarious verdict. The jury had found that there was no intent to defraud, but an intent to delay. The court held that part of the loan was an antecedent debt, that the mortgage was therefore void; and as for the rest, the case went off on the proposition that the

individual action of certain directors in executing the mortgage was not the action of the corporation itself. This view was amply supported by the authority cited. This laid the axe to the root of the tree. Since the execution of the mortgage was wholly unauthorized, it was necessarily held invalid. It follows that the views expressed by the learned Justice, pronouncing opinion to the effect that the mortgage was fraudulent and seems not essential to the decision, may, perhaps, be regarded as obiter, and the authority of the precedent in illustrating the question before this court may then be to some extent diminished.

Did the case before this court involve an issue of fact, we would be exceedingly loth to disturb the finding of the very able and efficient referee. We, however, cannot agree with the conclusion he has drawn from the undisputed facts, and therefore hold that conclusion should be reversed and the lien of the trust company sustained. There is a stipulation filed by counsel for the trust company and the trustee that this holding is not to conclude any right of procedure or any equity set forth or sought in an intervention of Mrs. Lena P. Jelks, which has not yet been heard.

Let decree be taken in accordance herewith.

BALFE et al. v. TILTON.

(District Court, D. New Hampshire. August 14, 1916.)

No. 373.

EXECUTORS AND ADMINISTRATORS \$\igcsim 506(1)\$\to Suit for Accounting by Executor-Burden of Proof.

In a suit in equity for an accounting by an executor, where as a preliminary question it was determined that his administration of the estate was fraudulent, and the case was referred to a master for an accounting, the burden of proof rested on defendant to show that he did not profit by transactions by which property of the estate was transferred to him.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2169-2175; Dec. Dig. \$\sim 506(1).]

In Equity. Suit by Mary A. Balfe, administratrix, and another, against Genieve E. Tilton. On motions to confirm and to set aside report of master. Decision reserved.

See, also (D. C.) 198 Fed. 704.

A. H. Holmes, of New York City, for plaintiffs. Foster & Lake, of Concord, N. H., for defendant.

ALDRICH, District Judge. This cause is now submitted upon motions which raise the question whether the report of the master, John E. Allen, shall be confirmed or rejected and set aside. Upon proceedings prior to the appointment and the hearings before Mr. Allen, certain findings of fact had been made by a former master, and upon hearings the findings had been confirmed in respect to the purposes for which they had been made.

The various hearings before the court, and before examiners and masters, were under a bill in equity in which relief was sought upon the general ground that Charles E. Tilton, who was executor of his brother Alfred's estate, had fraudulently subverted interests which belonged to Alfred's widow and daughter. Under the bill, which asks for discovery and an accounting, it became necessary, under the pleadings, to determine, as a preliminary question, whether certain releases, which had been executed by the widow of Alfred, were fraudulently obtained. Upon such ascertainments as were deemed proper, the releases were set aside as fraudulent.

The findings with respect to the releases executed by Louise Tilton, the widow of Alfred, were made by James P. Tuttle, as master, under a commission which defined the duties of such master as not requiring a hearing with the scope which would ordinarily be adopted for purposes of strict accounting, but a scope sufficiently broad to cover investigations with reference to the value of the interests of Alfred at the time of his death and at the time of the supposed releases, so far as it was thought that property values reasonably bore upon the question whether Louise was overreached in the supposed settlement between Charles E. Tilton, as executor, and the widow, Louise, and her daughter. Under such a commission, and upon such investigations and hearings as the parties sought, Mr. Tuttle reported that Charles had fraudulently obtained title to a large amount of real estate belonging to his brother, conservatively worth not less than \$100,000, that his administration of the estate was fraudulent, that the releases were obtained by fraud, and that the plaintiffs were entitled to an accounting. After Mr. Tuttle's report came in, the plaintiffs moved for a decree for \$100,000, and the motion was denied, upon the ground that the findings of Mr. Tuttle were not for the purpose of definitely establishing rights under a strict accounting, but for the purpose of ascertaining whether the releases should stand across the path of the plaintiffs, and thus put out of contention all questions in respect to the right of the plaintiffs to have an accounting. The report of Mr. Tuttle was accepted and confirmed in respect to such questions, the releases were set aside, an accounting was ordered, and the question of discovery was held in abeyance.

The commission to Mr. Tuttle, and his findings thereunder, were manifestly not for the purpose of establishing ultimate rights under an accounting, but for the purpose of determining whether the release, which lay across the path of the plaintiffs, should be removed, to the end that an accounting might be had.

Under certain explanations and orders, Thomas D. Luce was appointed master, and after an incomplete hearing before him he asked to be relieved from the case, and an order, as it is remembered, was entered accordingly. Subsequently, by agreement of the parties, John E. Allen was appointed master to state the account, and his report is now before me upon motions to which I have referred.

Under such proceedings as had been had before the court and the prior master, and under a decree appointing another master for the definitely expressed purpose of taking an account, it would ordinarily be supposed that such master would proceed to that end, without assuming responsibility in respect to matters involved in the prior interlocutory proceedings, which include findings and decrees. Still the master in this case seems to assume a broader responsibility than is ordinarily assumed by a master. It was entirely beyond his province to criticise a finding of Mr. Tuttle, a former master, and say that it was based upon unsupported conjecture. The criticism of Mr. Tuttle's report was not pertinent to any issue before Mr. Allen; and beyond what is involved in the idea of the master's criticism of the findings of a former master in the same proceedings, is the idea that it discredits a finding which was largely the foundation for the decree setting aside the releases.

Under conditions of established fraud, certain intendments and inferences are sometimes warranted. Intendments and inferences sometimes naturally and necessarily spring from the circumstantial situation; therefore it is not for one tribunal, and especially a tribunal not charged with the duty of reviewing a former finding, to characterize it as based upon unsupported conjecture.

It is quite true that the accounting, contemplated by the submission to Master Allen, was an equitable accounting, with explanations of the theory upon which the ascertainments were made. That, of course, meant that the accounting by Mr. Allen should be an equitable one, and an ascertainment of the fact whether there was anything in the Charles Tilton estate which belonged to the estate of Alfred. The discharge of the duty under such a submission did not require the strong characterizations against the findings of the prior master, and indirectly of the decrees of the court thereon.

The report of Mr. Allen is more like an opinion by a tribunal under the responsibility of writing an opinion in respect to ultimate rights than a statement of an equitable account by a master in equity.

If it be true that Charles Tilton's administration of the trust existing between himself, as executor of his brother's will, and the widow and daughter of his brother, was fraudulent throughout, it results that there is some burden upon the defendants to show that the Charles Tilton estate has not reaped any harvest by virtue of the fraud. The fact that there was a fundamental wrong in Charles Tilton's administering a trust, as between his own interests and the interests of others, goes far in the direction of creating the burden of showing that there is nothing in his estate that belongs to the estate of Alfred.

Under such circumstances of trust relations, the evidence in this case which has been submitted to me from time to time, consisting of letters written by Charles to Louise, and of explanations and transactions, and descriptions of the manner in which proceedings were instituted and carried along, has created a very strong impression in my mind, not only that Charles intended to overreach Alfred's widow and her child, but that he so managed Alfred's interests as to benefit by it to their damage.

The character of the letters, the manner of doing business, and the nature of the interviews between Charles and Louise are very weighty in sustaining this view. This does not mean that the estate of Charles

should be wronged by any general considerations of fraud, and there was no occasion for the master's interjecting into his report the idea that one guilty of fraud should not be denied equal protection of the law, or any expressions as to what justice requires. The master's duty was to state the account and the theory upon which it was made.

As observed, the report of Mr. Allen does not so far relieve my mind as to justify a final decree against the plaintiff. The report, notwithstanding certain disclaimers in respect to former findings, seems to be constructed upon the theory that there is, under the circumstances of fraud, no burden upon the defendant, and, indeed, in places it is quite argumentative in respect to the view that proceedings, in the various jurisdictions, of prima facie regularity were in fact honestly instituted, and this notwithstanding the premises, already assumed as correct ones by the court and former master, and by Master Allen, that the transactions, from their inception, were tainted with fraud.

As I view this case, it does not necessarily involve any question either of collateral or of direct attack upon proceedings in other jurisdictions. It is more a question whether Charles benefited through the instrumentalities of such proceedings, and thus it, perhaps, becomes in an equitable proceeding of this kind, after such a lapse of time, a question as to the value of the interests of Alfred of which there was a general intent to subvert.

It is not quite clear what is intended by page 17 of Mr. Allen's report. If it is meant that Charles is entitled to hold certain advantages, under an equitable accounting, in respect to the values of the Colorado and the New York real estate under the \$25,000 transaction relating to the releases, I should not want to approve of such a theory until more is known about it. As the transaction is declared void by reason of fraud, it does not appear plain that Charles' estate should be credited with the \$25,000, and also by reason of the transaction acquire advantages in respect to the values of unsold properties.

My attention has not been called to requests submitted at the hearing before Mr. Allen, but I had not supposed that it was for the master to make any rulings upon any question in respect to whether the account rendered in pursuance of the order of court was in conformity thereto.

Although it seems that the master traveled far afield in his comments upon prior proceedings and in respect to general questions of law, I am not at this time going to set the report aside, nor am I going to confirm it. Of course, it is open to the tribunal charged with final decision in a proceeding in equity in such a situation as this to confirm a report, reject it, or to hold it and its findings for its proper weight in such subsequent proceedings as may seem equitable.

It does not seem to me to be a correct view, under circumstances of fraud, that equity will lean very far in order to exonerate a wrong-doer in respect to values, upon the ground that it should not be assumed, that he understood the law of implied, resulting, and constructive trusts. On the contrary, the more equitable view would have reference to the value of the things subverted under wrongful intentions, and

this quite independent of direct or collateral attack upon judgments of other jurisdictions.

The transactions of Charles being tainted with wrongful intent, the indebtedness claim of \$24,675.28 presented in the Colorado courts is under suspicion, and is not necessarily res judicata as against these plaintiffs, and the burden of attack would not necessarily rest upon Alfred's widow and child, yet the master sustains the claim of Charles for \$24,675.28, put up in the Colorado courts in his own behalf, against the brother's interests, as correct in equity, upon the ground that there is nothing in the record to disprove its merits. Until more is known about this, I cannot approve of this theory or this finding.

If Charles Tilton's dealings with the widow were prompted by wrongful intent, and if the monthly installments, amounting to something like \$42,000, were made for the purpose of keeping her along and lulling her into a feeling of security, to the end that her interests and her child's might be more effectually absorbed by Charles, it would, perhaps, be a question whether an equitable accounting would restore these sums.

It would seem, in view of the whole situation, that further information should be had with respect to the \$20,000 legacy in Alfred's will.

It must be understood in this case that I have not only to weigh my own impressions, but to give proper weight to the findings of the two masters, who seem to hold different views in respect to the true equitable status between these parties.

In conclusion, the report of Master Tuttle sustains the status here-

tofore decreed; that of Master Allen is neither approved nor altogether rejected. I am not yet satisfied how this case should be decided, and I am not going to enter a decree until I know more about it.

I have doubts about the correctness of some of the theories and some of the findings of Master Allen. Under such circumstances, and without intimating any definite or fixed conclusions, I will hear the parties further, and, when I feel confident that I understand how the case should be disposed of, will decide it upon my own responsibility, aided, of course, by the investigations made by the masters.

There is an old theory that the conscience of a chancellor shall be satisfied before he decides. I am not quite sure how far that theory holds good in modern philosophies, but it is probably correct to say that a master's report in equity has not quite the binding force of that

of a master's report in an action at law.

UNITED STATES v. FONG FOO.

(District Court, N. D. Iowa, C. D. September 1, 1916.)

ALIENS 24-Deportation of Chinese-Change of Status.

A Chinese person, who, as found by the immigration officers, was a merchant at the time of going from the United States to China on a visit, and was readmitted as such on his return, but who until a year or two before going had been a laborer, and again became one on his return, from that time reverted to his former status of laborer, and, not having obtained the certificate of residence required by Exclusion Act May 5, 1892, c. 60, § 6, 27 Stat. 25, as amended by Act Nov. 3, 1893, c. 14, § 1, 28 Stat. 7 (Comp. St. 1913, § 4320), at which time he was a laborer domiciled in the United States, is subject to deportation under said acts.

Proceeding for deportation by the United States against Fong Foo. From an order of deportation, defendant appeals. Affirmed.

The defendant Fong Foo was charged, in an information filed before a United States commissioner in this district, with being a laborer at Lake City, Calhoun county, Iowa, without a certificate of residence, as required by section 6 of the act of Congress approved November 3, 1893, and upon a hearing before the commissioner was ordered deported to China, and he appeals, as authorized by section 13, c. 1015, Act Sept. 13, 1888, 25 Stat. 479 (United States Compiled Statutes 1913, § 4313).

Kenyon, Kelleher & Price, of Ft. Dodge, Iowa, for appellant. F. A. O'Connor, U. S. Atty., of New Hampton, Iowa, and Charles A. Lich, of St. Louis, Mo., representing the Bureau of Immigration.

REED, District Judge. Upon the information filed against him the appellant was arrested and committed to jail; later he was admitted to bail in the sum of \$1,000, and afterwards taken before the commissioner and given a hearing, at the conclusion of which the commissioner recites:

"And upon a full hearing and consideration of the matter, I find that defendant is a Chinese subject, that on the 6th day of November 1914, he was found engaged as a laborer at Lake City, Iowa, in said district, and not possessed of a certificate of residence, or entitled to one as required by law, and is unlawfully in the United States and not entitled to remain therein; and it is therefore ordered, adjudged, and decreed that the defendant, Fong Foo, be deported from the United States to China."

The information is quite indefinite, but no objection is made thereto. The Chinese Exclusion Acts of Congress are set forth in volume 2, United States Compiled Statutes of 1913, beginning at page 1735 (section 4290 et seq.). The information is based upon section 6 of the act of Congress approved May 5, 1892, as amended by Act November 3, 1893, c. 14, § 1 (United States Compiled Statutes 1913, § 4320), which amendment, so far as material, provides that it shall be the duty of all Chinese laborers within the limits of the United States. who were entitled to remain therein before the passage of the act to which this is an amendment, to apply to the collector of internal revenue of the respective districts within six months after the passage of this act for a certificate of residence; and any Chinese laborer within the limits of the United States, who shall neglect or refuse to comply with the provisions of this act and the act to which this is an amendment. or who, after the expiration of said six months, shall be found within the jurisdiction of the United States without such certificate, shall be deemed and adjudged to be unlawfully within the United States. and may be arrested and taken before a United States judge, whose duty it shall be to order that he be deported from the United States, as provided in this act and in the act to which this is an amendment, unless he shall establish clearly, to the satisfaction of said judge, that he has been unable to procure such certificate, and by at least one credible witness, other than Chinese, that he was a resident of the United States on May 5, 1892; and if, upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost; and any Chinese person, other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right, may apply for and receive the same without charge; and that no proceedings for a violation of the provisions of said section six of the act of May 5, 1892, as originally enacted, shall hereafter be instituted, and that all proceedings for said violation now pending are hereby discontinued.

Section 2 (Comp. St. 1913, § 4324), provides:

"The words 'laborer' or 'laborers,' wherever used in this act, or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant. Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing."

By section 7 of the act of May 5, 1892 (Comp. St. 1913, § 4321), the Secretary of the Treasury was required to make reasonable rules and regulations for the efficient execution of the act. Later the powers, duties, and authority of the Secretary of the Treasury were conferred upon the Secretary of Commerce and Labor, and after the creation of the Department of Labor upon the Secretary of Labor.

That the appellant is a person of the Chinese race is not disputed; and he testified in his own behalf upon the hearing before the commissioner through an interpreter substantially as follows:

"My name is Fong Foo. I am 51 years old. Was born in San Francisco. My father's name was Fong Sing; mother's name, Jenge Shee. They are both dead; died in China. I was a little over ten years old when I last saw them. I was working as a laborer at that time in San Francisco. Went to China in K. S. 33 (1907). Remained there a little over a year. Never was there at any other time. Came back to San Francisco. Never was out of United States at any other time. Lived when a boy in San Francisco. There are no persons living that I know of in San Francisco, who knew me when I was a boy. Worked in San Francisco for years and years. First went into firm of Quong Wo On & Co., about a year before I went to China. Put \$600 into the company that I had saved by working as a laborer. Was salesman and assistant bookkeeper in the firm. Lived during that time in rear of the store.

Did no other work in the firm. Lived during that time in the rear of the store. There were seven or eight partners in the firm. Do not remember all their names. Was there a little over a year, and then went to China. China to get married, and did get married. When I went I intended to return to the United States. Got papers from immigration officers at the port before I went. When I got back from China, I was examined by the immigration officers and got from them this paper marked 'Exhibit A.' back from China a new firm was organized, and was located on Dupont street, San Francisco. Was staying around there about a month, but did not work for the firm. I had no money to put in the new firm. There was about \$2,500 in accounts due the old firm, but I couldn't get anything. After about a month I left San Francisco and came to Garner, Iowa. Lived there about a year, and came to Lake City, and have been there ever since, about four years. I know Chin Mon Ho, whose deposition was read. Knew him in Oakland, Cal., where our store was. He has been in our store there, and I have been in his store there in Oakland. I have written to him, and he has written to me. I sent him money to send to China for me. The checks shown me are checks I sent to Chin Mon Ho to send to China. (Checks marked 'B' and 'C.') Chin Mon Ho is manager of Sang, Chung, Lung Co."

Cross-Examination.

"I lived at Lake City, Iowa, when I was arrested. . I own a laundry in that city. I returned from China in June, 1909. I worked about a month in San Francisco at the place the firm had changed to; before I left for China the firm was located at Oakland, Cal., at 365 Ninth street. I became a member of that firm, the Quong Wo On & Co., in 1906. Have been a laundryman for five years, since returning to the United States. Was a laborer prior to 1906. Was never a merchant before 1906. I was in San Francisco in 1892, 1893, and 1894. At that time I was working in a grocery store, for the Ching Woo Company. Never acquired any interest as a merchant until that with Quong Wo On & Co. in 1906. Was examined by the immigration officers on my return to the United States. Do not remember of saying at that examination that there was 14 members in the firm of Quong Wo On & Co., to which I belonged. Did not say that before that I was a member of the firm of Yee Wo & Co., 921 Dupont street, San Francisco. Have no certificate of residence. If I got one it would be destroyed by the earthquake. I expected the earthquake. I was ten years old when my parents left for China. They did not leave me in the care of any one. My parents died in China. I was probably 17 or 18 years old when they went back to China. I was born at San Francisco, at 728 Dupont street. It was a three-story brick building. I was born in a room on the third story. My wife is in China. Have one brother. Do not know where he is. Do not know where any one lives that remembers me when I was

Three questions are presented for determination: (1) Was the appellant born in the United States? If he was, of course, he cannot rightly be deported. If he was not, then (2) Was he a merchant at the time he went to China in 1907, intending to return to the United States? If he was, then, upon compliance with the regulations of the Immigration Bureau, he had the right to re-enter the United States as a merchant upon his return from China. (3) What was his status at the time of his arrest at Lake City, in 1914? Of those, in their order:

1. No other witness came to testify directly as to the place of appellant's birth. There is, however, among the papers transmitted to this court by the commissioner, what purports to be a copy of the record of births kept under the provisions of the Political Code of California, which shows that a Chinese person by the name of Fong Foo Gong was born in the city and county of San Francisco April 6, 1875; that his father's name was Fong Sing, his mother's name Jenge Shee,

both natives of China; the occupation of the father is given as a merchant, of 722 Dupont street, San Francisco; the residence of the parents is given as at the same place. This paper appears to have been recorded in 1898, is not authenticated as required by section 906, Revised Statutes of the United States, nor does it appear how the same came before the commissioner; but if the paper was properly authenticated and offered in evidence before the commissioner, and is genuine, it would show that the appellant is some 10 years younger than he says he is; more than this, if the appellant was born in San Francisco in 1875, as appears by this paper, or by his own statement, and has lived in the United States all of his life, except the short time he says he was in China, it is strange that he should be unable to speak the English language sufficiently plain to testify without an interpreter. This might be possible, but it is hardly probable. If he was born in the United States, he could not, of course, be rightly deported; but, without further considering the testimony as to the place of his birth, it must suffice to say that it fails to show with the required certainty that he was born in the United States.

2. Was the defendant a merchant within the meaning of section 6

of the Act of November 3, 1893, when he went to China?

The testimony in behalf of the defendant shows without substantial dispute that for more than a year before he went to China he became a partner in the firm of Ouong Wo On & Co., merchants engaged in the clothing and dry goods business at 365 Ninth street, Oakland, Cal., prior to the earthquake of April, 1906; and when he went to China in the fall of 1907 (K. S. 33) he made to the proper immigration officer at San Francisco an application as follows:

"In order to comply with the requirements of Treasury Decision No. 22,050. which provides that the departing Chinese merchant shall furnish the Commissioner of Immigration with evidence that he is a merchant, and that said evidence may be investigated prior to his departure, so that his right to

re-enter as a Chinese merchant may be established:

"Therefore I, Fong Foo, merchant, do solemnly swear: That I am a merchant and a member of the firm of Quong Wo On & Co., dealers in clothing and dry goods, doing business at No. 365 Ninth street, city of Oakland, county of Alameda, state of California. That my interest in said firm is six hundred dollars (\$600.00). That I have been a merchant and a member of said firm for more than one year last past, and that during said period I have not performed any manual labor, except such as was necessary in the conduct of my business as such merchant. That I have had attached hereto a statement subscribed and sworn to by white witnesses certifying that they know me to be a merchant. I further certify that the photograph attached to the first affidavit in this certificate is a correct likeness of myself at the present time. "[Signed] Fong Foo.

"[In writing and in Chinese characters above the writing.] "Subscribed and sworn to before me this 14th day of October A. D. 1907. Charles D. O'Connor, Notary Public." "[Seal]

Three witnesses (white) also made the following affidavit:

"Whereas, Fong Foo, whose photograph is hereto attached, is about to de-

part for China intending to return to the United States:

"Now, therefore, for the better identification of the said Fong Foo, and in order to facilitate his landing upon his said return, we, the undersigned, do hereby certify and declare under oath, each for himself and not one for the other, that we have known the said Fong Foo as a resident of state of California for the number of years set opposite our respective names; that he is by occupation a merchant in good standing, engaged in buying and selling merchandise at a fixed place of business, to wit, as a member of the firm of Quong Wo On & Co., dealers in clothing and dry goods, doing business at No. 365 Ninth street, in city of Oakland, county of Alameda, state of California; and that he now resides thereat and does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant, and that he has been engaged in such business as such merchant for more than one year last past."

Signed and sworn to before a notary public October 14, 1907, by Joseph Jacoby, 379 Ninth street, J. C. Gambo, 22 Eighth street, and A. Soloman, 525½ Twenty-Third street. Photograph attached. Indorsed upon these affidavits are the following words:

"Departed from San Francisco, per steamer Manchuria, October 24, 1907. [Signed by an inspector.]"

On his return from China in June, 1909, he was again examined before the immigration office in San Francisco, and two white witnesses each testified that he had known the defendant for a number of years, and that he had been a merchant in the firm of Quong Wo On & Co., 365 Ninth street, Oakland, Cal., for a year prior to his going to China in October, 1907.

All the testimony, other than that of the appellant, was taken by deposition in San Francisco, at the taking of which inspectors and interpreters from the Chinese Bureau of the Immigration Station at San Francisco were present, and no effort has been made to controvert the same. From this testimony and that of the appellant it appears that it was established to the satisfaction of the proper immigration officers at San Francisco, when he departed for China, that he was then a merchant within the meaning of section 6 of the act of May 5, 1892, as amended by the act of November 3, 1893, and also that in June, 1909, when he returned to San Francisco, he was then entitled to reenter the United States, and was permitted by the immigration officials to and did re-enter the United States at San Francisco. These findings are conclusive of the right of the defendant to enter the United States in June, 1909. United States v. Sing Tuck, 194 U. S. 161, 168, 169, 24 Sup. Ct. 621, 48 L. Ed. 917; United States v. Ju Toy, 198 U. S. 253, 261, 25 Sup. Ct. 644, 49 L. Ed. 1040.

3. What, then, was the status of the appellant after he re-entered the United States in June, 1909? Undoubtedly he was admitted because of being a merchant when he departed for China in 1907; and if he had followed that occupation after returning to the United States, it may be doubtful, at least, if he could now be deported. The appellant admits that in the years 1892, 1893, 1894, and prior to 1906, when he joined as a partner the mercantile firm of Quong Wo On & Co., in Oakland, he was a laborer. For some reason that firm closed its business when appellant was in China, and when he returned in 1909 the remnant of its property, wherever it was, had been moved to San Francisco, and the firm reorganized as a new firm under the name of Wing Wo On & Co., of which appellant says he was not a member, and to which he contributed nothing. After his return to San Francisco he stayed with the new firm for a short time, trying to settle or

collect his interest in the old firm, but was not successful, and within a month he left San Francisco. He was next heard from, so far as the testimony shows, at Garner and Lake City, in this district, where he was arrested upon the information filed in this proceeding.

There is no claim that, after he left San Francisco in 1909, he has been engaged as a merchant, or in any other occupation than that of a laborer, and claims that, when arrested, he owned a laundry in Lake City. As he was a laborer when first in the United States, so far as shown by the testimony, and up to 1906, when he invested in the firm of Quong Wo On & Co., his status passed from that of a laborer to that of a merchant, either in, or prior to, 1906. When he lost his interest in that firm, and he did not again engage in the business of a merchant, his status reverted to that of a laborer, which has been his occupation since he left San Francisco in 1909. As he is not a citizen of the United States, and cannot become one, and has no certificate of residence as required by the Exclusion Act, he has since leaving San Francisco been unlawfully in the United States, and subject to deportation. See United States v. Yong Yew (D. C.) 83 Fed. 832.

The commissioner, therefore, rightfully ordered his deportation to China, and that order must be and is affirmed; and it is accordingly so ordered.

ARMSTRONG CORK CO. et al. v. RINGWALT LINOLEUM WORKS.

(District Court, D. New Jersey. August 28, 1916.)

1. Trade-Marks and Trade-Names \$\sim 78\text{--Suit for Unfair Competition--} RIGHT OF ACTION.

An action for unfair competition lies only when a property right of the complainant has been invaded, and the fact that a defendant makes an article and sells it under a false name or designation, and thus deceives the public, does not give a right of action to another, who makes the genuine article so designated, where it is not shown that defendant has represented or sold its product as that of complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 88; Dec. Dig. €=78.]

2. Words and Phrases—"Linoleum."

"Linoleum" is a floor covering made of oxidized oil combined with ground cork, wood flour, or similar vegetable material impressed upon a suitable back, usually of burlap.

[Ed. Note.-For other definitions, see Words and Phrases, First and Second Series, Linoleum.]

In Equity. Suit by the Armstrong Cork Company and others against the Ringwalt Linoleum Works. On motion to dismiss bill. Motion

McDermott & Enright, of Jersey City, N. J. (Frank F. Reed and Edward S. Rogers, both of Chicago, Ill., of counsel), for plaintiffs. Briesen & Schrenk, of New York City (Fritz v. Briesen and Hans v. Briesen, both of New York City, of counsel), for defendant.

RELLSTAB, District Judge. The Armstrong Cork Company, Thomas Potter & Sons Company, the George W. Blabon Company,

and the American Linoleum Manufacturing Company filed their bill against the Ringwalt Linoleum Works, charging it with unfair competition in the manufacture and sale of a composition floor covering.

[1] As summarized in the brief of complainant's counsel, the bill

alleges that:

"Prior to December 19, 1863, Frederick Walton, was the inventor of a new floor covering or cloth, which was made from a composition of oxidized oil, ground cork, and wood flour impressed upon a suitable back. To this product he applied the name 'lipoleum,' which was an arbitrary word, invented by him and first applied to his patented composition. Patents were secured in England and in the United States, which expired in 1877, when the manufacture of linoleum became open to the public, and the name was dedicated to public use as descriptive of the composition covered by the expired patents. Immediately upon the expiration of the patents, and from time to time thereafter, other manufacturers began and continued to produce linoleum, and described the product with the word 'linoleum.' For many years the word 'linoleum' has had a definite and specific meaning, and indicated and now indicates in the trade and to users and the public a product made in accordance with the expired patent of Frederick Walton; that is to say, linoleum is a floor covering made of oxidized oil combined with ground cork, wood flour, or similar vegetable material impressed upon a suitable back, usually of burlap, and means no other product.

"The plaintiffs are manufacturers of linoleum made always and only in the way and of the materials just described. Plaintiffs manufacture about 54 per cent, of the linoleum manufactured in the United States, and their product, known as and designated as 'linoleum,' has a high reputation, and is known to the public as a product made as just described, and as a meritorious, de-

sirable, and durable article.

"The defendant knowingly, and with intent to deceive and to compete unfairly with the plaintiffs and other manufacturers and sellers of genuine linoleum, has placed upon the market an inferior, cheap, and spurious product. consisting of saturated felt paper, having designs painted upon the surface and deceptively contrived so as to resemble as nearly as possible genuine linoleum, and has advertised and sold such spurious product as linoleum, and as adapted to the purposes for which linoleum is intended, and has falsely and deceptively applied to such painted paper spurious product which it makes and sells the word 'linoleum' as the name or description of it, and falsely represented that said spurious product is linoleum, when the fact is, as is well known to defendant, that its product is not linoleum and cannot truthfully be so described, and that it is greatly inferior to genuine linoleum in cost, quality, and durability.

"Defendant's conduct has enabled and does enable dealers to sell, and such dealers do sell, this spurious product to buyers and users as linoleum, which it is not. Plaintiffs each and all are seriously damaged by defendant's unfair conduct."

The bill prays that the defendant be required to account for all profits derived by reason of its alleged misconduct, to pay the damages sustained by the plaintiffs, and that it be-

"perpetually enjoined and restrained from using in connection with the manufacture, advertisement, offering for sale, or sale of any product not linoleum, as known and understood and as herein described, the word 'linoleum,' from representing that the defendant's product which it sells as linoleum is linoleum, and from any and all untruthful use of the said word 'linoleum.' "

The defendant moves to dismiss the bill under equity rule 29 (198 C. C. A. xxvi, 115 C. C. A. xxvi), on the ground that it "does not state facts sufficient to constitute a cause of action." There is no allegation that the defendant, by its marks, labels, advertisements, or in other

ways, represents its goods as those manufactured by the plaintiffs, or that any person has been deceived by any act of the defendant into buying its goods as those of the plaintiffs. In other words, the defendant is not charged with palming off its goods as those of any other manufacturer.

The gravamen of the charge is that the defendant is making and vending a spurious article, and deceiving the public into buying it as genuine, with the result that the genuine article is discredited in reputation, and that the plaintiffs, who make and sell only the genuine article, are damaged. Such damages, however, are not the result of any attacks upon the property rights of the plaintiffs, and a right of action of the kind here pressed lies only when a property right has been invaded. Canal Company v. Clark, 13 Wall. (80 U. S.) 311, 20 L. Ed. 581; Goodyear India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 604, 9 Sup. Ct. 166, 32 L. Ed. 535; Brown Chemical Co. v. Meyer, 139 U. S. 544, 11 Sup. Ct. 625, 35 L. Ed. 247; Elgin National Watch Co. v. Ill. Watch Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; and American Washboard Co. v. Saginaw Mfg. Co., 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609. At the close of the argument on such motion, the court so expressed itself.

At the request of plaintiffs' counsel, however, a decree dismissing the bill was not then entered, and they were given an opportunity to submit an additional brief in support of their contentions. This brief, as well as that furnished by them at the time of the argument, has been read, and the question considered anew, without change of opinion. A discussion of the cases cited by plaintiffs' counsel as holding a different view—to my mind distinguishable from the instant case would be profitless, as the case of American Washboard Co. v. Saginaw Mfg. Co., supra, in my judgment, furnishes the law controlling the case at bar.

That case, as made by the bill, showed that plaintiff and defendant were manufacturers of washboards. The rubbing face of plaintiff's was of pure aluminum, while that of defendant's was made of a metal containing no aluminum whatever; that both branded their boards "aluminum," and so advertised them to the public; that the public was deceived into purchasing the defendant's boards as having a rubbing sheet made of aluminum, to the great and irreparable injury to plaintiff, as well as to the public. On demurrer the bill was dismissed. On appeal the dismissal of the bill was affirmed. The reasons given for such affirmance by Circuit Judge (now Mr. Justice) Day, speaking for the Circuit Court of Appeals, are so apt and convincing that extended quotations from his language are justified. He said:

"The bill * * * undertakes to make a case, not because the defendant is selling its goods as and for the goods of complainant, but because it is the manufacturer of a genuine aluminum board, and the defendant is deceiving the public by selling to it a board not made of aluminum, although falsely branded as such, being in fact a board made of zinc material; that is to say, the theory of the case seems to be that complainant, manufacturing a genuine aluminum board, has a right to enjoin others from branding any board 'aluminum' not so in fact, although there is no attempt on the part of such wrongdoer to impose upon the public the belief that the goods thus manufactured are the goods of complainant. We are not referred to any case going to the length required to support such a bill. It loses sight of the thoroughly established principle that the private right of action in such cases is not based upon fraud or imposition upon the public, but is maintained solely for the protection of the property rights of complainant. It is true that in these cases it is an important factor that the public are deceived, but it is only where this deception induces the public to buy the goods as those of complainant that a private right of action arises. * * * It is doubtless morally wrong and improper to impose upon the public by the sale of spurious goods; but this does not give rise to a private right of action, unless the property rights of the plaintiff are thereby invaded. There are many wrongs which can only be righted through public prosecution, and for which the Legislatuve, and not the courts, must provide a remedy. Courts of equity, in granting relief by injunction, are concerned with the property rights of complainant. * * *

"Take the metal which is the subject-matter of the controversy in this case. Many articles are now being put upon the market under the name of aluminum, because of the attractive qualities of that metal, which are not made of pure aluminum, yet they answer the purpose for which they are made and are useful. Can it be that the courts have the power to suppress such trade at the instance of others starting in the same business who use only pure aluminum? There is a wide-spread suspicion that many articles sold as being manufactured of wool are not entirely made of that material. Can it be that a dealer who should make such articles only of pure wool could invoke the equitable jurisdiction of the courts to suppress the trade and business of all persons whose goods may deceive the public? We find no such authority in the books, and are clear in the opinion that, if the doctrine is to be thus extended, and all persons compelled to deal solely in goods which are exactly what they are represented to be, the remedy must come from the Legislature, and not from the courts."

That case has been frequently cited with approval. See Daviess County Distilling Co. v. Martinoni (C. C.) 117 Fed. 186; American Wine Co. v. Kohlman (C. C.) 158 Fed. 830; Lowe Bros. Co. v. Toledo Varnish Co., 168 Fed. 627, 94 C. C. A. 83; Rathbone, Sard & Co. v. Champion Steel Range Co., 189 Fed. 26, 110 C. C. A. 596, 37 L. R. A. (N. S.) 258; Edward Hilker Mop Co. v. United States Mop Co., 191 Fed. 613, 112 C. C. A. 176; Borden Ice Cream Co. v. Borden's Condensed Milk Co., 201 Fed. 510, 121 C. C. A. 200; Borden's Condensed Milk Co. v. Horlick's Malted Milk Co. (C. C.) 206 Fed. 949.

The bill is dismissed, with costs.

ALEXANDER v. WILKES-BARRE RY. CO.

(District Court, M. D. Pennsylvania. December Term, 1913.)

No. 553.

DEATH \$\instyle=\frac{44}{\text{-}}\Action for Wrongful Death-Amendment of Pleadings.

Under Act Pa. April 26, 1855 (P. L. 309), which provides that "the persons entitled to recover damages for any injury causing death shall be the husband, widow, children or parents of the deceased and no other relative," the statement of claim in an action for wrongful death, brought by the administrator of the deceased for the benefit of his estate, cannot be amended, after the time for bringing action fixed by the statute has expired, by substituting the widow of the decedent as plaintiff.

[Ed. Note.—For other cases, see Death, Dec. Dig. 44.]

At Law. Action by R. B. Alexander, administrator of the estate of Vincenzo Colonna, deceased, against the Wilkes-Barre Railway Company. Sur motion to amend statement of claim. Denied.

M. H. McAniff and John McGahren, both of Wilkes-Barre, Pa., and Francis Rawle, of Philadelphia, Pa., for plaintiff.

Paul Bedford and Frank A. McGuigan, both of Wilkes-Barre, Pa.,

for defendant.

WITMER, District Judge. Action was brought by the administrator of the estate of Vincenzo Colonna, deceased, against the defendant, to recover damages for the alleged unlawful violence and negligence of defendant, resulting in Colonna's death. Colonna died January 31, 1913, and this action was instituted November 13, 1913. When the case was called for trial at the February term, 1916, counsel for plaintiff moved to amend by substituting the name of the widow of the decedent as plaintiff in place and stead of the administrator, and "to amend also the plaintiff's statement by inserting the names of decedent's two children as beneficiaries, in order that the widow may prosecute this action in her own behalf as well as for the benefit of his children." This motion was opposed by defendant on the ground that it was tending to introduce a cause of action after the statutory period allowing the same had expired.

At common law no action whatever could be sustained for the cause here disclosed. The act of Assembly approved April 15, 1851 (P. L. 674), granted the right to certain persons to maintain an action and recover damages for the death of a person occasioned by unlawful violence or negligence. By the act of April 26, 1855 (P. L. 309), it was provided that:

"The persons entitled to recover damages for any injury causing death shall be the husband, widow, children, or parents of the deceased, and no other relative."

This act took away from the personal representative of the decedent the right of action conferred by the former, and conferred it solely upon the four classes of persons in the order enumerated, to wit, "the husband, widow, children and parents"; consequently this action in its present form cannot be sustained, but the matter before the court is whether the motion to amend is to be allowed. Notwithstanding the able argument of counsel, this must also be denied, the statutory allowance of time having passed by, three times, since the cause of action arose which is for the first time by this motion suggested. Without husband, widow, children, or parents surviving there can be now, since the Act of 1855, no recovery. The plaintiff's statement as filed is silent as to the relatives of the decedent or the real beneficiaries entitled to recover under the statute, whose identity, it is provided, shall be therein disclosed, and the suit is brought solely for the benefit of his estate.

In this the case differs from Stewart v. Baltimore & Ohio R. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; Teti v. Consolidated Coal Co. (D. C.) 217 Fed. 443; Van Doren v. Penna. R. R. Co., 93 Fed. 260, 35 C. C. A. 282; Keystone Coal Co. v. Fekete, 232 Fed. 72.

— C. C. A. —; and kindred cases cited by counsel for plaintiff in which recovery was allowed, notwithstanding the nominal plaintiff. The important matter that determines whether suit shall prevail is dependent on the real plaintiff, or actual beneficiaries, for which suit is instituted.

As already noted, the actual and beneficial plaintiff in the statement on file is the estate, and not the widow and children of the decedent. Manifestly the measure of recovery is different where it is sought for the estate than when it is for the surviving widow and children—the one being for loss sustained by the estate, which in this case is nothing, because there can be no recovery; the other being for loss to wife and children of the earnings, support, society, and comfort of the husband and parent. To allow the amendment would assuredly introduce a new cause of action, which is not allowed, notwithstanding the liberality of the federal courts in allowing amendments.

Authorities supporting the conclusion reached may be found in Books v. Danville Borough, 95 Pa. 158; Haughey v. Pittsburg Railway Company, 210 Pa. 367, 59 Atl. 1112; Marshall v. Masselli, 47 Pittsb. Leg. J. (Pa.) 147; Coakley v. Pennsylvania R. R., 5 Clark (Pa.) 444; Di Paolo v. Laquin Lumber Company (C. C.) 178 Fed. 877.

The motion to amend is denied.

In re STOWE.

(District Court, N. D. California, First Division. September 5, 1916.)
No. 10215.

BANKRUPTCY = 123-ELECTION OF TRUSTEE-RIGHT TO VOTE.

Neither a bankrupt, nor his attorney, nor a general assignee, nor his attorney, may be permitted to control the selection of a trustee, and claims of creditors who have joined in such a plan may properly be denied the right to vote at the election.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 171–179; Dec. Dig. €=123.]

In the matter of Herbert A. Stowe, doing business as the Stockton Creamery, bankrupt. On review of rulings of referee. Affirmed.

R. C. Pardoe, of Stockton, Cal., for petitioner. Clarence A. Grant, of Stockton, Cal., for bankrupt.

DOOLING, District Judge. In the early part of June, 1916, Herbert A. Stowe, the bankrupt herein, made to Fillmore C. Marks an assignment for the benefit of his creditors. This was to be effective if all of the creditors assented thereto. Some of them did not do so, and the bankrupt then filed his petition and schedules and was duly adjudicated a bankrupt. Lafayette J. Smallpage was the attorney for the assignee, and when the bankruptcy proceedings were inaugurated he sent out to the creditors a circular letter in which he says:

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"We desire to represent you at the election of the trustee, and will do so without charge, provided you execute the enclosed proof of debt."

At this time the assignee had collected a considerable sum of money, for which he would necessarily have to account to the trustee who might later be selected. In response to this letter a number of creditors sent their claims with power of attorney to Smallpage. These claims were afterwards turned over to R. C. Pardoe, who attempted to vote them at the election for trustee. The referee refused to permit them to be voted, on the ground that the attorney for the assignee was endeavoring in this manner to control the election of trustee. In this connection the bankrupt testified as follows:

"Isn't it a fact, Mr. Stowe, from your knowledge, and with your approval, and you participated in it, Mr. Smallpage, representing the assignee nominally, and Mr. Stewart, representing you, were working together, were endeavoring to get all the claims in to elect the trustee in this matter? A. We were trying to get an assignment of all the claims; Yes, sir."

The action of the referee in this regard is approved.

The referee also rejected the claims of E. B. Stowe, father of the bankrupt, for the reason that the nominee of said E. B. Stowe was the same as the nominee whom Smallpage and the bankrupt were endeavoring to elect, and that the said E. B. Stowe had joined with Smallpage in endeavoring to control the bankrupt's estate. His ac-

tion in this regard is also approved.

There is no disposition on the part of the court to prevent the creditors of a bankrupt from selecting a trustee. But when some of the creditors knowingly join with the attorney of an assignee, whose interests are adverse to the interests of all the creditors of the bankrupt, in an endeavor to control the selection of the trustee, in which endeavor the bankrupt himself participates, the creditors who do not participate in such endeavor are entitled not to be left helpless in the face of such a union. The theory of the bankrupt law is that the assets of a bankrupt shall be honestly collected and honestly distributed among all the creditors. Neither the bankrupt himself, nor his attorney, nor an assignee, nor his attorney, can be permitted to control the selection of a trustee. If creditors knowingly join with the bankrupt or his attorney, or with an assignee or his attorney, in an effort to do what it has repeatedly been decided they may not do, the simplest and most obvious way to defeat their purpose is to reject their selection of trustee, and permit the creditors who are not in the combination to make the selection. That was done in the present instance and the action of the referee is affirmed.

HIGHLAND PARK MFG. CO. v. STEELE et al. (Circuit Court of Appeals, Fourth Circuit, July 24, 1916.)

No. 1276.

1. TENANCY IN COMMON \$\sim 45\$—Conveyance by Cotenant of Specific Prop-ERTY-EQUITIES OF GRANTEE.

While the deed of one cotenant conveying a specific part of the joint property does not give the grantee the right to the particular tract conveyed as against other cotenants, it is not void, and will be given effect in equity, if it can be done without prejudice to their interests.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 135–137; Dec. Dig. €=45.]

2. Partition & 78-Suit Against Grantee of One Cotenant Alone-EQUITIES OF PARTIES.

A, and B., who were cotenants in a tract of land, assuming themselves to be sole owners, undertook to make partition by each releasing to the other a specific part of the land. A, thereafter conveyed the particular tract so released to him by metes and bounds to defendant's grantor. Complainants, who were also part owners of the land, brought suit against defendant alone for partition of such particular part. Held, that defendant could not by such action be deprived of its equitable right to have the entire tract valued, and A.'s share thereof set off in that part conveyed by him.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 265-273; Dec. Dig. €==78.]

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville; Henry A. M. Smith, Tudge.

On petition for rehearing. Decree modified.

For former opinion, see 232 Fed. 10.

C. E. Spencer, of Yorkville, S. C., and Thomas C. Guthrie, of Charlotte, N. C. (Tillett & Guthrie, of Charlotte, N. C., on the brief), for appellant.

D. E. Finley and J. A. Marion, both of Yorkville, S. C., and E. M.

Blythe, of Greenville, S. C., for appellees.

Before PRITCHARD and KNAPP, Circuit Judges, and CON-NOR, District Judge.

CONNOR, District Judge. Appellant filed a petition for a rehearing of this cause, in so far only as the decision heretofore rendered. reported in 232 Fed. 10, disposed of what is termed the equitable defense set up in the cross-bill. The facts upon which appellant relies to sustain its equitable defense are quite complicated, and we are of the opinion were not clearly apprehended by the court. It appears that, by the deed executed by John Steele, Sr., to his son, Joseph A. Steele, November 16, 1860, he conveyed 494 acres. As construed by the Supreme Court of South Carolina in Steele v. Smith, 84 S. C. 464, 66 S. E. 200, 29 L. R. A. (N. S.) 939, and by this court in 232 Fed. 10, this deed operated to vest the title to the land in Joseph A. Steele upon the following trusts: One-half undivided interest for the use of his grandson, John G. Steele, for life, with power of appointment by

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will, and upon failure to exercise the power to convey to the heirs of said John G. Steele. The other half was vested in Joseph A. Steele to his own use in fee. If John G. Steele failed to execute the power of appointment, it became the duty of the trustee to convey this one-half undivided interest to the appellees, heirs of John G. Steele. If this had been done, upon the death of John G. Steele, the title to one undivided half would have been in Joseph A. Steele in fee, and the other half in appellees, as heirs of John G. Steele. Joseph A. Steele, the father of John G. Steele, however, died prior to the death of his son, leaving surviving, as his heirs, his widow, Eliza J. Steele, his son, the said John G. Steele, and five daughters. The one-half undivided interest owned by him vested in these persons, to their own use, as his heirs at law. The other one-half vested in them upon the trust declared in the deed to their father, Joseph A. Steele.

On August 3, 1868, and subsequent to the death of his father, the said John G. Steele undertook to convey in fee the entire tract of 494 acres to James Pagan. This deed operated to vest in Pagan, or his grantee, Patterson, the life estate of said John G. in one-half, and his interest in the other half in fee, being the interest which descended to him, as one of the heirs of his father, Joseph A. Steele. Upon the death of said John G. Steele July 5, 1905, intestate, therefore, the remainder in the one-half interest held in trust by the heirs at law of Joseph A. Steele vested in the appellees, under the limitation set forth in the deed of John Steele, Sr., to Joseph A. Steele, or they were entitled to call upon them for a conveyance thereof. It appears that the tract was separated by the Landsford road-400 acres thereof lying on the south and west side, and the remaining portion, which is conceded to be 99 acres, on the north and east side. The executors of Patterson, claiming under the Pagan deed, conveyed the 400 acres, on the south and west side of the road, to A. R. Smith and W. B. Wilson. They obtained from the five daughters of Joseph A. Steele a deed for their interest in the entire tract of 494 acres, vesting in them an undivided five-eighteenths interest in fee in the entire tract, and by the deed of John G. Steele to Pagan, thence to Patterson, his interest in the 400 acres, as one of the heirs of Joseph A. The appellees were entitled to one-half undivided interest in the entire tract. Patterson's executors then conveyed to Amelia Pride the 99 acres lying on the east side of the road. This deed operated to vest in Amelia Pride the interest which had vested in Patterson in the 99 acres. Subsequently Amelia Pride conveyed the interest in the 99 acres which she acquired from Patterson's executors to John L. Watson. This deed vested in Watson the interest of John G. Steele, as one of the heirs of his father, Joseph A., which he had conveyed to Pagan, who conveyed to Patterson.

Smith and Wilson and Watson undertook to make a partition of the 99 acres—Watson releasing to Smith and Wilson all of his interest in 27 acres thereof, described by metes and bounds, and they releasing to Watson all of their interest in the balance of the tract. Smith and Wilson thereafter conveyed by the same metes and bounds the 27 acres to the Standard Cotton Mill, and its interest in the same land was conveyed to appellant, Highland Park Manufacturing Company. Appellees brought suit in the state court against Smith and Wilson and others for partition, and recovered their undivided interest in the 400 acres lying on the south and west side of the road. Steele v. Smith, 84 S. C. 464, 66 S. E. 200, 29 L. R. A. (N. S.) 939. The judgment in that suit, eliminated the 400 acres from this controversy, leaving the appellees tenants in common with the appellant and those who represented the remaining interest in the 99-acre tract.

Appellant insists that, conceding appellees to be entitled to partition, and to have allotted to them nine-eighteenths, or one-half, in value of the 99 acres, it is entitled to have allotted to it five-eighteenths of the same tract, that being the interest acquired under the deed of Smith and Wilson. It further contends that it is entitled to have the entire tract of 99 acres valued, and if the 27 acres conveyed to it, without the improvements, is not of greater value than five-eighteenths thereof, to have it allotted to the appellant. This contention was presented by the cross-bill filed by appellant, which, for the reasons stated by the special master and approved by the District Judge, was dismissed. In view of the fact that, upon the removal of the cause into the District Court, it was properly placed on the equity side of the docket, the court may so mold its decree that the equities of all parties will be conserved and administered. There is no necessity for resorting to a cross-bill. The cross-bill in the record may be resorted to for the purpose of ascertaining appellant's contention as to the facts upon which the equity is based. There are other facts referred to in the transcript upon which appellant asked permission to amend its crossbill. We do not deem it necessary to further refer to them; so far as they may become relevant in the further disposition of the case in the District Court, they may be brought to the attention of the court. It appears that, before filing the bill herein for partition of the 27 acres, appellees made some settlement with those who claimed to own the balance of the 99-acre tract. We are thus brought to an examination of the contentions made by appellant upon the first hearing, and more clearly and specifically urged upon the rehearing. will simplify the situation to deal with the case without regard to the 400 acres, appellees having recovered their interest therein, as stated.

Recurring to the position of the parties when Smith and Wilson and Watson, together with appellees, were the owners, and before the attempted partition between Smith and Wilson and Watson of the 99 acres, we find that they owned the land as tenants in common, each holding undivided interests:

nith and Wilson	18
ratson	18
ppellees	18

The other three-eighteenths was outstanding in the widow of Joseph A. Steele. In this condition of the title, a decree for partition would have been easily made. When, however, Smith and Wilson and Watson undertook to make partition by the release or conveyance by Watson to Smith and Wilson of 27 acres, by metes and bounds, as representing five-eighteenths of the entire tract, of which they were ten-

ants in common with appellees, an equitable element between them and the other tenants was introduced.

[1] It is well settled, both upon reason and authority, that, as tenants in common are seised per my et per tout, neither of them owns, or can convey a valid title to, any specific portion of the tract so held in common. A deed undertaking to do so is held by some courts a nullity, the grantee taking no title. It is, however, now established by the weight of authority that a court of equity will treat the deed as a conveyance of such interest as the grantor or cotenant has in the land, not permitting it to operate to the prejudice of the other cotenants. This principle has been recognized by the Supreme Court of South Carolina in Young v. Edwards, 33 S. C. 404, 11 S. E. 1066, 10 L. R. A. 55, 26 Am. St. Rep. 689, in which, after stating the general rule, it is said:

"Of course, such a conveyance will not be allowed to operate to the prejudice of the rights and interests of the other cotenants; but where it can be given full effect without injury to other cotenants, there is no reason why it should not be sustained. Such we understand to be the view sustained by the weight of the authorities elsewhere."

So Mr. Freeman in his work on Cotenancy (section 199) says:

"Although the deed does not impair the rights of the other cotenants, it by no means follows that they may treat it as void, or entirely disregard it. While falling short of what it professes to be, it nevertheless operates on the interest of the grantor by transferring it to the grantee. The latter acquires rights which the cotenants ought to be bound to respect. They ought not to be permitted to ignore his conveyance and treat him as one having no interest in the property." Walton v. Ward, 142 Ga. 385, 82 S. E. 1067; O'Neal v. Cooper, 191 Ala. 182, 67 South, 689.

In Beale v. Johnson, 45 Tex. Civ. App. 119, 99 S. W. 1045, it is said:

"The deed of a cotenant, conveying a specific part of the joint property, is not void, and a court of equity will set apart to the grantee in such deed the particular tract conveyed, if this can be done without prejudice to the other cotenants." Gates v. Salmon, 35 Cal. 576, 95 Am. Dec. 142; Holcomb v. Coryell, 11 N. J. Eq. 548; Story's Eq. Jur. 656c.

The decisions appear to be uniform in holding the equitable doctrine as stated in the foregoing cases. We have not overlooked the cases cited by appellees. It would seem to follow that, upon the execution of the deed by the five daughters of Joseph A. Steele to Smith and Wilson of their five-eighteenths interest in the tract of 494 acres, they became tenants in common with appellees of the entire tract, and upon the conveyance of John G. Steele to Pagan, who conveyed to Patterson, he became also tenant in common to the extent of his interest as one of the heirs of said Joseph A. Steele. Patterson's executors conveyed this interest in the 99 acres to Amelia Pride, who conveyed to Watson, thus putting in him the interest of John G. Steele in the fee in the 99 acres which he inherited from his father, Joseph A. Steele.

Appellant, Highland Park Manufacturing Company, through the Standard Cotton Mills, acquired the five-eighteen is interest in the 99-acre tract which had vested in Smith and Wilson, and was by them

conveyed to the Standard Cotton Mills. Appellees were entitled to make, and according to the usual practice should have made, all of the tenants in common parties to the original suit, treating the 494-acre tract as one body of land to be partitioned. They were under no obligation to recognize the conveyances of the 99 acres and the 27 acres as separating or interfering with the integrity of the original tract, in each and every part of which they were the owners of an undivided one-half. In such a petition, in which all persons interested were parties, the court would have partitioned the entire tract, setting apart to the appellees their one-half, and to the other parties their respective interests, preserving the equities of all parties. They did not pursue this course, but, treating the 400 acres as a separate tract, of which they claimed one-half, they obtained partition thereof in the suit brought in the state court, taking no account of the 99 acres. After thus securing their interest in the 400 acres, they may have treated the 99 acres as one tract, and had partition thereof, making all persons having an interest therein parties to the record.

As we have seen, Smith and Wilson, claiming under the deed from the five daughters of Joseph A. Steele and the deed from Watson, would not have been entitled, at law, to hold the 27 acres by metes and bounds, but would have been entitled to the undivided interest which they had thus acquired, being five-eighteenths. The fact that they held a deed from the cotenant for a specific portion of the land could not affect prejudicially the right of appellees to have their one-half interest in value set apart to them; but, if it could be done without such prejudice, Smith and Wilson had an equity, which the court would have enforced, to have the 27 acres set apart as and for their five-eighteenths interest in the entire 99 acre tract. Mr. Freeman says:

"While no such grantee has an absolute right to have the part granted to him set apart to him, or his grantor, upon partition, yet he has rights which will receive the consideration of the court, and will be respected, so far as they can be, without prejudice to the rights of the other part owners. The court, however, when the interests of the other owners will not be impaired thereby, will set off to the grantees of specified parcels the tracts included within their respective deeds." Cotenancy, § 205.

The learned author further says:

"He is more deeply interested in partition than any of the tenants in common of the entire tract. It little matters to them where their respective portions may be located. But with the grantee of a special location it is all-important that such division will be made as will allow his deed to become operative. He is entitled to the consideration of the court, and will, whenever his claims are known to the court, be protected, as far as possible without doing injustice to the cotenants of the whole tract." Section 465.

So, in Boggess v. Meredith, 16 W. Va. 29, it is said:

"In making such partition, if the parcel sold and conveyed by one tenant in common" by metes and bounds "can be assigned to the purchaser as a part or the whole of the share of his grantor without prejudice to the cotenant, * * * the courts will so assign it, thereby making the purchaser's title perfect."

While the equity of the grantee of one of the tenants in common of a specific portion of the land held in common has been worked out by different methods, the principle upon which the equity is based is uniformly recognized. The courts permit the deed to so operate as to effectuate the intention of the parties to it, without prejudicing the right of the other tenants in common. This is illustrated in the language of the court in Cook v. Great Northern Railroad Co., 3 Tex. Civ. App. 125, 22 S. W. 1012:

"While it has been held that the deed of a tenant in common for a portion of the land by metes and bounds is void, the recognized doctrine in this state is that such a deed will convey an equity which the grantee has a right to assert in a suit for partition, and to have the land conveyed and set apart to him in the partition, if it can be done without prejudice to the other tenants in common."

In that case one of the tenants in common conveyed a portion of the land by metes and bounds. The other tenants made partition of the residue of the tract—not taking into consideration the portion conveyed, or giving any recognition to the rights of the grantee of their cotenant. Thereafter they brought suit for partition of the portion of the tract conveyed, making the grantee party defendant. The Court (Texas) held that, in making partition of the portion of the tract not conveyed, the plaintiffs had recognized the validity of the conveyance and the title of the grantee to the portion conveyed to him, and that they were estopped from asserting any interest therein. The Supreme Court of Michigan in Pellow v. Arctic Mining Co., 164 Mich. 87, 128 N. W. 918, 47 L. R. A. (N. S.) 573, Ann. Cas. 1912B, 827, worked out the equity in the same way.

In Bigelow v. Littlefield, 52 Me. 24, 83 Am. Dec. 484, one tenant in common conveyed by metes and bounds a portion of the land. Thereafter the other tenant sought to have partition of the portion so conveyed, making the grantee party defendant. The court dismissed the petition, saying:

"Plaintiff does not ask that partition may be made of the whole tract in which she claims to be a tenant in common, but only of that portion held by the respondents; and, if she could succeed, she would take from them one-half of the land for which her husband has been paid the full value. But she cannot succeed. When partition of real estate held in common is to be enforced by legal process, the whole tract so held must be partitioned at the same time. One tenant in common cannot enforce partition of part only of the common estate. Nor does a conveyance by one tenant in common of his interest in a part only of the land thus held authorize a cotenant to enforce partition of such part against the grantee, leaving the residue of the estate unpartitioned." Barnes v. Lynch, 151 Mass, 510, 24 N. E. 783, 21 Am. St. Rep. 470.

[2] Without regard to the particular method adopted in each case for protecting the right of the grantee of one of the tenants of a specific portion of the land, the decisions all recognize his right to be protected, if it can be done without prejudice to the rights of the other tenants. In Kennedy v. Boykin, 35 S. C. 61, 14 S. E. 809, 28 Am. St. Rep. 838, it was held that a mortgagee of one tenant in common of a specific part of the land was entitled to have the partition so made that his rights on the part covered by the mortgage should be

protected—subject, of course, to the limitation that the right of the other tenants should not be prejudiced. Railroad Co. v. Leech, 35 S. C. 146, 14 S. E. 730; Jeter v. Knight, 81 S. C. 265, 62 S. E. 259, 128 Am. St. Rep. 908, in which it was said, citing former decisions of the court, that:

"Where a tenant in common had placed a burden on the common property, justice and equity demanded that partition should be, if practicable, so made as to allot to such tenant in common the portion upon which the burden has been placed."

The equity was enforced and administered upon the same principle

in Young v. Edwards, supra.

Applying the principle to the facts in this regard, it would seem that, as appellees had, by suing for and recovering their interest in the 400 acres, elected to treat the 99-acre tract as a separate part of the original tract of 494 acres, they should have sought partition of the entire 99 acres—making all persons who had any interest therein parties to the proceedings. If this had been done, Smith and Wilson, or appellant, as their grantee, would have been entitled to assert the equity to have the decree for partition so molded that, if it could be done without prejudice to the other tenants, the 27 acres for which they held a deed from the cotenant, representing five-eighteenths of the 99-acre tract, should be allotted to them. This equity is vested in the appellant, Highland Park Manufacturing Company, by the conveyance under which it acquired the title of Smith and Wilson. While it does not very clearly appear how it was brought about, it seems to be conceded that appellees have settled with those claiming or holding as tenants in common with them the residue of the 99 acres—they seeking in this suit to have partition only of the 27 acres, treating the residue as eliminated. It is manifest that appellees could not, by any settlement with those who claimed, or owned, the undivided interest in the residue of the 99-acre tract, affect the equity of Smith and Wilson, or their grantee. It may be that they have released to such persons their interest in such residue.

However this may be, as the record now appears, appellant is entitled to have the entire tract valued, and have set apart to it, in severalty, such portion thereof as represents five-eighteenths in value of the whole, unless other conveyances of portions of the tract have affected this equity. If, upon such valuation, it shall appear that the 27 acres is not of greater value than five-eighteenths of the entire tract, the decree will direct the allotment thereof to appellant; if a part thereof is found to be of such value such part should be allotted. The principle upon which the court will frame its decree is stated by Mr. Justice Story:

"Courts of equity in making these adjustments will not confine themselves to the mere legal rights of the original tenants in common, but will have regard to the legal and equitable rights of all parties interested in the estate, which have been derived from any of the original tenants in common." Eq. Jur. 656.

Appellees urge, among other objections to appellant's claim, that it will be necessary, in its administration, to bring into the record

new parties—those to whom parts of, or interests in, the residue of the 99-acre tract have been conveyed. We assumed this to be true in the original opinion filed herein. In the present condition of the record it is not clear whether such necessity will arise. If, however, the court shall conclude that such parties are necessary, we see no good reason why they may not be brought in for the purpose of adjusting the equities and giving to all concerned what is justly due them. Marshall v. Beverley, 5 Wheat, 313, 5 L. Ed. 97.

It is insisted that the attempted partition between Smith and Wilson and Watson was, as to appellees, absolutely void; that the deed of release to the 27 acres by metes and bounds wrought no change in the title or status of either Watson or Smith and Wilson. If by this is meant that such deed could not operate as a conveyance, vesting the legal title to the 27 acres, in Smith and Wilson, or affecting prejudicially the rights of appellees, it is conceded to be true; but, as we have seen, this deed operated to vest in Smith and Wilson equities which could not be destroyed by appellees. They could not be enforced to the prejudice of appellees, but, within this limitation, will be protected and enforced. If it be conceded that the release or quitclaim from Watson to Smith and Wilson was entirely inoperative for any purpose, the deed from Smith and Wilson, to those under whom appellant claims, of the 27 acres by metes and bounds, brings it within the principle upon which the equity now asserted is based. It was an attempt on the part of Smith and Wilson to convey by metes and bounds a specific portion of the 99 acres of which they owned an undivided five-eighteenths interest; hence the deed from Watson to them may be eliminated from consideration, without affecting the equity asserted by appellant.

We are not inadvertent to the difficulties presented in doing so. The unfortunate misconception of the rights of the parties interested. under the deed from John Steele, Sr., to Joseph A. Steele, resulting in complications which none could anticipate, has imposed upon the court the duty of, so far as is possible, securing the substantial rights of those who have acquired, in good faith, interests in, and expended large sums upon, permanent improvements on the portion of the land which they honestly believed to belong to them. While the court will not permit the rights of appellees who are adjudged, in this suit, to be entitled to one-half in value of the 99 acres, to be prejudiced, it will not permit them, in the enforcement of such right to disturb and displace equities of appellant, based upon sound principles of justice. They have sued for, and recovered, their interest in the 400 acres, without taking into account the rights of Smith and Wilson, or their grantees, in the 99 acres. We do not hold they were not entitled to do so, but if they elected to pursue that course, and in doing so, they were doubtless well advised, they eliminated that portion of the original tract from further consideration, leaving their rights, and the rights of the other cotenants, in the remaining 99 acres to be worked out upon equitable principles.

We have given careful consideration to the interesting argument of appellees, oral and by brief. It appears to us that they fail to give effect to the equitable conceptions upon which the court deals with the rights of parties related to the property in this case. We note the statement in the brief that Watson conveyed to Mrs. Kimbrell 18 acres of the 99-acre tract prior to the purchase by Smith and Wilson from the daughters of Joseph A. Steele. What, if any, effect this fact has on the equity of appellant, we do not perceive, and note it

only because counsel attach importance to the fact.

We do not concur with appellant that, for the reasons assigned, appellees are estopped from maintaining this suit for partition of the 27 acres, nor that the bill should be dismissed because they do not ask for partition of the entire 99 acres. We are of the opinion that, for the reasons given herein, the 99 acres constitute the unit, or tract, of which partition should be made. We have not overlooked the admission in the record in regard to the value of the 27 acres as related to the remainder of the tract, but do not think such admission should be adopted as the basis for making a decree herein. The decree from which the appeal was taken, adopting the findings of the special master in regard to the value of the improvements placed on the 27 acres, by appellant and its grantor, and the rental value, directs the appointment of commissioners to make partition upon the basis prescribed, and, if they find that actual partition cannot be made to report to the court the value of the lands sought to be partitioned, etc.

This decree is affirmed, with the following modification: That the commissioner so appointed will also ascertain and report the value of the entire 99 acres, independent and exclusive of the betterments and improvements, together with the value of the 27 acres, also independent of betterments, so that the court may be advised whether said 27 acres is of greater or less value than five-eighteenths of the value of the entire tract, with such other and further information in respect to the value of said 99 acres, or any part thereof, and in regard to the title thereto, as the same has been affected by conveyance of any part or parts thereof, to persons other than the present parties to this record. That the court will, if in its opinion other persons are necessary parties to a final determination of the rights and equities of the present parties, make such orders as, in its opinion, may be necessary to bring such persons into this suit, to the end that a full and final determination of the rights of all parties in interest may be had. The motion made by appellant to amend its cross-bill is not before us. We do not express any opinion in regard to the refusal of the judge to allow the amendment. In our opinion, all questions involving the equities of the parties to any portion of the 99 acres should be considered and disposed of by the court in framing its final decree. Further proceedings will be had in the cause in accordance with the opinion herein set forth.

Modified.

MISSOURI PAC. RY. CO. et al. v. C. E. FERGUSON SAWMILL CO. *
(Circuit Court of Appeals, Eighth Circuit. July 19, 1916.)

No. 4604.

1. Pleading \$\infty\$369(1)—Interstate Commerce Commission—Action to Enforce Award of Damages—Election.

In an action against railroad companies to enforce an order of the Interstate Commerce Commission awarding reparation to plaintiff for unjust and unreasonable freight charges exacted by defendants, a motion to require plaintiff to elect on which one of two orders of the Commission it would rely was properly denied, where the second order merely modified the first in a formal particular having nothing to do with the award of damages; nor was it material that the second order did not change the date fixed by the first for payment of the award, which had already passed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199, 1200; Dec. Dig. ६ 369(1); Replevin, Cent. Dig. § 206.]

2. COMMERCE ← 95—Interstate Commerce Commission—Action to Enforce Award of Damages—Evidence.

Under the provision of Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384, as amended by Hepburn Act June 29, 1906, c. 3591, § 5, 34 Stat. 590 (Comp. St. 1913, § 8584, subd. 2), that a suit for damages based on an award of the Interstate Commerce Commission "shall proceed in all respects like other civil suits for damages," except that "the findings and order of the Commission shall be prima facie evidence of the facts therein stated," the plaintiff in such action may introduce evidence in addition to that produced before the Commission.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 145; Dec. Dig. &=95.]

3. Commerce €==85—Interstate Commerce Commission—Jubisdiction to Award Damages,

Objections to the jurisdiction and authority of the Interstate Commerce Commission to award damages to a shipper because of unjust and unreasonable freight charges exacted by railroad companies considered, and held without merit.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. \$25.]

4. COMMERCE \$\sim 87\$—Interstate Commerce Commission—Authority to Award Damages—Limitation.

Interstate Commerce Act Feb. 4, 1887, \$ 16, as amended by Act June 29, 1906, \$ 5 (Comp. St. 1913, \$ 8584, subd. 2), relating to awards of damages by the Interstate Commerce Commission, provides that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after." Held, that the filing of a complaint within such time, asking a modification of a rate and generally for reparation for all sums unlawfully collected, was a compliance with such requirement and authorized the Commission to make an award of damages, although the complaint contained no specific statement of the shipments on which reparation was claimed and such statement was not filed until more than two years thereafter and after a hearing as to the legality of the rate complained of, where no objection was made on that ground before the Commission.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 139; Dec. Dig. €=>87.]

5. COMMERCE \$\insigma 86\$—Interstate Commerce Commission—Authority to Award Damages.

That other carriers, not parties to a proceeding before the Interstate Commerce Commission, participated to a small extent in the transportation of shipments on account of which an award of damages was made against defendants, held not to invalidate the award.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 140; Dec. Dig. \$86.]

6. Commerce ← \$5—Interstate Commerce Commission—Award of Damages —Interest.

In making an award of damages on account of excessive freight charges paid under protest, the Interstate Commerce Commission may properly allow interest.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. ⇐=85.]

7. Costs = 196—Action to Enforce Award by Interstate Commerce Commission—Allowance of Attorney's Fee.

The reasonable attorney's fee authorized to be allowed in favor of the plaintiff in an action to enforce an award of damages made by the Interstate Commerce Commission, to be taxed as a part of the costs "if the petitioner shall finally prevail," should not be taxed, when error proceedings are taken, until they are determined.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 751; Dec. Dig. \$ 750.]

Sanborn, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern

District of Arkansas; Jacob Trieber, Judge.

Action by the C. E. Ferguson Sawmill Company against the Missouri Pacific Railway Company, the St. Louis, Iron Mountain & Southern Railway Company, and others. Judgment for plaintiff, and defendants named bring error. Affirmed.

E. B. Kinsworthy, of Little Rock, Ark., and Henry G. Herbel and Fred. G. Wright, both of St. Louis, Mo., for plaintiffs in error. John F. Clifford, of Little Rock, Ark., for defendant in error.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

CARLAND, Circuit Judge. The Sawmill Company, hereafter called the plaintiff, brought this action against the St. Louis, Iron Mountain & Southern Railway Company and the Missouri Pacific Railway Company, hereafter called defendants, to recover the sum of \$583.27, and interest thereon at 6 per cent, from September 1, 1911, being the amount of an award of damages allowed by the Interstate Commerce Commission, hereafter called Commission, for unjust and unreasonable freight rates paid by the plaintiff on cypress lumber in carloads from Little Rock and Woodson, Ark., to points in Oklahoma, Kansas, and Missouri. The Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company, Missouri, Kansas & Texas Railway Company, and St. Louis & San Francisco Railroad Company were originally made defendants in the action, but were subsequently dismissed by the plaintiff. A jury being waived, the case was tried to the court.

[1] At the close of the trial judgment was rendered for plaintiff in the amount of the award of the Commission and interest, amounting in all to \$717.17. As a part of the judgment the court allowed

ther ordered:

an attorney's fee in the sum of \$500. The defendants have brought the case here, alleging error. At the commencement of the trial counsel for defendants made a motion that the plaintiff be compelled to elect upon which order allowing reparation it would rely. The motion was denied, and an exception taken. In order to understand this motion, a brief statement is necessary.

The first petition in the proceeding which resulted in the award of reparation was filed by the plaintiff with the Commission August 31, 1909. The St. Louis, Iron Mountain & Southern Railway Company was the only defendant in this complaint. The plaintiff complained of what was called the Southwestern Line Tariff No. 50, effective August 3, 1909, which had been issued by said railway June 24, 1909, and which named a rate on cypress lumber from Little Rock and Woodson, Ark., to Kansas City, Mo., and other principal consuming points, of 24 cents per 100 pounds, being an advance of 8 cents over the previous tariff. The complaint alleged that the tariff rate complained of was unjust, discriminatory, and unduly prejudicial to the interests of the plaintiff. The complaint prayed that the Commission order the defendant to cease and desist from said violations of the Act to Regulate Commerce, and that it be required to establish and put in force a rate on cypress lumber from Little Rock and Woodson, as formerly carried in its Joint Freight Tariff No. 4929, and also that defendant be ordered to repay to complainant all sums paid by it for freight in excess of those rates which the Commission should determine to be reasonable and just.

May 2, 1910, the Commission made its report in the case, and found that the rates on cypress lumber in carloads from Little Rock and Woodson to points in Oklahoma, Kansas, and Missouri, located on the lines of defendant, were unjust and unreasonable, and that the maximum rates for the future between the points named should not exceed the rates set forth in a table attached to the report. The Commission said in its report that, if the plaintiff desired to question the reasonableness of rates to points on the lines of the Missouri Pacific Railway Company, said company should be made a party.

An order was duly made, condemning the rates complained of as unreasonable and unjust, and commanding the defendant to establish and put in force rates that the Commission decided to be reasonable. On June 27, 1910, the plaintiff filed a supplemental complaint which in no wise differed from the original complaint, except that the Missouri Pacific Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island & Pacific Railway Company, Missouri, Kansas & Texas Railway Company, St. Louis & San Francisco Railroad Company, and Union Pacific Railroad Company were made defendants. On April 1, 1912, the Interstate Commerce Commission made a supplemental report in the same case, after additional testimony had been taken and the other railroad companies made defendants. The supplemental complaint above referred to contained the same prayer as the original complaint. In its supplemental report the Commission adhered to its former decision and fur-

"That to enable the defendants to adjust the rates to points other than Kansas City in harmony with the Commission's report herein, and for the purpose of receiving proof upon which an order of reparation may be entered, the case be held open for such further action of the Commission as may be necessary."

On November 4, 1913, the Commission made an award in the case, finding the amount of reparation due to the plaintiff from the defendants in the supplemental complaint in the sum of \$583.27, and interest thereon at the rate of 6 per cent, per annum from September 1, 1911. The award contained the usual order for the payment of the same. The present action was commenced for the purpose of recovering the award provided for in the order of November 4, 1913. About a year after the award had been made, and about four months after the commencement of the present action, the defendants applied to the Commission for an order modifying the order of November 4, 1913, as follows: The order last referred to contained a statement that the parties had filed an agreed statement of facts respecting the movement of the shipments involved and the amount of reparation due thereon. The defendants objected to the expression "agreed statement of facts," as they claimed that no such statement was made. On considering this application the Commission on November 25, 1914, made an order modifying its former order, and changing the recital therein as above mentioned, so that it read that by statements filed the parties have agreed as to the facts respecting the movement of the shipments involved and the amount of charges collected thereon. On the making of this modified order the plaintiff in the present action filed a supplemental complaint setting up in addition to the original order the modified order and the report of the Commission in connection therewith.

It will thus be seen that the defendants in the present action were asking the court to compel the plaintiff to elect as to whether it would rely upon the original order or the modified order. The motion to compel an election was properly overruled. There was only one order of reparation made by the Commission, and there was only one case before the Commission. It was proper that both reports and both orders be set forth in the complaint, that the true situation might be presented. In this connection it is claimed that the order of November 25, 1914, required an impossible date for the same to be performed by the defendants, in that it required the defendants to pay the award to plaintiff on or before December 15, 1913, a date nearly a year before the date of the order. This is a sample of many of the objections made at the trial. This confusion in dates occurred in this way: The original order of November 4, 1913, fixed the date of the payment of the award as December 15, 1913. The modifying order of November 25, 1914, did not change the date of the performance of the original order, but simply modified it in the respect that complaint was made by the defendants. The defendants had not complied with the original order and a suit was then pending to enforce it. The modified order was not a new order, which required a new date to be fixed for its performance, and the objection has no merit. Moreover, this point was not presented to the court below.

[2] Counsel for defendants also moved to strike portions of the supplemental complaint relating to the supplemental order. This motion was rightly overruled for the reasons above stated. After the plaintiff had introduced in evidence the orders and reports of the Commission awarding damages, it called as a witness Mr. C. E. Ferguson, its president, for the purpose of showing that it had been actually damaged in the amount claimed, and the manner thereof. Counsel for defendants objected to the introduction of any evidence other than that produced before the Commission. This objection was overruled, and an exception taken. There is no merit in this contention. Section 16 of the Act to Regulate Commerce provides:

"Such suit in the Circuit [District] Court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated." Comp. St. 1913, § 8584, subd. 2.

It thus appears from the law itself that the suit must proceed in all respects like other civil suits for damages, with no distinction between it and such other actions for damages, except that the findings and order of the Commission shall be prima facie evidence of the facts therein stated. In Meeker v. Lehigh Valley Railroad Co., 236 U. S. 412, 35 Sup. Ct. 328, 59 L. Ed. 644, the Supreme Court declared with reference to this provision as follows:

"This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take from any of its incidents. Nor does it in any wise work a denial of due process of law. In principle, it is not unlike the statutes in many of the states, whereby tax deeds are made prima facie evidence of the regularity of all of the proceedings upon which their validity depends."

See Meeker v. Lehigh Valley Railroad Co., a companion case, 236 U. S. 434, 35 Sup. Ct. 337, 59 L. Ed. 659; Western New York & P. R. Co. v. P. Refining Co., 137 Fed. 343, 70 C. C. A. 23.

In the case last mentioned numerous authorities are cited to support the position here taken. The purpose of placing Mr. Ferguson on the stand was to show that the shipments of lumber were made f. o. b. destination, and, although the consignees in the first instance paid the freight, it was charged back to the plaintiff on settlement of accounts.

[3] At the close of all the evidence counsel for the defendants requested the court to declare the law to be that the plaintiff was not entitled to recover. Under this head certain reasons why the request should be granted were stated. The trial court refused to declare the law as requested, and an exception was taken. It is first claimed that the Commission had no jurisdiction to make the award which it did for the reason (a) that the summons issued to the defendants required them to "satisfy the complaint or answer the same in writing within 20 days from this date." The summons was dated July

5, 1910. Section 13 of the act provides that after the filing of the petition the carrier "shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission." Comp. St. 1913, § 8581. Section 6 of the act provides:

"No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compilance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: Provided, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified." Comp. St. 1913, § 8569, subd. 3.

It is claimed that defendants could not have satisfied the complaint within 20 days by changing the rate, as the statute requires 30 days' notice of a change in rates. Under the law above quoted and the facts in this case there is no merit whatever in this contention: First, because, if the defendants desired to satisfy the complaint by changing the rate complained of, we must presume that the Commission would upon the request of defendants have allowed a change upon less than the regular notice; second, the record shows that the original petition was filed with the Commission August 31, 1909, and answer thereto was filed October 13, 1909. The supplemental complaint was filed June 27, 1910, received by defendants July 7, 1910, and answer filed August 22, 1910. In each instance, therefore, the defendants had 45 days in which to answer the original and supplemental complaints, respectively, and of course would have been allowed a longer time for good cause shown. No extension of time was asked for, and the defendants proceeded to try the case before the Commission without objection, and the objection now made was not heard of until it was made at the trial below. As a jurisdictional question the point made is frivolous.

(b) It is contended that the Commission had no authority to award reparation on shipments that moved prior to the date of filing plaintiff's complaint. This contention has no merit. The original complaint, as above stated, was filed August 31, 1909. It complained of a tariff effective August 3, 1909, alleging that the tariff was discriminatory, unduly prejudicial, and exorbitant, and prayed that the defendants be required to establish and put in force rates on cypress lumber from Little Rock and Woodson, Ark., as formerly carried in its Joint Freight Tariff No. 4929. The supplemental complaint alleged substantially the same facts. Each complaint prayed for reparation. The Commission in its report said that the complaint—

"alleges that defendant has recently advanced rates on cypress lumoer from Woodson and Little Rock to points in Oklahoma, Kansas, and Missouri, over the rates which have been in effect for many years; that said advances are unreasonable in themselves and unjustly discriminatory against Woodson and Little Rock, and in favor of Memphis, Tenn., and other points east of

Little Rock. The prayer of the complaint is that the rates formerly in effect be restored and reparation made for all sums unlawfully collected."

The Commission, of course, could only establish a new rate for the future, but the very meaning of reparation is compensation for what has occurred. The plaintiff could not be injured until it had paid an excessive rate.

[4] (c) It is next claimed that, as no specific statement of the shipments on which reparation was claimed was filed with the Commission until October 31, 1913, the Commission had no authority to award reparation thereon as the same were barred by the statute of limitation, found in section 16 of the act and which reads as follows:

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after."

The original complaint, filed as above, contained the prayer that has been heretofore quoted. The Commission and every other person connected with the case understood it to be a complaint for reparation, as well as for the establishment of just and reasonable rates. A specific statement of the particular shipments on which reparation was claimed is shown by the record to have been received by the Commission May 25, 1912. The defendants did not plead the statute of limitation before the Commission, but, on the contrary, received the specific statement of shipments, and held the same in their offices for about five months, finally returning the same to the Commission with the statement:

"Our claim department has checked this statement and finds same to be correct as to shipments moved and the charges collected, and basing same on the new rates ordered in by the Commission there would be an overcharge of \$592.67; but this admission should not be construed that the complainant is entitled to reparation in this case."

This statement was signed by the general freight agent of the defendants. The defendants demanded no bill of particulars, or that the complaint be made more specific and certain, before the Commission. The statute provides that the filing of the complaint shall toll the statute. The record shows that 8 of the shipments moved in 1909, 15 moved in 1910, 5 in 1911, and 1 in 1912. We are of the opinion that under the facts shown in the record the claim for reparation was not barred.

(d) It is next claimed that, as the only evidence submitted before the Commission as to the payment of the freight charges were the expense bills given by the carriers to the consignees in whose name the bills ran, there was no evidence that plaintiff paid the freight. The case before the Commission was tried throughout by all parties on the theory that the plaintiff had paid the freight; but it becomes immaterial on a motion made in the present case that the plaintiff be nonsuited for the reason that the proof in the present action fully shows that the plaintiff paid the freight and suffered the damage.

[5] (e) Complaint is made that some of the shipments are shown by the record to have moved over the lines of other carriers than those which were parties before the Commission, and the proposition

is urged that the Commission had no power to condemn what is called one leg of a through rate. So far as this objection is concerned, the record shows that all the carriers over whose lines the shipments moved were made parties defendant before the Commission, except the Atchison, Topeka & Santa Fé and the Omaha Bridge & Terminal Railway Company. These carriers are connected with the shipments in controversy in this way. There were 12 shipments of lumber made over the lines of defendants to Council Bluffs, Iowa, on a through rate. It is shown, however, in the record, that the lumber was hauled from Omaha, Neb., across the river to Council Bluffs, Iowa, by the Omaha Bridge & Terminal Railway Company, that an arbitrary of \$5 per carload was charged by the Terminal Company for hauling the freight across the river, and it is also shown that the defendants paid this sum on the 12 cars, the same being absorbed in the through rate. The plaintiff, however, seeks to recover nothing from the Terminal Company, and we must presume that the Commission considered all the circumstances including the payment of the arbitrary in fixing a reasonable rate for the future, and the amount of reparation to be paid by the defendants. The Terminal Company does not own any cars, its business is that of hauling cars belonging to other railroad companies, to and from industries on its tracks, and transferring such cars between various railroad companies entering the cities of Omaha, South Omaha, and Council Bluffs. The reasonableness of the rates of which complaint was made by the plaintiff before the Commission were in issue, and the defendants were parties before the Commission. To now assume that they did not present to the Commission the fact that they paid an arbitrary of \$5 per carload at Omaha is to convict them of a grave inattention to business.

We now come to a carrier, however, who was not before the Commission, and who is not a defendant in this case. The connection of this carrier with the shipments in question arises in this way. There was one shipment of lumber from Woodson, Ark., to Girard, Kan. The shipment moved over the St. Louis, Iron Mountain & Southern Railway to Coffeyville, Kan., thence over the Missouri, Kansas & Texas to Chanute, thence over the Atchison, Topeka & Santa Fé to Girard. The total amount of the expense bill, roughly figured, was \$103.80. Of this amount the Atchison received \$17.30, the M., K. & T. \$21.51, and the Iron Mountain \$64.53. Each carrier received of the overcharge of 6 cents per 100 pounds, the same proportion which the total amount received by it bears to the total expense charged. This would result in the Atchison receiving about \$3.50 of the overcharge and the M., K. & T., about \$4.50. It goes without saying that, as the Atchison, Topeka & Santa Fé and the Missouri, Kansas & Texas were not parties to this action, no judgment can be rendered against them, and this little amount cannot be lawfully charged against the defendants.

We now come to the defendants in this case. The order granting the reparation reads thus:

"It is therefore ordered that the above-named defendants, in so far as they participated in this traffic, be and they are hereby notified and required

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* * to pay unto complainant the sum of \$583.27, with interest thereon at the rate of 6 per cent. per annum from September 1, 1911."

So that it appears the defendants are liable for such part of the overcharge as each received, and technically the judgment ought to have gone that way. But as no point is made about this we assume that, as the defendants are under the same management, it makes no difference to them that the amount of liability was not found sepa-

rately.

It is claimed further that the judgment ought to have been for the defendants, for the reason that the Commission has overruled the principle of rate making upon which the order of reparation was based, and the cases of North-Bound Rates on Hardwood, 32 Interst. Com. R. 528, Southern Lumber Rates, 34 Interst. Com. R. 652, and North-Bound Rates on Hardwood, 34 Interst. Com. R. 708, are cited; but an examination of those cases convince that they did not have the effect of setting aside or overruling the order made in the present case. The complaint of the plaintiff referred to rates charged it as a lumber producer at Woodson, Ark., compared with shippers in its immediate neighborhood, and the Commission held that a blanket adjustment of rates which ignores so fundamental a principle as the geographical location of production can, with difficulty, be maintained in the face, of a result which compels a producer, with a 24-cent rate, to compete with a large number of neighboring producers enioving an 18-cent rate. The cases referred to consider general ratemaking schemes covering large sections of country involving several

[6] Complaint is made that the Commission had no authority to allow interest on the amount of the award. We decided in the case of D. & R. G. R. Co. v. Baer Bros., 209 Fed. 577, 126 °C. A. 399, that interest was allowable on excessive freight rates part under protest, and interest has been allowed in similar cases. Meeker v. Lehigh Valley Ry. Co., 236 U. S. 412, 433, 35 Sup. Ct. 328, 59 L. Ed. 644; Meeker v. Lehigh Valley R. R. Co., 236 U. S. 434, 439, 35 Sup. Ct. 337, 59 L. Ed. 659; Baer Bros. Mer. Co. v. D. & R. G. Ry. Co., 233 U. S. 479, 491, 34 Sup. Ct. 641, 58 L. Ed. 1055; So. Ry. Co. v. St. Louis Hay & Grain Co., 153 Fed. 729, 82 C. C. A. 614.

[7] It is also objected that the court erred in allowing an exorbitant

and excessive attorney's fee. Section 16 of the act provides:

"If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit."

It appears, therefore, as matter of law, that the attorney fee was prematurely taxed, as it was not known when it was taxed whether

the plaintiff would finally prevail or not.

As a result of a careful examination of the whole record, we are of the opinion that the judgment below must be affirmed as to the amount of reparation and interest; that as to the attorney fee it should be reversed. The amount of the award was about \$9 less than the amount admitted to be due by the defendants, if they were liable at all, and they would hardly ask us to reverse a case for the small amounts of overcharge received by the Atchison and M., K. & T.

Let the judgment be affirmed, and the case remanded, with instructions to the trial court to tax a reasonable attorney's fee upon notice to the counsel of defendants.

SANBORN, Circuit Judge (dissenting). With regret I find myself unable to concur in the opinion and conclusion of the majority in this case.

Section 13 of the Interstate Commerce Act (4 U. S. Comp. Stat. 1913, § 8581), requires a complaint to state briefly the facts on which the plaintiff relies for the relief it asks of the Commission, and directs the Commission to send to the defendant carrier a statement of the complaint and to call upon it to answer the complaint within a reasonable time. It also provides that if the carrier, within the time specified by the Commission for the answer, makes reparation for the injury alleged in the complaint, it shall be relieved from liability for the violation complained of. The Commission summoned the carrier to satisfy the complaint or to answer it within 20 days. The carrier could not make reparation and satisfy the complaint in that way, because the complaint contained no statement whatever, either generally or specifically, of the amount of reparation sought. The carrier could not satisfy the complaint within the 20 days by lowering the rate, of which complaint was made, because by section 6 of the act it was prohibited from making any change without 30 days' notice thereof, and the defendant was in this way deprived of its statutory right to satisfy the complaint and avoid an answer, and was compelled to answer without an opportunity to exercise that right. To my mind it is not a persuasive answer to this fact that the grace of the Commission might have shortened the time for changing the rate, or that the grace of the complainant or that of the Commission permitted the defendant to answer after its right to answer was lost. The opportunity to satisfy the complaint is a right independent of the will or grace of complainant or Commission. It is no answer to the charge that one who has taken another's property without due process of law has deprived his victim of his right to that property to say that the taker has the power to return it to him, and may of his grace and good will do so. An opportunity to satisfy the complaint, dependent on the will or discretion of the Commission, or of the complainant, lacks every element of the right secured to it by the statute, and the action of the Commission fixing 20 days as the time for answer, and summoning the defendant to satisfy the complaint or answer it within that time, seems to me absolutely to have deprived the carrier, under the circumstances of this case, of his statutory right to satisfy the complaint and thereby avoid answering it.

The act of Congress provides that:

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after." 4 U. S. Comp. Stat. 1913, § 8584, subd. 2.

One of the rules of the Commission requires that:

"If reparation is sought, the petition or an exhibit thereto should set out in detail the shipments involved showing origin, destination, date, number and initials of cars, weight, rate paid, rate claimed and reparation claimed."

And the record discloses the fact that on October 29, 1909, one of the examiners of the Commission gave notice to the complainant of this rule, that no damages in reparation could be recovered under this complaint "which alleged no amounts of damages, or times or places when such damages were incurred whatever," and that if it desired to recover such damages it must file a supplemental complaint therefor and set them forth. Neither in the original complaint nor in the supplemental complaint making new parties did the complainant allege any amount or amounts that it had paid or lost, or any amount or amounts that it claimed; nor did it ever allege or claim any such amount or amounts in any complaint or pleading until it filed with the Commission a statement of its claims for reparation for the first time on October 31, 1913, although, as stated in the opinion of the majority, the Commission on May 25, 1912, received and sent to the defendants a statement of claims which the defendants returned with the admission that the shipments there mentioned moved and that the charges there made were collected. But it will be noticed that this admission contained these words:

"But this admission should not be construed that the complainant is entitled to reparation in this case."

It is true that the complaints made prior to October 31, 1913, contained prayers for a change of the rate for which a cause of action was stated and for reparation. But none of these complaints stated any facts whatever constituting any cause of action for any reparation, none of them stated any facts which would have entitled the plaintiff to introduce any evidence whatever of any damages, nor did the plaintiff ever state in any manner any such facts or cause of action until October 31, 1913. Because no such cause of action and no such facts were ever pleaded or alleged prior to October 31, 1913, I am unable to resist the conclusion that then for the first time was any complaint for the recovery of any damages claimed in this case filed with the Commission within the fair and just meaning of the statute, and as the causes of action for all the damages recovered in this action, except \$20.72, accrued more than two years prior to that date, the recovery of those damages seems to me to be barred by the act of Congress. Even if the time when the statement of May 25, 1912, was received by the Commission could be deemed the time of the filing of a complaint for these damages, yet all damages accruing prior to May 25, 1910, would be barred, and \$324.89 of the amount recovered is for such damages.

Nor does it seem to me that where, as in this case, no cause of action for any damages whatever was alleged in the earlier complaint, the failure of the defendants prior to the filing of a complaint for the damages to demand a bill of particulars can deprive them of any right or privilege. As no cause of action for damages was stated in those earlier complaints, there was no claim for damages to particularize, and as the Supreme Court of Missouri said in Mallinckrodt Chemical Co. v. Nemnich, 169 Mo. 388, 397, 69 S. W. 355:

"Nor will it do to say that defendant should have moved to have made the pleading more definite and certain. He might indeed have done this, but was

not compelled to do so. The primary duty of making the pleading definite and certain is on the party drawing the pleading, and he cannot, by his remissness, cast on his opponent the onus of doing what his own duty demands."

Where a complainant fails utterly to state any facts upon which a cause of action can be based, a cause of action may not be created by the failure of the defendant to demand a bill of particulars.

Finally, the rate established by the Commission, on which these claims for reparation are founded, was unjust and unreasonable, and it seems to me that the Commission itself, in later cases, has in effect so decided. 32 Interst. Com. R. 528; 34 Interst. Com. R. 708; 34 Interst. Com. R. 652.

MOORE V. CITY OF YONKERS.

(Circuit Court of Appeals, Second Circuit. April 18, 1916.)

No. 212.

1. MUNICIPAL CORPORATIONS \$\iftsize 488, 489(5)\$—Public Improvements—Assessment for Benefits—Waiver of Objections.

The general rule is that objections to an assessment for a local improvement are deemed waived, if not presented at the time and in the manner prescribed by law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1151, 1152; Dec. Dig. \$\sim 488, 489(5).]

2. MUNICIPAL CORPORATIONS ⇐ 488, 489(5)—ASSESSMENT FOR PUBLIC IM-PROVEMENTS—SUIT TO ENJOIN.

An owner, whose property was assessed for benefits for a street improvement, who failed to appear at the public hearing before the municipal council to fix the boundaries of the assessment district, or before the board of assessors at the time fixed for hearing objections to the assessment, or at the public hearing before the council when the assessment was confirmed, in the absence of fraud or bad faith, is concluded by the action taken, and cannot maintain a suit in the federal courts to enjoin enforcement of the assessment on the ground that property benefited was not included in the assessment district, or that the assessment is confiscatory and deprives him of his property for a public use without compensation, in violation of his constitutional rights.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1151, 1152; Dec. Dig. ⇐=488, 489(5).]

3. MUNICIPAL CORPORATIONS 516—PUBLIC IMPROVEMENTS—ASSESSMENT FOR BENEFITS.

A Legislature, or a common council, exercising an authority delegated to it by the Legislature, is not by the Constitution of the United States required to include within the assessing area all the property benefited by a local improvement, but may in its discretion assess the whole cost on abutting property, and in the absence of fraud or bad faith its action is reviewable by the courts only in the manner provided by statute.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. 516.]

4. MUNICIPAL CORPORATIONS ⇐=>488, 489(5)—ASSESSMENT FOR PUBLIC IMPROVEMENTS—ESTOPPEL.

A property owner, who thinks himself injured by a wrongful special assessment, is, if he has knowledge of what is being done, under obliga-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

tion to act promptly in interposing his objections; otherwise, his laches will bar him of relief.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1151, 1152; Dec. Dig. \$\sim 488, 489(5).]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by Edward C. Moore, Jr., against the City of Yonkers. Decree for defendant, and complainant appeals. Affirmed.

Dunlop & Smith, of New York City (James N. Dunlop and Heber Smith, both of New York City, of counsel), for appellant.

Thomas F. Curran, of Yonkers, N. Y., for appellee.

Before COXE and ROGERS, Circuit Judges, and HOUGH, District Judge.

ROGERS, Circuit Judge. This case arises out of special assessments levied by the defendant against certain premises in the city of Yonkers in the state of New York. The action is in form a suit in equity to remove a cloud upon the title to appellant's premises. The alleged cloud consists of two assessments levied in certain proceedings for the laying out, opening and extending of Convent Place from Convent avenue to Palisade avenue in the city aforesaid. It is alleged in the complaint and contended on the trial that, while the proceedings resulting in the assessment were entirely regular on their face, nevertheless, the assessment was void as a taking of private property for public use without compensation in contravention of the fourteenth amendment to the Constitution of the United States. The complaint prays for a decree vacating the assessments and enjoining their collection. The court below dismissed the bill for want of equity, but filed no opinion.

In this case the plaintiff was the owner in fee of a parcel of land in the city of Yonkers, lying between Palisade avenue on the west and Park avenue on the east, and fronting on Shonnard Place on the north. The land had a frontage of some 800 feet on Palisade avenue and Park avenue, and of some 440 feet on Shonnard Place. The common council of Yonkers on August 1, 1910, adopted a resolution initiating proceedings to open Convent Place between Convent avenue and Palisade avenue. Convent avenue ran parallel with Palisade avenue and Park avenue and was the second avenue east of Park avenue. To do this it was necessary to take a part of the tract of plaintiff's land, and for the portion of his land appropriated for this purpose plaintiff was awarded the sum of \$10,203.

The city council adopted an ordinance directing the proper officers to assess the whole cost of the opening of this avenue upon the property included within the boundaries of the district of assessment as fixed by the council; and a portion of the premises designated by the council as deemed to be benefited by the opening of Convent Place included the plaintiff's property as above described. The board of assessors of the city accordingly prepared an assessment roll assessing the entire cost of the proceedings upon the property within the designated district.

This assessment was presented to the council and on November 10, 1913, was confirmed by it, and the various assessments thereupon became liens upon the parcels of land affected thereby. The amount assessed against the property of the plaintiff amounted to \$14,175.38, being \$6,952.85 on lot 9 and \$7,222.53 on lot 10. The aggregate amount of all the assessments on the property within the taxing district was \$22,410.17. More than one-half of the whole amount thus fell upon the property of the plaintiff.

The plaintiff claims that the assessments on his premises are in excess of the benefit conferred upon the whole of his premises; that in fixing the limits of the assessing district property has been included which was not benefited, and property excluded which was benefited; that the proceeding is illegal and erroneous, in that it was not made in accordance with the benefit received; that to the extent the assessments exceeded the benefit conferred his property has been taken from him for public use without just compensation and in contravention of

the Constitution of the United States.

The plaintiff alleges that on December 27, 1913, "being ignorant of the fact that said assessment was invalid," he was compelled to pay and did pay to the defendant under coercion of law \$5,250 on account of the assessment on lot 9, and that the balance of the assessment on that lot, \$1,702.85, remains unpaid, and is a lien on the lot, and constitutes a cloud upon the title; and he also alleges that he paid \$5,250 on account of the assessment on lot 10, and that the balance of that assessment, \$1,972.53, is unpaid, and a lien on the premises, and constitutes a cloud on the title. He also alleges that on August 22, 1914, and as soon as he became aware of the illegality of the assessment, he presented to the common council a petition in which he prayed that the council would reverse and correct the assessment roll to make it accord with the benefit conferred on each parcel. His petition for relief was denied.

Thereupon he filed his bill in the court below, asking that the defendant be directed to repay to him so much of the sums received from him as may be found to be in excess of the benefits conferred upon his premises; the assessments to be vacated and set aside in so far as they exceed the benefits received. He also asks an injunction restraining and enjoining the defendant from taking any steps to enforce its lien upon his land, or to collect the amount of the assessment still unpaid.

The Legislature has power to create an assessment district and fix its boundaries, and charge the cost of a local improvement in whole or in part on the property within the defined area, either according to valuation or frontage or superficial area. Instead of exercising the power directly, it may delegate the right to a municipal corporation, and when the power is so delegated the municipal corporation exercises its discretion in determining what property should be included in the assessment district and the extent to which the property therein is benefited.

The question of what territory is to be included in the area to be assessed is legislative, and not judicial. And the action of the Legislature, or of the common council, to which body the legislative discretion

may have been delegated, is ordinarily conclusive. Williams v. Eggleston, 170 U. S. 304, 311, 18 Sup. Ct. 617, 42 L. Ed. 1047. But the power of a common council or of a Legislature is not in these matters altogether unlimited. Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. In Norwood v. Baker the Supreme Court laid down the law respecting assessments as follows:

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

In that case land was taken for street purposes without compensation, and, in addition, the property owner was assessed \$218.58 to pay the costs of condemnation proceedings. The court below held that the complainant was deprived of his property without due process of law, and issued a permanent injunction enjoining the village from enforcing the assessment.

In the case at bar the assessment against the complainant's lots aggregated \$14,175,38, and exceeded the award made to him by the sum of \$3,972.38. In other words, not only was the complainant not compensated by the city for surrendering a strip of land containing more than half an acre, but, on the contrary, was required to pay \$3,972.38 for the privilege of giving up his land; and of this sum of \$3,972.38 the sum of \$1,966.21 was paid in awards to other property owners, who appear to have received a benefit from the street, but who were not required to pay any portion of the expense of the proceeding, as their property was not included in the assessment district. Moreover, the annual assessment of complainant's property the year after the improvement was made and the special assessment was laid was no greater than it was before the improvement was made. The Tax Law of the state requires the assessors each year to assess all the taxable property in their district at its value. The same assessors, therefore, who levied a special assessment of \$14,175.38 against complainant's property for benefits created by the improvement, swore nine months later that the value of the property had not increased over its value of a year before. The case is a much more aggravated one than that of Norwood v. Baker, supra. The complainant's expert testified that in his opinion complainant's property was benefited by the opening of the street by an amount some \$9,000 less than the assessments levied on the property. The experts of the defendant testified, however, to the contrary, and according to their testimony the plaintiff derived a net benefit of \$2,388.48.

As to the assessment district the District Judge was satisfied that there was injustice in fixing its limits, and that property which ought plainly to have been included was left out of it. He said:

"There is no question at all about it, if you take the physical situation that has been described here, the great advantage of opening this street was not

to the property through which it was cut, but to those people up there who wanted to get down to the trolley line," etc.

What was done in Norwood v. Baker and in the case at bar was not a legitimate exercise of the taxing power, but was an act of confiscation of this complainant's property.

The question, however, is whether the courts of the United States can afford the plaintiff the relief which he seeks, in view of the situation in which he stood at the time he instituted his action in the court below. In this case the plaintiff failed to appear and to make objection at the public hearing given by the common council on the question as to the area of the assessment district. He also failed to appear before the board of assessors at the time fixed pursuant to law for hearing objections to the assessment; and in like manner he failed to appear before the common council at the public hearing on the confirmation of the assessment. At each of these hearings an opportunity was afforded him to be heard on all pertinent and available questions. As he did not appear at any of the hearings, and made no objection until after the common council had confirmed both the assessing district and the assessment roll, it is necessary to inquire whether he is now entitled to come into court to question the validity of the assessment.

- [1] The general rule is that objections to an assessment are deemed to be waived, if not presented at the time and in the manner prescribed by law. Betts v. Naperville, 214 Ill. 380, 73 N. E. 752; Ottawa v. Chicago, etc., R. Co., 25 Ill. 43; Stewart v. Detroit, 137 Mich. 381, 100 N. W. 613; Pabst Brewing Co. v. Milwaukee, 126 Wis. 110, 105 N. W. 563; Leavenworth v. Jones, 69 Kan. 857, 77 Pac. 273; Morse v. Omaha, 67 Neb. 426, 93 N. W. 734; Wilkinson v. Trenton, 35 N. J. Law, 485, affirmed 36 N. J. Law, 499; State v. Norton, 63 Minn. 497, 65 N. W. 935.
- [2] In Brown v. Grand Rapids, 83 Mich. 103, 47 N. W. 117 (1890) a bill was filed to remove a cloud on complainant's title under circumstances somewhat similar to the case at bar. The city of Grand Rapids had made an assessment for the opening and widening of a street and had levied an assessment therefor on complainant's property. The complainant insisted in that case, as in the case now before us, that the taxing district did not include all the property benefited; that the assessors had acted illegally and arbitrarily in fixing the assessment; that the effect was to compel him to donate his property to public use without compensation. The court reversed the court below and dismissed the bill. The court in its opinion said:

"He did not appear, and does not pretend that he made any effort to have the assessment corrected, before the council. The determination of these two bodies, the commissioners who made the assessment roll, and the common council of the city of Grand Rapids, cannot now be inquired into, unless it appears that they acted in bad faith. * * * Where provision is made by law for a review of assessment proceedings, and a body appointed with the power to set the assessment aside or correct the error complained of, and the party wholly fails to appear before such body, or take any steps to have such correction made, he is not in position to appeal to the courts for redress in the absence of fraud or bad faith."

See Brown v. City of Saginaw, 107 Mich. 643, 65 N. W. 601. In City of Terre Haute v. Mack, 139 Ind. 99, 110, 38 N. E. 468, 472, the court declared that:

"The act of the engineer in making his report and ascertaining and fixing the amount of liability on the lots or parcels, and that of the common council in making the assessment, were each ministerial and not judicial acts. From such acts no appeal lies unless given by statute. Board, etc., v. Davis, 136 Ind. 503 [36 N. E. 141, 22 L. R. A. 515]."

In Wright v. Forrestal, 65 Wis. 341, 27 N. W. 52, the action was brought to declare void and set aside certain tax certificates issued upon a tax sale for the nonpayment of special assessments for a local street improvement. The complaint was dismissed, and the court said:

"Certainly the record does show that quite a large number of the lots were not charged with benefits to an amount equal to the estimated cost of the work in front of the same, nor anything near that sum. Any mistakes which the board may have made in charging lots with a greater sum as benefits than it might be made to appear they would receive from the construction of the street would furnish no ground of relief so long as such charge was not made fraudulently and for the purpose of making the owners pay more than their just proportion of the costs of such improvement. Mistakes of judgment or opinion in this respect can only be corrected by appearing before the board at the proper time, and having them corrected by an appeal to the board or to the common council, as provided by the charter. After the time for reviewing the assessment has passed, the legality or justice of the award upon the proper basis, or that it was fraudulently made. Mere mistake of judgment cannot avail to vitiate the proceedings."

See, also, Lambert v. Bates, 148 Cal. 146, 82 Pac. 767; Twenty-

Eighth Street Sewer, 158 Pa. 464, 467, 27 Atl. 1109.

The proceedings taken by the municipal authorities of Yonkers were not void. The city had authority to open this street, and to assess the cost of the improvement upon the property benefited. Two errors are alleged to have been committed. The first relates to the limits of the assessing district, which it is claimed failed to include property which should have been embraced within it. The second relates to the character of the assessment, which it is claimed substantially exceeded the benefits which accrued to the complainant's property.

[3] As to the first of these questions the complainant is not at liberty to raise it. A Legislature, or a common council exercising an authority delegated to it by the Legislature, is not by the Constitution of the United States required to include within the assessing area all the property benefited by a local improvement. It could assess the whole cost upon the abutting property alone, if it thought best. In Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, the court, speaking through Mr. Justice Peckham, said:

"Assuming for the purpose of this objection that the owner of these lands had by the provisions of the act, and before the lands were finally included in the district, an opportunity to be heard before a proper tribunal upon the question of benefits, we are of opinion that the decisions of such a tribunal, in the absence of actual fraud and bad faith, would be, so far as this court is concerned, conclusive upon that question. It cannot be that upon a question of fact of such a nature this court has the power to review the decision

of the state tribunal which has been pronounced under a statute providing for a hearing upon notice. The erroneous decision of such a question of fact violates no constitutional provision. * * * It has been held in this court that the Legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The Legislature, when it fixes the district itself, is supposed to have made proper inquiry and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question, of what is termed the apportionment of the tax; i. e., the amount of the tax which he is to pay. Paulsen v. Portland, 149 U. S. 30, 41 [13 Sup. Ct. 750, 37 L. Ed. 637]."

It is nowhere alleged in the complaint that in fixing the assessment district the common council was actuated by fraud or bad faith. It is simply averred that certain premises actually and substantially benefited by the opening of the street were excluded, and that certain premises which were not benefited were included. This raises no constitutional question which will enable a United States court to review the decision of the state tribunal—in this case the common council—which has been rendered under an act which provided for a hearing upon notice. Complainant did not avail himself of his opportunity to attend and cannot now raise the question here.

The second error is one of a different nature. It is that the assessment upon the complainant's property is in excess of the benefit conferred upon the premises. That raises a constitutional question, and if the allegation is true then the assessment is contrary to the Constitution. That the assessment is in excess of the benefits we have already pointed out. But is the plaintiff entitled to raise the question under the circumstances of this case? Where an assessment is confirmed by proceedings in a court, and a judgment is entered to that effect, such judgment is controlled as to its effect and validity by the principles of law applicable to judgments in general. Confirmation is not always by a court, but is sometimes by a common council or other corresponding body, the action of which body is by statute to have the same effect as the judgment of a court. And in such cases the action taken cannot be attacked collaterally if the tribunal had jurisdiction, but is conclusive upon the parties. Page and Jones on Taxation by Assessment, volume 2, § 927. That the common council of Yonkers had jurisdiction in the matter of this assessment is clearly disclosed.

In this case it is not contended that the statute under which the assessment was laid is unconstitutional. It provided fully for notice and hearing, and it is immaterial that such hearing was to be had before the tribunal laid the assessment. Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; Hibben v. Smith, 191 U. S. 310, 24 Sup. Ct. 88, 48 L. Ed. 195; Seattle v. Kelleher, 195 U. S. 351, 25 Sup. Ct. 44, 49 L. Ed. 232. Appellant, as already stated, never appeared before that tribunal, and he has never sought through the courts any correction of this assessment, other than that proposed by this suit. If he had been so disposed he might by certiorari or by original action have pro-

cured review in the courts of the state of New York, and there raised the constitutional objections here insisted on. Matter of New York, 190 N. Y. 350, 83 N. E. 299, 16 L. R. A. (N. S.) 335, 13 Ann. Cas. 598. In our opinion, a property owner, who deems himself injured by an assessment, and who has an opportunity of seeking correction before the tribunal pointed out in the assessment law, is under an obligation to appear there and urge his objections in order that the municipality may correct its proposed error. That waiver of the most lawful objections to a proposed assessment is possible has been pointed out in Wight v. Davidson, 181 U. S. 371, 21 Sup. Ct. 616, 45 L. Ed. 900; Chadwick v. Kelly, 187 U. S. 540, 23 Sup. Ct. 175, 47 L. Ed. 293.

The conclusion we have reached is that the complainant, not having appeared before the tribunal the New York law provided for the confirmation of these assessments at the hearings before that body, and not having taken steps to have the action taken by that tribunal reviewed in a direct proceeding by the courts, and not having shown any reason why that course was not open to him and why it was not taken, is now precluded from attacking in this collateral proceeding the validity of the assessment.

[4] Moreover, a property owner who thinks himself injured by a wrongful assessment is, if he has knowledge of what is being done, under obligation to act promptly in interposing his objections, so that the municipality may correct the defects in its proposed action. Many courts have held that, if a public corporation has jurisdiction to levy an assessment, a property owner who makes no objection, but waits until the improvement has been made and his property has received the benefit therefrom, will not be permitted to raise objections which, if raised in time, would have rendered the assessment invalid. His conduct estops him, or amounts to a waiver of his rights, or shows such laches as debars him from relief. The public interests demand prompt objection to be made. In the case at bar the assessment was confirmed by the council on October 14, 1913, and complainant commenced his suit in the court below more than a year thereafter, on November 20, 1914. He alleges that he was ignorant of the invalidity of the assessment: but ignorance of the law does not excuse him, for he is assumed to know what the law is. The complaint was rightly dismissed.

Judgment affirmed.

ATLAS TRANSP, CO. v. LEE LINE STEAMERS.

(Circuit Court of Appeals, Eighth Circuit. August 24, 1916.)

No. 4490.

1. Collision \$\iff 95(5)\$—Overtaking Steam Vessels—Fault.

The steam touchout losh Cook with four barres in

The steam towboat Josh Cook, with four barges in tow, two ahead, end to end, and one on each side, was passing up the Mississippi river at night, and when in Random Shot Chute, a narrow, crooked, and

changeable channel above Memphis, about a mile long, was overtaken by the steamer Rees Lee. The Lee signaled her intention to pass to the port of the Cook, to which the latter assented. When opposite the leading barge the Lee sheered to starboard because unmanageable and from the effect of the current was turned across the channel. The Cook reversed and backed, but the Lee came into collision with the port barge, which shortly afterward sunk. *Held*, that the Lee was in fault for attempting to pass in the dangerous channel; that the action of the Cook in backing, if not proper, was taken in extremis, and not chargeable as a fault.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. ⊚⇒95(5).]

2. COLLISION \$\igcress=94\to Overtaking Vessels Passing\to Assumption of Risk by Overtaking Vessel.

Under Rule 22 of the navigation rules applicable to the Mississippi River (Rev. St. § 4233 [Comp. St. 1913, § 7964]) which provides that "every vessel overtaking any other vessel shall keep out of the way of the last mentioned vessel" an overtaking vessel is to be its own judge of the matter of safety in passing and assumes all risk, except such as may be due to the fault of the overtaken vessel and the latter by answering a passing signal no more than assents to the passing at the risk of the overtaking vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 197-199; Dec. Dig. &=94.]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in admiralty for collision by the Atlas Transportation Company against the Lee Line Steamers. Decree for respondent, and libelant appeals. Reversed.

George A. Mahan, of Hannibal, Mo. (James A. Seddon, of St. Louis, Mo., and Albert R. Smith and Dulany Mahan, both of Hannibal, Mo., on the brief), for appellant.

Guy A. Thompson, of St. Louis, Mo. (O'Neill Ryan, of St. Louis,

Mo., on the brief), for appellee.

Before HOOK and CARLAND, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. From a decree dismissing a libel in admiralty, the libelant appeals. The suit grew out of a collision between vessels navigating the Mississippi river. The libelant's steam towboat, the Josh Cook, was ascending the river above Memphis, towing four barges, of which two were lashed end to end straight ahead. One was lashed to the starboard side, and one to the port side of the Josh Cook, and each of these lapped back 40 or 50 feet. The one on the port side, called the Barrett, No. 15, was loaded with coal, and it sank after the collision. The Josh Cook was 175 feet long, 34 feet wide, and drew from 5 to $5\frac{1}{2}$ feet of water. Each barge was 28 feet wide and 160 feet long.

The respondent's vessel, which collided with the barge, was a packet stern wheel steel hull steamer, 260 feet long, 50 foot beam, called the Rees Lee. It was a speedier boat than the Josh Cook, and was also bound up the river. It passed the Josh Cook about 11 o'clock at night,

€===> For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

made a landing at Pecan Point Warehouse on the Arkansas side, and while so engaged the Josh Cook passed up the river ahead of the Rees Lee. After having discharged its passengers and freight at Pecan Point Warehouse, the Rees Lee put out from shore and again proceeded up the river. When about 150 feet behind and somewhat to port of the Josh Cook, it blew two blasts of its whistle as a signal that it desired to pass the Josh Cook on the port side, to which the Josh Cook answered with two blasts. At this time the vessels were ascending a channel of the river known as Random Shot Chute. It was about a mile in length, ran slightly north-northwest by south-southeast, and was bordered on the east by a sand bar, the western shore of which curved slightly to the northwest and to the southwest.

Along the inner side of the sand bar was shoal water, covering a submerged portion of the bar. West of the channel, and along the Arkansas shore, and extending well out into the river towards the sand bar, was another reef or submerged sand bar. Its shape somewhat resembled an equilateral triangle, with the Arkansas shore as its base, and the apex reaching out to the channel proper, opposite the center of the shoal along the west side of the eastern sand bar. This left a narrow passage of deep water, whose width was estimated by different witnesses as from 150 to 500 feet.

When the Rees Lee blew its passing signal, the Josh Cook was near the middle of the channel and about to enter the narrowest portion of it, between the point of the western reef and the reef along the west side of the east sand bar. It was about half past 11 at night, with no moon, but clear starlight. The Josh Cook veered somewhat to the east and reduced its speed to slow, and the Rees Lee came alongside and about 50 or 60 feet away under a full head of steam. When the stern wheel of the Rees Lee was about opposite the middle of the head barge, its prow began to turn towards the southeast and the boat was beyond control of its rudder. This was claimed to have been caused by the Rees Lee running at fast speed into shoal water upon the point of the submerged sand bar on the west, and the displaced water on its port bow, being unable to find escape, "piled up" and resisted progress on that side, and caused the boat to run away from the shoal, and this, together with the river current, turned its course across the channel. The pilot of the Josh Cook, seeing the danger, stopped and then backed it, placing it and its barges also across the channel, so that the boats were about parallel, and in this position they remained for a few minutes, and then the starboard bow of the Rees Lee came in contact with the port side of the coal barge, damaging it so that it subsequently sank.

[1] The trial court found that the collision was an accident, without fault of the Rees Lee. For the respondent, the claim is made that the point of the reef had been built up and out into the river unexpectedly, causing shoal water where the Rees Lee attempted to pass the Josh Cook. The witnesses for both parties agreed in testimony that this portion of the river was known to be difficult to navigate, and had a narrow and crooked channel. They also agreed that the channel was subject to sudden changes, and that bars and reefs were formed and

destroyed in periods as short as overnight. The pilot of the Rees Lee admitted that this channel was considered as a mean place and a very changeable one, with a rapid current and a narrow channel. While the pilot had not seen this channel for a week before the collision, the Rees Lee had gone through it on its downward journey on the forenoon of that day. Under these circumstances, the Rees Lee was at fault in undertaking to pass the Josh Cook in the nighttime in such a narrow and changeable channel, bordered by shoal water, when a few minutes' delay would have afforded a safe place for passing.

[2] It is claimed that the Josh Cook was at fault, because it answered the Rees Lee's signal by two blasts of its whistle, and that this was an assurance of the safety of the attempted maneuver, whereas it should have responded with the danger signal. By rule 22 of the rules enacted by Congress for the prevention of collisions, applicable to vessels upon this portion of the Mississippi river:

"Every vessel overtaking any other vessel shall keep out of the way of the last named vessel." Act April 29, 1864, c. 69, art. 17, 13 Stat. 61 (Comp. St. 1913, § 7964).

By rule 8 of the pilot rules for the Mississippi river adopted under authority of sections 4405–4412 of the Revised Statutes of the United States (Comp. St. 1913, §§ 8159–8166):

"When a steamer is overtaking another steamer, * * * if the overtaking steamer shall desire to pass on the left or port side of the steamer ahead, she shall give two short blasts of the whistle, and if the steamer ahead answers with two blasts, the overtaking steamer may pass on the port side of the steamer ahead; or if the steamer ahead does not think it safe for the overtaking steamer to attempt to pass at that point she shall immediately signify the same by giving not less than four short and rapid blasts of the whistle, and under no circumstances shall the overtaking steamer attempt to pass the steamer ahead until such time as they have reached a point where it can be safely done, when the steamer ahead shall signify her willingness by blowing one blast of the whistle for the overtaking steamer to pass on the starboard side of the steamer ahead, or two blasts of the whistle for the overtaking steamer to pass on the port side of the steamer ahead.

"Every steamer overtaking another shall keep out of the way of the overtaken steamer. Every steamer coming up with another steamer from any direction more than two points abaft her beam shall be deemed to be an overtaking steamer. * * *

"The steamer ahead shall in no case attempt to cross the bow or crowd upon the course of the overtaking steamer."

Under these rules, the Josh Cook had the right and the duty to hold her course. It was not its duty to keep away from the Rees Lee, unless a collision should become imminent. The Rees Lee had the right to pass the other boat, if it could do so with safety to both. It had to be its own judge as to the matter of safety, as whatever risk attended its passage from the narrowness of channel, the shallowness of water, the current, suction, or other causes, except the fault of the Josh Cook, was assumed by the Rees Lee. The reply of the Josh Cook to the passing signal of the Rees Lee was no more than an assent to it, at the risk of the vessel proposing it. It expressed an understanding of what the Rees Lee proposed to do, and an agreement not to thwart it; but the success of the maneuver was at the risk of the Rees Lee. Spencer on Collisions, § 71; Whitridge v. Dill, 23 How. 448, 454, 16 L. Ed. 581; The Great Republic, 23 Wall. 20, 32, 23 L. Ed.

55; The Atlantis, 119 Fed. 568, 571, 56 C. C. A. 134; The Mesaba (D. C.) 111 Fed. 215, 221, 223; The Nereus (D. C.) 23 Fed. 448, 455; The Greenpoint (D. C.) 31 Fed. 231, 232; The Charles Morgan (D. C.) 6 Fed. 913, 914; The Canisteo (D. C.) 47 Fed. 908, 910; The Ruth (D. C.) 178 Fed. 749, 751; The Henry W. Oliver (D. C.) 202 Fed. 306, 310; The Fred Jansen, 49 Fed. 254, 255, 1 C. C. A. 238; Standard Oil Co. v. The Garden City (D. C.) 38 Fed. 860, 862; The Aurania and The Republic (D. C.) 29 Fed. 98, 125; The City of Springfield (D. C.) 29 Fed. 923, 925; The Edward Smith, 135 Fed. 32, 36, 67 C. C. A. 506; The Sif (D. C.) 181 Fed. 412, 415.

In behalf of the Rees Lee, it is claimed that the Josh Cook was at fault in not holding its course, in placing itself and its barges diagonally across the channel after the Rees Lee had sounded the danger signal, and in not beaching the barge Barrett, No. 15, in shallow water that was immediately on the right and left of the scene of the injury. The witnesses agree that, as soon as the passing signal had been given, the Josh Cook yielded some of the channel to the passing boat, by taking a course slightly further east than the one it had pursued and

was entitled to hold.

There is a conflict in the testimony as to whether the course of the Josh Cook was changed at the time the Rees Lee began to veer to the southeast. To some of the witnesses on the Rees Lee, it appeared as if the Josh Cook had veered to the north and west, and the theory is advanced that it had encountered shoal water on the east side of the channel, and had turned from it into the deeper water to the west, so that the boats appeared to be running somewhat toward each other. If this be accepted as the fact, it cannot be said that the Josh Cook was bound to anticipate that the Rees Lee would be so managed that it would run across or down the channel and escape control. It is but speculation with unknown factors to say that the Rees Lee could have safely righted itself in the current, had the Josh Cook maintained its course. Moreover, the shifting of its passageway so as to give a wider berth to the Rees Lee was known to the Rees Lee when it undertook to pass.

It is said the Josh Cook was negligent because it stopped its engine and began to back when the danger signal was given, and this caused the prow of the Josh Cook and its barges to be carried by the current down stream, so that the Rees Lee was unable to swing about in the current without its wheel striking them, and therefore it was compelled to drift in a parallel position across the channel until the collision. The charge is also made that the barge should have been beached upon some of the nearby sand bars, instead of attempting to land it upon the head of the sand bar to the east, an attempt that resulted in failure, owing to the barge breaking in two from the weight

of its cargo, after the forward end had been pushed on the bar.

Of these charges, it is enough to say that the time in which the officers had to act was short, the dangers imminent, and the results uncertain. If the acts of officers of the Josh Cook were mistakes, they were made in extremis, and pardonable. The Elizabeth Jones, 112 U. S. 514, 526, 5 Sup. Ct. 468, 28 L. Ed. 812; The Maggie J. Smith, 123 LL S. 440, 355, 8 Sup. Ct. 150, 21 L. Ed. 175

123 U. S. 349, 355, 8 Sup. Ct. 159, 31 L. Ed. 175.

It appears evident that the responsibility for the collision rested solely upon the Rees Lee, and the decree of the lower court is reversed, with costs in both courts, and the cause is remanded, with directions to enter a decree holding the Rees Lee solely at fault, and to order a reference therein to ascertain the damages.

NUPEN et al. v. PEARCE.

(Circuit Court of Appeals, Eighth Circuit. August 4, 1916.)
No. 4611.

1. Brokers @=102—Relation to Principal—Liability of Principal for Broker's Fraud.

An owner of land placed it in the hands of a real estate agent for sale, stating the price he would accept net to him. Being advised that a sale had been made, he made a conveyance to the agent at the latter's request and received the price stipulated therefor. He had nothing to do with the sale made by the agent. Held, that he was not liable to the purchaser to whom the agent conveyed for any fraud or deceit of the agent inducing the sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 146; Dec. Dig. ⊕ 102.]

2. TRIAL \$\infty 233(2)\$—Instructions—Reading Pleading to Jury.

Where defendants in an action file separate answers and make separate defenses, it is error for the court to read the answer of one to the jury as a part of its charge, when it contains allegations likely to influence the jury as to the liability of another defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 528; Dec. Dig. ⊕=233(2).]

3. Fraud \$\sim 59(3)\top Actions\top Measure of Damages.

The measure of the damages recoverable by a purchaser of land for fraud and deceit inducing the purchase is the difference between the value of what he parted with and the actual value of the land.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 62; Dec. Dig. 59(3),]

In Error to the District Court of the United States for the District of North Dakota; Wilbur F. Booth, Judge.

Action at law by E. D. Pearce against K. M. Nupen and others. Judgment for plaintiff, and defendants bring error. Affirmed in part, and reversed in part.

S. E. Ellsworth, of Jamestown, N. D. (E. E. Cassels, of Ellendale,

N. D., on the brief), for plaintiffs in error.

T. H. Null, of Huron, S. D. (Arthur Knauf, of Jamestown, N. D., and Null & Royhl, of Huron, S. D., on the brief), for defendant in error.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

ADAMS, Circuit Judge. This action was brought in the District Court by Pearce, the defendant in error, against Nupen, Lane, and Wiley, to recover damages for alleged deceit and misrepresentation

⁶⁼For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
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practiced by them to bring about the sale to him of a half section of land in Kidder county, N. D. Defendants filed separate answers, each denying participation in the alleged deceit and misrepresentation. On the issue so joined the case was tried to a jury, which found for plaintiff against all the defendants, assessing damages at \$1,697.25. Defendants prosecute this writ of error.

Some undisputed facts are these: In October, 1909, defendant Wiley was the owner of the E. ½ of section 15, township 138 N., range 73 W. of the fifth principal meridian, in Kidder county, N. D. Desiring to dispose of it, he employed the defendant Nupen, who was a real estate agent and doing business at Steele, not far from the land in question, authorizing him to sell it at \$9 per acre net to him (Wiley). Afterwards Nupen entered into correspondence with defendant Lane, who resided at Ellendale, a distance of about 100 miles from Steele, who had property he desired to trade for land in Kidder county. Negotiations followed, resulting in an agreement, dated February 21, 1910, between Lane, whom Nupen had interested in the matter, and Pearce, the plaintiff, by the provisions of which Lane assumed and agreed to sell the land to Pearce at \$22.50 per acre, and to accept in payment therefor a certain residence property situated in Letcher, S. D., valued at \$4,000, subject to a mortgage, however, securing a debt of \$1,500; the balance in notes of Pearce, secured by mortgage on the property in question. This agreement was made subject to the approval of the properties after inspection by the parties. On the following day (February 22d) Pearce and Lane, pursuant to an arrangement made by Nupen, met the latter at Steele, and the three went together to view the land in guestion. Defendant Wiley was not present at this inspection. On returning to Steele, plaintiff advised Nupen and Lane that he was willing to consummate the trade. Afterwards, and on March 3d, Wiley and his wife executed a general warranty deed of the tract in question to Nupen, and Nupen and his wife on the next day (March 4, 1910) executed a general warranty deed of the same tract to the plaintiff, Pearce. On March 2, 1910, Pearce and his wife executed a warranty deed conveying lots 7, 8, and 9, of block 11, in the town of Letcher, S. D., to one Clark, who had purchased the property from Lane. On March 12, 1910, Pearce executed two mortgages on the land in question, one to secure a note for \$3,000, and the other a note for \$1,920, each payable to Nupen. Nupen retained the one for \$1,920, and assigned and delivered the other (\$3,000) to Lane. Nuper paid Wiley \$9 per acre, amounting to \$2,880, and no more, for the land. The balance of the purchase money and property paid by Pearce for the land was divided between Nupen and Lane. So much for undisputed facts.

There was evidence tending to show that Nupen and Lane, on the occasion of the inspection of the land by Pearce, pointed out to him, who was ignorant as to its location, the W. $\frac{1}{2}$ of the section, instead of the E. $\frac{1}{2}$, as the property of Wiley which they were trying to sell Pearce (this W. $\frac{1}{2}$ having the appearance of a fine flat tract of land), and represented to Pearce that there was no alkali, gumbo, or excessive sand on the land they offered to sell him, and that, with the ex-

ception of a small patch near a windmill, which they spoke of, the half section which they desired to sell was tillable land. There was evidence tending to show that these representations were false. There was also evidence, uncontradicted and conclusive, that the land was deeply covered with snow at the time the inspection was made, and that Pearce had reason to rely and did rely upon the representations made to him by Nupen and Lane as to the identity and character of the Wiley half section, and, generally speaking, there was evidence tending to establish plaintiff's cause of action, and also evidence to the contrary.

At its close each of the defendants moved the court to instruct the jury to find a verdict in their favor. These motions were denied, and the court charged the jury; but as no parts of the charge, except those presently to be referred to, have been brought here for our consideration, the jury were presumptively properly advised as to the general rules of law governing the case. The court included in its charge the following statements, which were duly excepted to:

(1) "As to the motion on behalf of the defendant Wiley (to instruct a verdict in his favor), I think it is true that there is little or no evidence therecertainly no evidence on which a verdict could rest-that Mr. Wiley himself made any misrepresentations in regard to this land, so that he cannot be held on the theory that he himself made any misrepresentations; and the question then arises whether there were two transactions here: First, a sale by Wiley to Nupen; and, second, a sale by Nupen to the plaintiff—or whether there was really and in fact only one transaction, with two or three steps to accomplish it. I am inclined to take the latter view, or at least I think it will be a question for the jury to say whether or not there was in fact two separate and distinct transactions. If they find that there were two separate and distinct transactions, a completed sale between Wiley and Nupen, which had nothing whatever to do with the other transaction between Nupen and Lane and the plaintiff, then the defendant Wiley would drop out of the case so far as damages were concerned. If, on the other hand, they find that Nupen was acting for Wiley, and that the deeds from Wiley to Nupen and from Nupen to the plaintiff were simply steps in one transaction, the deed running to Nupen for the purpose of convenience in carrying out the transaction, and enabling him to conveniently get his commission, then I think the defendant Wiley would be included with the other defendants. * * * Now, one of the first questions for you to determine in this case is: Was there but one transaction, or were there two or more transactions involved

(2) "The measure of damages in this case is the difference between the actual value of what Pearce parted with and the actual value of what he received, and these values are to be ascertained by you as of the time of the transaction; that is, on or about March 4, 1910."

The assignments of error challenge: (1) A large number of rulings of the trial court in the admission of evidence, offered by plaintiff, over defendants' objection; (2) the ruling of the trial court upon the defendants' motion for an instructed verdict at the close of the case; (3) the charge of the trial court to the jury, as already set forth, concerning Wiley's liability; and (4) the charge of the trial court on the measure of damages.

Counsel for defendants have not seen fit to make any argument, either orally or in writing, on the several assignments of error relating to the admission of evidence, neither have they in any respect con-

formed to the provisions of our rule governing such assignments of error. We shall, therefore, give no further consideration to them.

So far as the defendants Nupen and Lane are concerned, there can be no doubt about the sufficiency of the evidence to justify a submission of the case to the jury as to them. The only argument they make in their brief against it is that it appears affirmatively that Pearce did not rely upon any of their representations. We think this is not so. The evidence tends to establish such reliance, and it was for the jury to pass upon its sufficiency under proper instructions. This is all we need to say on that subject.

As to the motion for an instructed verdict by Wiley, this may be said: All that he appears to have done, according to the proofs in this case, was to place his land for sale in the hands of Nupen, a reputable real estate agent, whose business it was to find purchasers for land intrusted to him. Wiley fixed the sum of \$9 per acre, net to him, as the price at which he would sell the land. He does not appear to have had anything further to do with the matter until Nupen advised him that a sale had been made, when he made a deed to Nupen, as requested by him, and received the consideration of \$9 per acre therefor, in strict accord with his original proposition to Nupen, and nothing more. And such seems to have been the impression of the trial court. He observed:

"I think it is true that there is little or no evidence there—certainly no evidence on which a verdict could rest—that Mr. Wiley himself made any misrepresentations in regard to this land."

It is inconceivable, except for one thing, how a jury found a verdict against Wiley, and, judging from the observations of the trial judge, just quoted, it is apparent that he would not have submitted the case to the jury, so far as Wiley was concerned, except for the same thing.

Wiley filed a separate answer to the complaint of plaintiff. His answer contained an explicit and unequivocal denial of any misrepresentations made by him to Pearce, or any participation with the other defendants in any transactions leading up to the sale of the land to Pearce. In this way he obviously intended to stand on his own bottom, and defend himself in his own way. Lane, however, took a different course. He sought not only to protect himself, but injected statements in his answer which the court thought inculpated Wiley, and accordingly charged the jury as already set out.

[1] Apart from the statement found in Lane's answer to the effect that the two conveyances of land from Wiley to Nupen and Nupen to Pearce were part of one and the same transaction, we confidently assert there is no evidence in the case, or no reasonable inferences deducible from any evidence, which in the slightest degree connected Wiley, either acting by himself or through any others as his agent, with the transaction culminating in the sale of the land to Pearce. The answer of Lane would not have been competent evidence against Wiley if it had been offered in the usual course. If it had been so offered, it would have been clearly incompetent. Its vice was not extracted by being read by the court to the jury in its charge. In view of the

observations of the court made in connection with it, it must have been influencive and misleading to the jury, and doubtless produced a verdict against Wiley which otherwise would not have been rendered.

- [2] We think the court erred in reading Lane's answer to the jury, and that the exception to the charge, as taken by Wiley, should have been sustained. We also are of opinion that the court erred in not directing a verdict in Wiley's favor, as requested by him, at the close of the case.
- (3) We do not think Nupen or Lane can complain of the measure of damages given by the court to the jury; that is, the difference between the value of what Pearce parted with and the actual value of the property which he received. This is the rule approved by the Supreme Court of the United States for such cases as this. Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279; Sigafus v. Porter, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113; Atwater v. Whiteman (C. C.) 41 Fed. 427; Glaspell v. Northern P. R. Co. (C. C.) 43 Fed. 900. See also George v. Hesse, 100 Tex. 44, 93 S. W. 107, 8 L. R. A. (N. S.) 804, 123 Am. St. Rep. 772, 15 Ann. Cas. 456, and cases cited. And notwithstanding the construction placed by the Supreme Court of North Dakota upon its statute fixing the measure of damages for deceit and misrepresentation in the sale of personal property, we do not feel at liberty to depart from the rule so approved by the Supreme Court of the United States.

The judgment against Nupen and Lane is affirmed, and that against Wiley is reversed, and the cause, as to him, is remanded to the District Court, with instructions to grant a new trial, when, unless the evidence is substantially different from that now presented, a verdict should be directed in his favor.

GERMAN-AMERICAN STATE BANK V. LARIMER.

(Circuit Court of Appeals, Eighth Circuit. August 9, 1916.) No. 4602.

BANKRUPTCY \$\sim 304\text{--Action by Trustee to Recover Preference--Instructions.}

In an action by a trustee in bankruptcy against a bank to recover a preference, the complaint alleged that by an arrangement between the bankrupt, the bank, and a third person, at a time when the bankrupt was indebted to the bank and known to be insolvent, the third person purchased the entire stock of merchandise of bankrupt, giving in payment a check on the bank, which was deposited by the bankrupt to his account and applied by the bank on his indebtedness. The answer alleged that the deposit was received in the usual course of business and was applied as a set-off on bankrupt's indebtedness under its general lien. Held that, if such was the fact, the bank had the right of set-off under Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 565 (Comp. St. 1913, § 9652), and its action in making the application under its lien did not constitute a preference, and that the failure of the court to submit such issue to the jury was reversible error.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 463; Dec. Dig. ⊗ 304.]

Amidon, District Judge, dissenting.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Error to the District Court of the United States for the District

of Kansas; John C. Pollock, Judge.

Action at law by J. E. Larimer, trustee in bankruptcy of the estate of I. M. Blitz, against the German-American State Bank. Judgment for plaintiff, and defendant brings error. Reversed.

D. R. Hite, of Topeka, Kan. (Edwin D. McKeever, of Topeka,

Kan., on the brief), for plaintiff in error.

T. M. Lillard, of Topeka, Kan. (John W. Newell, William Wallace, R. W. Blair, and C. A. Magaw, all of Topeka, Kan., on the brief), for defendant in error.

Before SMITH and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. Larimer, as trustee of the estate of I. M. Blitz, a bankrupt, commenced this action against the bank to recover the sum of \$5,000, with interest thereon at 6 per centum from December 26, 1912, on the ground that said sum was received by the bank from the bankrupt under such circumstances as would constitute a voidable preference. Among other allegations of the complaint it was alleged that on December 26, 1912, the bank, together with the bankrupt and one Sam Friedberg, entered into an arrangement whereby the bankrupt should execute a bill of sale for his stock of merchandise and store fixtures to said Friedberg, and whereby the said Friedberg should give to the bankrupt a check on the defendant bank for the sum of \$5,000 as the purchase price of the said stock of merchandise and store fixtures; that the bill of sale was delivered as agreed, and after delivery of the check for \$5,000 to the bankrupt the latter transferred the check to the defendant bank, which was thereupon entered on the books of the bank as a purported deposit by the said bankrupt; that at the time of the making of said purported deposit the bank was a creditor of the bankrupt, and then and there well knew that the check of \$5,000 was the entire proceeds of a bulk sale of the jewelry stock of the bankrupt; that said purported deposit of \$5,000 by the bankrupt was not a deposit of money in the usual course of business, but was in fact a transfer of all the available assets of the said bankrupt to the bank, while the said bankrupt was insolvent, and at the time the said transfer or purported deposit was made the bank had reasonable cause to believe that the enforcement of said transfer would effect a preference.

The bank by its answer, in addition to a general denial, alleged that on the 26th day of December, 1912, the bankrupt was indebted to it in a large sum greatly in excess of \$5,000 for money borrowed and actually loaned to him by the bank; that for several years prior thereto the bankrupt had been a customer of the bank and a heavy borrower, as well as at various times a depositor; that on the 26th day of December, 1912, the bankrupt was a regular depositor at the bank, carrying an account therein; that on said day and in the due course of business the bankrupt deposited with the bank in the regular and usual way the sum of \$5,000, for which sum

the bankrupt was given credit on the books of the bank; that thereafter on the following day said bank, by reason of the bankrupt owing it large sums of money in excess of \$5,000 on certain promissory notes, which were past due, duly appropriated said \$5,000 under its general lien upon the deposit of the bankrupt and applied the

same as a set-off upon the amount due on said notes.

The issue thus presented by the pleadings was whether the deposit of the money by the bankrupt in the bank was a deposit in the usual course of business, with the right of set-off in the bank, or whether, although in the form of a deposit, taking the whole transaction between the bank, Friedberg, and the bankrupt, it amounted to a transfer by the bankrupt to his creditor as a payment on past due indebtedness while he was insolvent; the bank having reasonable cause to believe that the enforcement of the transfer would effect a preference. If the money was deposited by the bankrupt with the bank in the usual course of business, then the deposit would not constitute a transfer of the money to the bank, but simply created the relation of debtor and creditor between it and the bankrupt. Scammon v. Kimball, 92 U. S. 362, 23 L. Ed. 483; New York County Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380; Durkee v. National Bank, 102 Fed. 845, 42 C. C. A. 674.

The estate of the bankrupt would not be lessened in any degree, for the reason that, although the sum of \$5,000 was paid to the bank, there was due and owing by the bank to the estate the same sum. So the real question for the jury to decide was whether this deposit by the bankrupt was in good faith, in the usual course of business, or whether it was a mere form and manner of transferring the \$5,000 to the bank to be applied on the indebtedness of the bankrupt under such circumstances as to constitute the deposit a voidable preference. The trial court submitted to the jury the contention of plaintiff, but in our judgment did not submit the contention of the bank. Counsel for the bank requested the court to charge the jury as follows:

"The law gives to a bank a lien on the deposit of its customers and a right to set off against any indebtedness of a depositor any or all of the balance of said depositor equal to the amount of said indebtedness, and this right of set-off is not taken away by the bankruptcy law. The enforcement by a bank of its lien or right of set-off, by applying a deposit made honestly in the due course of business, and without intent to prefer the bank to the payment of the depositor's notes in the bank's favor as they mature, does not, though within four months of the bankruptcy proceeding against such depositor, constitute a preference forbidden by the act of July 1, 1898; and you are instructed that, if the defendant bank in this case enforced its lien or right of set-off by applying a deposit of the said I. M. Blitz to his past-due indebtedness to the said defendant bank the bank would have a right to thus apply said deposit even if done within four months before said Blitz filed his petition in bankruptcy."

The request was denied, and an exception taken. If this request had left it to the jury to say whether the deposit in question was made in the usual course of business, it might have been given; but it did not. The last clause simply provided that, if the bank applied the deposit regardless of its character, then the plaintiff could not recover. This is not the law. New York County Bank

v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380; Studley v. Boylston National Bank, 229 U. S. 523, 527, 33 Sup. Ct. 806, 57 L. Ed. 1313; In re George M. Hill Co., 130 Fed. 315, 64 C. C. A. 561, 66 L. R. A. 68 (7th Cir.); Lowell v. International Trust Company, 158 Fed. 781, 86 C. C. A. 137 (2d Cir.); section 68a, Bankruptcy Law. The court, in commenting on said request, charged the jury as follows:

"That is good law where applicable. There is such a thing as a banker's lien; that is to say, if you are a depositor in a bank, the bank has a lien on your deposit, so that it may, under certain conditions, apply the amount of your deposit, on your obligation, but that is only under certain conditions. Banks, just the same as individuals, and all others, are subject to the Bankruptcy Law. So, if the bank has no knowledge, or has no cause to believe or reasonable ground to believe, at the time it makes the application, that the depositor is insolvent, or has no reasonable cause for believing, if they do apply it under the bank's lien, that they will thus obtain a preference over other creditors, why they can make the application. But a bank is just as much subject to the Bankruptcy Law, all kinds of banks, as are individuals. So, if in making the application under their banker's lien, they know at the time they make their application the depositor is insolvent, and know that they will get a greater proportion of their debt by making such application than other creditors will get, of like class, why, of course, they cannot make the application."

To this charge an exception was taken. The effect of the charge of the court was to tell the jury if they found the bank applied the deposit under such circumstances as would ordinarily constitute a voidable preference, then the right of the bank to a set-off under section 68a of the Bankruptcy Law was destroyed. But this would not be true if the transaction was as the bank claimed it to be; that is, a deposit in the usual course of business, and the jury was not so told. The charge as given for all practical purposes took away the bank's defense. New York County Bank v. Massey, supra; Studley v. Boylston National Bank, supra; In re George M. Hill Co., supra; Lowell v. International Trust Company, supra; section 68a, Bankruptcy Law. In Bank v. Massey, supra, the Supreme Court said:

"As we have seen, a deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment pledge, mortgage, gift, or security. It is true that it creates a debt, which, if the creditor may set it off under section 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation, and do not hold any debts of the bankrupt subject to set-off. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences so as to prevent set-off in cases coming within the terms of section 68a. If this argument were to prevail, it would in cases of insolvency defeat the right of set-off recognized and enforced in the law, as every creditor of the bankrupt, holding a claim against the estate subject to reduction to the full amount of a debt due the bankrupt receives a preference in the fact that to the extent of the set-off he is paid in full."

Also in Studley v. Boylston National Bank, supra:

"The Bankruptcy Act recognizes this right, and it cannot be taken away by construction, because of the possibility that it may be abused. The remedy against that evil is found in the fact that the trustee is authorized to sue

and recover, if it is shown that after insolvency the money was deposited for the purpose of enabling a bank or other creditor to secure a preference. But to deny the right of set-off, in cases like this, would in many cases make banks hesitate to honor checks given to third persons, would precipitate bankruptcy, and so interfere with the course of business as to produce evils of serious and far-reaching consequence."

It is claimed that, if there was error in the charge of the court, it was not prejudicial, for the reason that the evidence conclusively showed that the deposit of the money was not made in the usual course of business, and therefore a verdict would not have been allowed to stand if rendered in favor of the bank. The trial court, in submitting the case to the jury, used the following language:

"Now, gentlemen, the facts up to a certain point in this case are practically undisputed. That this man Blitz was insolvent at the time he sold his stock of goods to Friedberg and deposited the proceeds of that sale in this bank, which was on the 26th day of December, 1912, as I remember it, from all that has been shown by this evidence, there is no substantial controversy whatever. The question is: Did the bank either know or have reasonable cause to believe, at that time, that this man Blitz was insolvent, and that by making this application on the debts owed by the bankrupt to it it would receive a preference? All the evidence in this case has been offered and received, or almost all of it, for the sole purpose of allowing you, gentlemen of the jury, to judge of that single fact, as to what the bank at that time knew, or what it had reasonable cause to believe—what it should have known."

Again:

"Gentlemen of the jury, the question that you will have to determine will be, to look into the entire case and see whether this bank from all of its dealings had before this time with this bankrupt, from the manner in which its business with this bankrupt had been conducted, in so far as the bank and its officers knew, and from all the other facts and circumstances in the case determine: Did the bank know, or had it reasonable cause to believe the bankrupt was then insolvent and knew that by the application of this fund of \$5,000, received in the manner the bank knew it was received, it was receiving a preference over other creditors?"

Nowhere in the charge was the jury told that, if they found that the bank received the deposit in the usual course of business, it could apply the deposit as a set-off against the indebtedness of the bankrupt. Where a trial court submits a case to a jury at all, it should declare the law applicable to the contentions of both sides. We do not feel it to be our duty at this time on an exception to a charge to sift the evidence and determine whether a verdict for the bank could be sustained.

It is urged, however, that the right of set-off as given by section 68a of the Bankruptcy Law does not enlarge the doctrine of set-off, and cannot be invoked in cases where the general principles of set-off would not justify it; that the matter is placed within the control of the bankruptcy court which exercises its discretion upon general principles of equity. Cumberland Glass Company v. De Witt, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042. This being the law, it is contended that the bank had no authority on its own motion to exercise its right of set-off, but should have submitted a statement of the mutual accounts to the court of bankruptcy and had the set-off allowed if permissible.

In Studley v. Boylston Bank, supra, it was decided that a bank could exercise the right of set-off before bankruptcy by an entry on its books; but, conceding that some action of the court is necessary, the bank in this action was sued by the trustee of the estate of the bankrupt in the court having jurisdiction over the bankrupt estate, and we see no reason why it could not claim the right of set-off in this action and have the matter adjudicated by the court of bankruptcy. As the evidence stood when the case was submitted to the jury below, no reason appeared why the set-off should not be allowed, providing always the deposit was made in the usual course of business, and not a mere formal transaction, to cover up what was in fact and law an unlawful preference.

For error in charging the jury in that portion of the charge excepted to, the judgment is reversed, and a new trial ordered.

AMIDON, District Judge (dissenting). I am unable to concur in the reversal of the judgment in this case. Blitz, the bankrupt, was a jeweler at Topeka, Kan. He was largely indebted to the bank, which had liens upon all his property with the exception of his stock in trade. It also held about \$2,000 worth of diamonds, the most valuable quick asset of his stock, as collateral. For some weeks prior to the sale of his stock to Friedberg, Blitz had been conducting a forced sale. It had been advertised as a sale on behalf of his creditors, and was in charge of attorneys representing his creditors, and the proceeds of the sale, after paying the expenses of the store, were deposited by these attorneys and not by Blitz. The bank had been entirely familiar with this sale, and had made arrangements to get a part of the proceeds. At about the time of the conclusion of the forced sale, the bank recommended to Friedberg that he buy the Blitz stock. Friedberg said he had not the money and the bank offered to furnish it to him. This it did. Blitz and Friedberg met at the bank. The bank gave Friedberg credit for the amount needed. Blitz delivered him the bill of sale of the stock and fixtures. Friedberg drew a check for \$5,000, the purchase price, and delivered it to Blitz. He presented this at the window of the bank as a deposit, and received a deposit slip for the amount. This occurred at 4 o'clock in the afternoon, just as the bank was closing. The following morning the bank applied the \$5,000 credit produced by the deposit in partial payment of Blitz' indebtedness to it.

Two features show that this transaction was not a deposit in due course:

First. Blitz had no current account at the bank. The evidence shows clearly that, for more than a year previous to the transaction here involved, his account had been closed. The last entry in his passbook was December 19, 1911. Blitz, however, continued to draw checks upon the bank, and send them to his creditors. When these checks were presented for payment the bank would notify Blitz, and he would come in and take them up with cash. Neither these checks nor the cash with which they were paid were ever entered in Blitz' account. This is the nature of the account, as shown by the uncontradicted evidence. Blitz so testified, and he was in no way contradicted by any

officer of the bank. It was a suspicious circumstance that the ledger leaves of the bank showing Blitz' account had mysteriously disappeared.

Second. The bank, rather than Blitz, was the dominating power in the deposit of the \$5,000. The bank brought about the sale; it furnished the money, and took scrupulous care that the fund should never

get beyond its immediate control.

To apply to such a transaction the doctrines applicable to a regular current account between banker and depositor, such as was involved in New York County Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, and Studley v. Boylston National Bank, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313, cited in the majority opinion, is to confound things essentially different. This transaction, read in the light of its attendant circumstances, shows clearly that the money was received by the bank as a payment, and that the form of deposit was a mere subterfuge. The history of the transaction, the manner and place in which it was consummated, showed that it was the intent of the bank officers that the money should be immediately applied to the payment of the bank's indebtedness. The fact that this was not done on the evening when the deposit was made, does not change the real character of the transaction, but simply shows an intent to defeat the Bankruptcy Law by a colorable shift, and enable a local bank to appropriate the entire estate of a bankrupt merchant, and leave his mercantile creditors, with claims amounting to more than \$14,000, without a farthing. There was, in my judgment, no substantial evidence requiring the trial court to submit to the jury the question whether the transaction was a deposit in the due course of business. Upon the evidence it would have been the plain duty of the court to set aside such a verdict, if returned.

The judgment was right, and it seems to me a miscarriage of justice to reverse it for the mere purpose of seeing whether a jury will

do its plain duty.

ALSOP v. McCOMBS et al.

(Circuit Court of Appeals, Eighth Circuit. August 4, 1916.) No. 4601.

STIPULATIONS \$\iff 14(5)\$—Involuntary Dismissal—Grounds—Stipulation in Another Court.

By stipulation of counsel in an action in a state court it was agreed that one pending in a federal court between the same parties should stand continued and not be tried until that in the state court should be "finally determined," or so long as it should be "pending." Afterward, on motion of plaintiff, the state court entered a judgment of dismissal. Held, that the stipulation afforded no ground for dismissal of the action in the federal court.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 29; Dec. Dig. ← 14(5).]

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action at law by James N. Alsop against Ruddell M. McCombs and

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

others. From a judgment of dismissal, plaintiff brings error. Reversed.

Chester H. Krum, of St. Louis, Mo., and George W. Jolly, of

Owensboro, Ky., for plaintiff in error.

C. D. Corum, of St. Louis, Mo. (Sam B. Jeffries, of St. Louis, Mo., and R. B. Oliver, of Cape Girardeau, Mo., on the brief), for defendants in error.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

ADAMS, Circuit Judge. Alsop, the plaintiff below, instituted this action at law in the District Court of the United States for the Southeastern Division of the Eastern District of Missouri to recover damages for an alleged breach of a contract by the terms of which defendants agreed to purchase his interest in certain letters patent then issued or thereafter to be issued to him, and, being unable to secure service of process upon one of the defendants, he later instituted another suit by attachment in the court of common pleas of Cape Girardeau county, Mo., against the same defendants to recover damages for the same breach. The cause in the common pleas court was set for trial at the February term, 1914, of that court, and the plaintiff, not being ready for trial, secured a continuance to the May term, 1914, of that court upon entering into the following stipulation with the defendants:

"It is hereby stipulated that the pleadings in the above-entitled cause shall be made up and settled at the February, 1914, term of said court.

"It is further stipulated that this cause shall be tried in the above-named common pleas court in Cape Girardeau county at the May, 1914, term of said court.

"It is further stipulated that the suit brought by the above-named plaintiff in the Southeastern division of the Eastern district of Missouri, and which is pending in the federal court at Cape Girardeau, shall stand continued until the above case pending in the common pleas court at Cape Girardeau shall have been finally determined; that is to say, the suit in the federal court of Cape Girardeau shall not be tried as long as the said case now in the common pleas court at Cape Girardeau is pending, either in said court or in any appellate court. The plaintiff herein makes this stipulation in consideration of the agreement of the defendants to continue this cause to the May, 1914, term of this court.

"Chester H. Krum,
"George W. Jolly,
"Attorneys for Plaintiff.
"Jeffries & Corum,
"Attorneys for Defendants."

When the cause in the state court was called for trial at the following May term, the plaintiff asked leave to dismiss it. Defendants, by counsel, objected, because they had filed a cross-bill, and because plaintiff had agreed to try it at that term of court. After argument of counsel, the court then made the following order:

"Thereupon it is considered, ordered, and adjudged by the court that the plaintiff's petition be dismissed, and that he take nothing by this writ herein, and that defendants have and recover of and from said plaintiff all their costs and charges in this behalf expended, and have execution therefor."

Afterwards defendants filed an amended answer in this cause, containing, among other defenses, a special one to the effect that the plaintiff had stipulated in the other cause that it should be heard at the May term of that court, and had further stipulated that this cause should not be heard until after the cause pending in the state court should have been finally determined. On the issue so made by the amended answer, the cause was called for trial in the court below. Thereupon defendants moved the court to try the issue raised by the special defense first, and the court, over the objection of plaintiff's counsel, who demanded a jury to try all the issues together, proceeded to a hearing of that issue alone, without a jury, and after hearing the evidence adduced on both sides made the following order:

"Wherefore, the premises considered, it is ordered and adjudged by the court that plaintiff's right to prosecute his action herein in this court is abated, and that the complaint filed herein be and the same is dismissed. It is further ordered that defendants and each of them go hence without day, and that they and each of them have and recover of and from this the plaintiff their costs in this behalf expended, and have execution therefor."

To reverse this judgment plaintiff prosecutes this writ of error, assigning particularly that the District Court erred in admitting, over plaintiff's objection, the stipulation entered into by the parties at the February term, 1914, of court of common pleas in the cause therein pending, which, in effect, challenges the sufficiency of the evidence to sustain the judgment as rendered.

Did the stipulation, to the effect that this cause should not be heard until the one pending in the state court should be finally determined, warrant the abatement and dismissal of this cause by the court below? We think not. That stipulation was made, not in this cause, but in another one pending in another court, and can have the force and effect of an agreement of counsel only. In our opinion, according to its terms and the unimpeachable record of the court in which it was made, it afforded no warrant for the judgment of dismissal of this cause. The parties agreed that this cause should "stand continued" until the one in the state court should be "finally determined," and should not be tried as long as that one "was pending."

The main purpose of the agreement obviously was that this cause should stand continued from time to time until the other one in the state court should be disposed of, and in no sense did it warrant a peremptory dismissal of it. But if the parties had intended that a dismissal should result from the violation of its terms, the facts, as conclusively shown by the record, would not warrant such dismissal. No prohibition whatever is found in the agreement of the trial of this cause in the court below after the one in the state court should have been "finally determined," or after it should cease to be "pending" there or in some appellate court. After the cause should be finally disposed of in the state court the parties were left free to proceed with the trial and disposition of this cause in the usual course.

It is conclusively shown by the proof that the cause in the state court had been "finally determined" and was not "pending" in that court at the time of the trial of this cause. The record of the pro-

ceedings in the state court introduced in evidence at the hearing below shows that, upon plaintiff's request to take a voluntary nonsuit, a judgment of dismissal and an award of execution in favor of the defendants for all their costs was entered; the order of the state court in that behalf being that "plaintiff's petition be dismissed, and that he take nothing by this writ herein, and that defendants have and recover of and from said plaintiff all their costs and charges in this behalf expended, and have execution therefor." Nothing, in our opinion, could more plainly show that the cause in the state court had been finally determined, and was not then pending, than this final judgment.

It is argued that the state court erred in permitting the plaintiff to take a voluntary nonsuit, and in rendering its judgment of dismissal in that cause; this, on two grounds: (1) Because the parties had agreed that the cause should be tried in the state court at its then May term, 1914; and (2) because in that action at law the defendants had interposed some equitable defense in the nature of a cross-bill in equity. Whatever may be the merits or demerits of these contentions, the judgment of the state court cannot be questioned in this action. It was the final judgment of a court of competent jurisdiction and cannot be attacked collaterally.

In view of the conclusion so reached, it is unnecessary to consider or pass upon the question of practice raised by plaintiff's counsel, that the court below erred in overruling his demand for a jury to try the special plea, together with the other issues in the case.

The judgment must be reversed, and the cause remanded to the District Court, with directions to proceed with its trial on the merits.

LO PONG v. DUNN, Immigration Inspector.* (Circuit Court of Appeals, Eighth Circuit. July 10, 1916.) No. 4569.

1. ALIENS \$\infty\$=31, 32(13)—Deportation of Chinese—Chinese Other Than Laborers—Fraudulent Procurement of Certificate.

The certificate on which a Chinese person was admitted as a student under Act May 6, 1882, c. 126, § 6, 22 Stat. 60, as amended by Act July 5, 1884, c. 220, 23 Stat. 116 (Comp. St. 1913, § 4293), is prima facie evidence only of the facts therein stated, and neither such certificate nor the decision of the immigration officers admitting the alien preclude a subsequent inquiry as to his right to remain in the United States; and where fraud in procuring the certificate is charged, the alien is subject to the action of the Secretary of Labor and his action is conclusive, if the proceedings and hearing were fair.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig. €=31, 32(13).]

2. Aliens 29—Depostation of Chinese—Chinese Other Than Laboress.

The prima facie case made by such certificate as to the status of the alien as a student may be overcome by the other facts in the case.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 91; Dec. Dig. \$29.]

Appeal from the District Court of the United States for the Eastern District of Missouri.

Habeas corpus by Lo Pong, alias Lo Bong, against James R. Dunn, Inspector in Charge, Immigration Service, Department of Labor. From a judgment dismissing the writ, petitioner appeals. Affirmed.

Byron F. Babbitt, Charles P. Johnson, and Eustace C. Wheeler, all of St. Louis, Mo., for appellant.

Benjamin L. White, Asst. U. S. Atty. (Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., on the brief), for appellee.

Before HOOK and CARLAND, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. [1] The appellant, Lo Pong, a Chinese person, was arrested by the respondent, an immigration inspector, under a warrant issued by the Secretary of Labor, charging him with being found in the United States in violation of section 6 of the Chinese Exclusion Act, as amended by Act July 5, 1884, c. 220, 23 Stat. 116, having secured admission on a fraudulently procured certificate. He was accorded a hearing and a transcript of the proceedings at the hearing was submitted to the Secretary of Labor, who ordered his deportation. Appellant then obtained a writ of habeas corpus, but, on final hearing, the writ was dismissed, and he prosecutes this appeal.

Before leaving China, appellant obtained a certificate of admission from the viceroy at Canton, viséed by the United States consul, certifying that he was a student, and therefore authorized to come within the United States under the provisions of section 6 of the Chinese Exclusion Act as amended by Act of July 5, 1884. He was admitted by the immigration officer at Vancouver, B. C., after an examination, and proceeded to San Francisco. At this examination, he stated his age as 18 years, that he had attended school in his native village and at a nearby city for 8 years, and that he intended to attend the Oriental public school at San Francisco, first studying English and then taking a course in mining engineering. He exhibited a bank draft for \$500 and had \$7 in gold. He remained in San Francisco for two months, but attended no school. He claimed to have received lessons at his dwelling room during this period, two or three times a week, from some woman whose name he had forgotten, who did not speak Chinese, and who taught him only as to the English alphabet. Appellant then proceeded to St. Louis, Mo., where he resided for about 2 years and 10 months before the institution of this action. During this time he has attended no school, and claims that he has had no occupation or employment, has earned no money, and has expended that which he brought with him. He claims that he has suffered from a cough and pain in the back for the last two years, and that this disables him from attending school. His examination discloses a number of contradictory statements as to facts within his knowledge, such as his age, his receiving money from China, and his mother's name.

By section 1 of the Act of Congress of April 29, 1902, c. 641, 32 Stat. 176, as amended by section 5 of the Act of April 27, 1904, c. 1630, 33 Stat. 428 (Comp. St. 1913, § 4337), all laws in force on April 29, 1902, regulating, suspending, or prohibiting the coming of Chinese persons into the United States, and the residence of such persons therein, were re-enacted without modification. By section 6 of the Act of Congress of May 6, 1882, c. 126 (22 Stat. 60), as amended by Act July 5, 1884, c. 220 (23 Stat. 116), every Chinese person, other than a laborer, entitled to come to the United States, must obtain the permission of the Chinese government and be identified as so entitled, evidenced by a certificate, viséed by the proper diplomatic or consular representative of the United States. Such certificate is prima facie evidence of the facts set forth therein, but may be controverted and the facts therein stated disproved by the United States authorities. Under this statute, the decision of the appropriate immigration officers admitting the alien did not conclude an inquiry as to his right to remain within the United States. Li Sing v. United States, 180 U. S. 486, 490, 21 Sup. Ct. 449, 45 L. Ed. 634; United States v. Pin Kwan, 100 Fed. 609, 611, 40 C. C. A. 618; United States v. Lau Sun Ho (D. C.) 85 Fed. 422, 423.

By section 20 of the Immigration Act of February 20, 1907, c. 1134, 34 Stat. 904 (Comp. St. 1913, § 4269), as amended by the Act of March 4, 1913, c. 141, 37 Stat. 736, "any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry to the United States." The warrant and order of deportation charged appellant with being found in the United States in violation of section 6 of the Chinese Exclusion Act, as amended by Act July 5, 1884, having secured admission on a fraudulently procured certificate. The gravamen of this charge was a fraudulent entry into the United States, and hence appellant, though a Chinese person, was subject to the action of the Secretary of Labor. United States v. Wong You, 223 U. S. 67, 69, 32 Sup. Ct. 195, 56 L. Ed. 354; Williams v. United States, 186 Fed. 479, 480, 108 C. C. A. 457; Ex parte Greaves (D. C.) 222 Fed. 157, 158.

[2] It is not disputed that the action of the Secretary was conclusive if the proceedings were fair (Zakonaite v. Wolf, 226 U. S. 272, 274, 33 Sup. Ct. 31, 57 L. Ed. 218; Low Wah Suey v. Backus, 225 U. S. 460, 468, 32 Sup. Ct. 734, 56 L. Ed. 1165; Tang Tun v. Edsell, 223 U. S. 673, 675, 32 Sup. Ct. 359, 56 L. Ed. 606; Chin Yow v. United States, 208 U. S. 8, 11, 28 Sup. Ct. 201, 52 L. Ed. 369; United States v. Ju Toy, 198 U. S. 253, 261, 25 Sup. Ct. 644, 49 L. Ed. 1040; United States ex rel. Haum Pon v. Sisson, 230 Fed. 974, 975, — C. C. A. —); but appellant contends that the order of deportation is not supported by any substantial evidence and therefore he is entitled to be discharged. As the evidence shows that appellant has been in the United States for three years, has not attempted other work as a student than his efforts to master the English alpha-

bet during the first two months of his residence here, and the reasons for abstention from further study seem vague and unsatisfactory, and his credibility is weakened by the contradictions in his testimony, the Secretary of Labor might well draw the inference that he procured his certificate of admission fraudulently and not intending to be a student. The prima facie evidence of his certificate as a student may be overcome by the other facts in the case. United States v. Yong Yew (D. C.) 83 Fed. 832; United States v. Ng Park Tan (D. C.) 86 Fed. 605; United States v. Foo Duck, 172 Fed. 856, 858, 97 C. C. A. 204.

The judgment of the District Court is affirmed.

EWERT v. BECK.*

(Circuit Court of Appeals, Eighth Circuit, July 5, 1916.)

No. 4546.

1. TRIAL =143-DIRECTION OF VERDICT-POWER OF COURT.

It is the duty of the court to direct a verdict even though the evidence may be conflicting if the evidence on behalf of one party is of so conclusive a character that the court in the exercise of a sound discretion, would set aside a verdict for the adverse party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. &==143.]

2. Vendor and Purchaser \$\sim 231(14)\$—Constructive Notice—Effect of Mistake in Instrument.

That an instrument affecting title to land through mistake was dated on Sunday, which under the state law would render it void, did not change the effect of the record as constructive notice, where it was in fact executed on a week day.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 538, 539; Dec. Dig. €=231(14).]

In Error to the District Court of the United States for the Eastern District of Oklahoma,

Action at law by Paul A. Ewert against G. W. Beck. Judgment for defendant, and plaintiff brings error. Affirmed.

Paul A. Ewert, of Joplin, Mo., in pro. per.

W. H. Kornegay, of Vinita, Okl. (Judson, Green & Henry, of St. Louis, Mo., on the brief), for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. The plaintiff in error, hereafter called plaintiff, brought an action in ejectment against defendant in error, hereafter called defendant, claiming right of possession under an instrument called a mining lease, executed to him by an Indian allottee of the land. The defendant's claim of title was based on a similar instrument executed to him by the same grantor.

Plaintiff's lease was executed on July 26, 1913, while the lease to

[@]____For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 235 F.—33 *Rehearing denied December 11, 1916.

defendant bore date of August 18, 1912, and was filed for record on the following day. The plaintiff's lease contained a clause that certain covenants of plaintiff should not be binding upon the plaintiff "until the expiration of all prior lawful leases that may be found to exist upon said land." At the trial there was evidence that defendant's lease was signed and delivered in Kansas, but plaintiff contended that its validity depended upon the laws of Oklahoma, as it referred to land in Oklahoma and its covenants were to be performed there, and under the laws of that state it was void because it was executed on Sunday.

A verdict was directed for the defendant, and the propriety of that action is challenged, and it is claimed there was such evidence as to the execution of the lease on Sunday as to present an issue of fact for the jury. The defendant, the notary who took the acknowledgment of the lease, the attesting witness thereon, and defendant's brother, each testified to having been present at the time of the execution of the lease, and each clearly and circumstantially stated that it was executed and delivered by the lessee to the lessor at Baxter Springs, Kan., on Saturday, the day preceding the purport-The defendant produced the bank check which he gave to the lessor in payment of the consideration and verified its date, which was on this Saturday. A clerk in a bank at Baxter Springs also verified the fact that the check was presented at the bank by the lessor on this Saturday and was then paid, and that it was forwarded to its correspondent bank for collection on the same day and so entered on the remittance register.

In addition to this testimony, the lessor testified that the transaction occurred on Saturday; but on cross-examination, and in response to leading questions as to whether defendant did not get the lease from him in Oklahoma, and on Sunday, replied in the affirmative. He also admitted that he had made similar admissions to plaintiff, and a written statement, which had been dictated by plaintiff to his stenographer, read over to the grantor, and signed by him, by mark, was introduced. The stenographer testified that the lessor had sworn to the truth of that statement. It also recited that the lease was executed and delivered on Sunday and in the state of Oklahoma. It is quite apparent, from the record of the examination of this Indian lessor, that he was ignorant, dull, and confused, and the trial court's remark at the close of his testimony, that there was not much certainty to be secured from that witness' testimony, and that he doubted very seriously whether he understood the questions put to him, was amply justified.

[1] In this condition of the evidence, the trial court properly withdrew this issue from the jury. It is its duty to direct a verdict, even in cases in which the evidence may be conflicting, if the evidence on behalf of one party is of so conclusive a character that the court, in the exercise of a sound judicial discretion, would set aside a verdict for the opposing party. Patton v. Texas & Pacific Railway Co., 179 U. S. 658, 659, 21 Sup. Ct. 275, 45 L. Ed. 361; Canadian Northern Ry. Co. v. Senske, 201 Fed. 637, 644, 120 C. C. A. 65; Haskell v.

Columbus Savings & Trust Co., 207 Fed. 322-326, 125 C. C. A. 72; Robinson v. Denver City Tramway Co., 164 Fed. 174, 177, 90 C. C. A. 160. The presumption of the date of execution, arising from the apparent date of the lease, was overcome as a matter of law, when the evidence to the contrary became so conclusive that an opposite finding was not sustainable. Woodward v. Chicago, M. & St. P. Ry. Co., 145 Fed. 577, 580, 75 C. C. A. 591.

[2] It is insisted that the record of the lease to defendant was not notice to plaintiff, because it was the record of an instrument which was void on its face. If the lease was void, it was because it was in fact executed and delivered on Sunday, and not because it mistakenly appeared to have been executed on that day. The date was not a material part of the lease, and the error in the date would not avoid it. Lamore v. Frisbie, 42 Mich. 186, 3 N. W. 910; Merrill v. Sypert, 65 Ark. 51, 44 S. W. 462; Saunders v. Hartwell, 61 Tex. 679; Durfee v. Grinnell, 69 Ill. 371; Hoit v. Russell, 56 N. H. 559.

There is a further objection to the court's action in allowing the defendant to show a mistake in the date of his lease, because his answer contained only a general denial; but the court did not err, for section 4929 of the Revised Laws of Oklahoma of 1910, relating to actions of ejectment, provides as follows:

"It shall be sufficient in such action, if the defendant in his answer deny, generally, the title alleged in the petition, or that he withholds the possession as the case may be, but if he deny the title of the plaintiff, possession by the defendant shall be taken as admitted. Where he does not defend for the whole premises the answer shall describe the particular part of which defense is made."

There was no error in the trial of the case, and the judgment must be affirmed.

PERARA V. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. August 28, 1916.)

No. 4627.

1. CRIMINAL LAW @=1180-APPEAL-LAW OF CASE.

Contentions of accused, disposed of on a prior appeal, become the law of the case, and, having been settled adversely to him, are no ground for reversal on subsequent appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3002-3004; Dec. Dig. ⇐=1180.]

2. CRIMINAL LAW \$\ightharpoonup 776(2)\$—Trial—Instructions—Character Evidence.

A charge that evidence showing accused's good character for honesty, integrity, and morality is admissible and should be considered by the jury, and if it is of such a nature as to lead the jury to believe that it is impossible that a man of such high character would commit such a crime, and for that reason raises a reasonable doubt in the minds of the jury whether accused is guilty of the crime charged, accused is entitled to the benefit thereof, which was coupled with a further statement, pointing out that persons of high character frequently commit crimes, and that for accused to have obtained his position in the Post Office Depart-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ment, it was necessary to furnish recommendation of two reputable citizens to vouch for his integrity, is prejudicial, in effect depriving accused of all benefit of the character evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1844; Dec. Dig. ♦ 776(2).]

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Mitchell C. Perara was convicted of crime, and brings error. Reversed and remanded.

George W. Murphy, E. L. McHaney, and S. A. Jones, all of Little Rock, Ark., for plaintiff in error.

W. H. Martin, of Hot Springs, Ark., and W. H. Rector, of Little Rock, Ark., for the United States.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

ADAMS, Circuit Judge. An indictment, containing five counts, was found against Perara, plaintiff in error, in the District Court of the United States for the Western Division of the Eastern District of Arkansas. There have been two trials, and this is the second writ of error in the case. At the first trial, the court directed a verdict of not guilty on the third, fourth, and fifth counts, and submitted the case to the jury on the first and second counts only. The first charged defendant with stealing certain mail matter while acting as a railway postal clerk, and the second charged him with embezzling the same. The jury found the defendant guilty on the first and not guilty on the second count, and judgment was entered accordingly. This court, on the first writ of error, reversed the judgment for error in the charge of the court, and remanded it for another trial. Perara v. United States, 221 Fed. 213, 136 C. C. A. 623. Some other errors were assigned, but none of them sustained. At the second trial the first count only, for stealing the mail, was submitted to the jury, and the defendant was again found guilty, and now prosecutes this writ of error.

[1] The important errors now assigned and argued relate: (1) To the question of venue; and (2) to the ruling on a plea of former adjudication or double jeopardy, resulting from the acquittal of defendant on the charge of embezzlement. These questions were considered by us at the former hearing in separate opinions and on a motion for rehearing, and were adjudged adversely to the defendant. That judgment, being unreversed, became the law of the case, and cannot be the subject of further consideration. In confirmation of our former judgment, however, reference may be made to the conclusions reached and the principles stated in Morgan v. Devine, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. 1153; Ebeling v. Morgan, 237 U. S. 625, 35 Sup. Ct. 710, 59 L. Ed. 1151; and Morgan v. Sylvester, 231 Fed. 886, — C. C. A. —, cases analogous to this and substantially presenting the questions now referred to.

[2] Defendant also assigns error to the following portion of the charge to the jury:

"The defendant has introduced evidence for the purpose of showing his good character for honesty, integrity, and morality. Such evidence is admissible and should be considered by the jury; and, if it is of such a nature as to lead the jury to believe that it is improbable that a man of such high character would commit such a crime, and for that reason it raises a reasonable doubt in your minds as to whether the defendant really is guilty of the offense as charged, he is entitled to the benefit of that doubt and your verdict should be not guilty.

"But, I want to say to you that evidence of this nature should be taken with a great deal of caution, for a man may bear the very best reputation and yet may secretly indulge in vice and crime. We often hear of cases where men of the very highest character, even ministers of the gospel, deacons of the church, and men who never fail to respond with a loud 'Amen' in the church, have been sometimes found to be secretly engaged in vice and crime, and if it is proven that they did commit the crime, the fact that they only practiced it in secret, and that so far as the public knew they were men of the highest character, would not excuse them from the consequences of their crime. Not only that, there are many crimes that can only be committed by men who bear a good reputation, such as the crime in this case. Take, for instance, the case of an employe of the Post Office Department, as this defendant was. Under the law, before he can obtain employment, he must, upon his application, get the recommendation of two reputable citizens vouching for his integrity. Otherwise, his application couldn't even be considered, and, of course, gentlemen, neither the government nor anybody else is going to employ a man in a position where he has opportunities to commit larceny, to steal or embezzle funds, if his reputation is bad. But, in other cases, take the cashier or the president of a bank, who we hear has robbed a bank of thousands and sometimes hundreds of thousands of dollars. Would they have been elected to those positions unless their character was above suspicion? When we read of a treasurer of a county running away and becoming a defaulter, there is no doubt but that every man who voted for him believed he was an honest man, and that his character was above suspicion. So that ought to be taken into consideration, whether the mere fact that, so far as the public knew, a man's character was good, for that reason, if the evidence otherwise shows that he committed the crime, it would justify or would raise such a doubt in the minds of a reasonable jury as to justify a verdict of not

The latter part of the foregoing excerpt (commencing with the words "But, I want to say to you"), contains, in our opinion, prejudicial error. By direct statement, innuendo, and suggestion it, in effect, nullified the true rule as first stated, and made good reputation of doubtful value and probably a positive disadvantage to the defendant. Because of the generally accepted proposition that one of good reputation is less likely to commit crime than one of bad reputation, it has become appropriate and common for courts to charge the jury that good reputation, if proven, is a fact to be considered by the jury, together with all the other facts and circumstances of the case in reaching the ultimate conclusion of guilt or innocence. A statement of this brief kind, without elaboration, is, in our opinion, about all that can be profitably or safely said to a jury on the subject.

For error in the charge just pointed out, the judgment must be reversed and the cause remanded to the District Court, with directions to grant a new trial.

HENDERSON v. MORSE (two cases). In re COGSWELL CANDY CO.

(Circuit Court of Appeals, Eighth Circuit. August 28, 1916.)

Nos. 169 and 4625.

1. Bankruptcy \$\infty\$440—Review—Mode of Reviewing Decision.

Where an order of the trial court in bankruptcy involves a finding of fact, the order must be reviewed on appeal, and not by petition to revise.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. \$\infty\$440.]

2. BANKRUPTCY \$\infty 467-Review-Findings.

An order of the referee in bankruptcy approved by the trial court disallowing a claim, will not be disturbed on appeal, where supported by substantial evidence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. \$\sim 467.]

Appeal from, and Petition to Revise Order of, the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

In the matter of the bankruptcy of the Cogswell Candy Company. Claim by Devereaux Henderson, opposed by John J. Morse, trustee in bankruptcy. The claim was denied, and claimant appeals, and also petitions to revise the order. Affirmed on appeal, and petition to revise dismissed.

William L. Mason, of St. Louis, Mo., for appellant and petitioner. Wagner & Miller and Franklin Miller, all of St. Louis, Mo., for appellee and respondent.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

ADAMS, Circuit Judge. On January 26, 1915, the Cogswell Candy Company, a corporation of Missouri, engaged in the retail candy business, had a fire at its place of business, resulting in the destruction of considerable property, upon which it carried insurance in five insurance companies, aggregating \$9,000. Ruth Cogswell was its president, and W. R. Cogswell its secretary and treasurer. Shortly after the fire occurred W. R. Cogswell signed a contract, as secretary and treasurer of the company, employing the appellant, Devereaux Henderson, an attorney at law, to collect the claims of the candy company against the insurance companies, for 15 per cent, of the total sum collected. On the same day the president objected to the contract, and soon thereafter the board of directors of the company repudiated it. Henderson, as soon as the contract was signed, entered upon the discharge of the duties of his employment, but did little, if any, work before he was advised of the disapproval of his contract. On January 28, 1915, the company was adjudicated a bankrupt, and John J. Morse, the appellee, chosen trustee. He collected, without the assistance of Mr. Henderson, \$5,354.51 from the insurance companies, and Henderson presented a claim against the estate in bankruptcy for \$803.40, the same being 15 per cent. of the amount so collected by the trustee. This claim was resisted by the trustee on the ground that the contract was made without authority. Much evidence was produced by the trustee, tending to show that Cogswell, as secretary and treasurer of the company, had no authority to make the contract, that the president of the company alone had that authority, and that the compensation for the little work and labor required to be done, as stipulated in the contract, was so grossly excessive as to indicate bad faith. Evidence to the contrary was produced by the claimant. At the conclusion of it all the referee made an order disallowing the claim. The district judge, on petition for review, affirmed the order. Henderson now brings the case here on appeal, and also by original petition to revise.

[1] As the case involves a consideration and finding of facts, we must dispose of it on the appeal, and not on the petition to revise.

[2] We have carefully read all the evidence and the briefs and arguments of counsel, and find that there is substantial proof sustain-

ing the order made.

The rule is well settled in this court that the findings of a referee in a case like this, concurred in by the court on petition for review, are presumptively correct, and will not be disturbed by an appellate court unless some obvious error of law or serious mistake in considering the evidence has occurred. As we are unable to find any such error or mistake, and think the order is well sustained by the proof, it must be affirmed, and the petition to revise dismissed.

MOLINE PLOW CO. v. OMAHA IRON STORE CO. • OMAHA IRON STORE CO. v. MOLINE PLOW CO.

(Circuit Court of Appeals, Eighth Circuit. July 24, 1916.) Nos. 4597, 4598.

1. Patents \$\infty 328-Invention-Plowshare.

The Lindgren patent, No. 860,308, for a plowshare reinforced by a patch of soft metal welded to its lower face, held void for lack of invention.

2. TRADE-MARKS AND TRADE-NAMES \$\iiiing Trade-Marks.

Defendant sold plowshares intended to replace those on complainant's plows and plainly so marked with a stencil on their face. Complainant's shares had stamped into the metal on the back its monogram trade-mark, and the manufacturer of those sold by defendant also stamped on their back a mark so nearly like complainant's trade-mark as not to be distinguishable therefrom by ordinary purchasers. *Held*, that there was such simulating of complainant's mark as was calculated to deceive purchasers and as to constitute unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 82; Dec. Dig. € 71.]

3. Trade-Marks and Trade-Names @=97-Unfair Competition-Injunction.

The manufacturer of particular goods is entitled to the reputation they have acquired, and the public is entitled to the means of distinguishing between those and other goods, and to protection against unfair dealing,

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Rehearing denied September 20, 1916.

whether there be a technical trade-mark or not, and anything which is intended and calculated to deprive either the manufacturer or the public of such rights is a fraud, which a court of equity may lawfully prevent by injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. ⇐⇒97.]

4. Trade-Marks and Trade-Names \$\infty 70(1)\$—Unfair Competition—Duty to Distinguish Goods.

The duty is imposed upon every manufacturer or vendor, especially when he enters upon a field previously occupied by another, to so distinguish the articles he makes or the goods he sells from those of his competitor that neither their names nor their dress will be likely to deceive the public, or to mislead the ordinary buyer into purchasing his goods for those of his competitor, or to create confusion in the trade between the rival articles.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. \$\sim 70(1).]

5. Trade-Marks and Trade-Names \$\sim 86\$—Unfair Competition—Right to Relief—Laches.

Constant or continuing use of unfair methods of competition neither deprives the injured party of his equitable right to an injunction against their continuance nor confers upon the trespasser any right to perpetuate them.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 95; Dec. Dig. ⊗ 56.]

6. Courts ⇐=330-Jurisdiction of Federal Courts-Amount or Value in Controversy.

A federal court of equity is not without jurisdiction to render a decree for an injunction against continuing trespasses, where threatened irreparable injury is alleged, by the mere fact that no proof has been made of the specific amount of that injury.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 898; Dec. Dig. ≈330.]

7. Trade-Marks and Trade-Names \$\iff 97\text{—}Injunction Against Unfair Competition\text{—}Scope.

In a suit by a manufacturer of plows to restrain the defendant from unfair competition by selling plowshares made by another to replace worn-out or broken shares, and marked in imitation of those made and sold by complainant to replace those on its own plows, the injunction should be restricted to such shares as are fitted for use on complainant's plows.

[Ed. Note,—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. \$\simega 97.]

8. Trade-Marks and Trade-Names \$\infty 70(2)\$—Unfair Competition.

Where a manufacturer of plows uses on extra shares designed to replace those on its plows which may become worn out or broken certain marks and numbers to designate their quality and the size and style of plow for which they are fitted, other manufacturers of shares to be sold in competition have the right to use the same designations thereon, when it does not tend to confuse the trade or deceive purchasers; but it is their duty to see that their repair parts are so marked as to prevent such confusion and to notify purchasers that they are not made by the original manufacturer.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⊗ 70(2),]

Appeal from the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Suit in equity by the Moline Plow Company against the Omaha Iron Store Company. From the decree, both parties appeal. Amended and affirmed.

Samuel W. Banning, of Chicago, Ill. (Thomas A. Banning, Thomas A. Banning, Jr., and Ephraim Banning, all of Chicago, Ill., on the brief), for complainant.

Otto Raymond Barnett, of Chicago, Ill. (Percival H. Truman, of

Chicago, Ill., on the brief), for defendant.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

SANBORN, Circuit Judge. The Moline Plow Company, a corporation of Illinois, brought a suit in equity against the Omaha Iron Store Company, a corporation of Nebraska, for infringement of letters patent No. 860,308 for an improvement in plowshares, issued to August Lindgren July 16, 1907, and for unfair competition, and prayed for an injunction and an accounting. The suit was founded on the sale by the defendant of plowshares manufactured by the Star Manufacturing Company and fitted to replace plowshares upon plows made by the Moline Plow Company. The Star Company assumed the charge and expense of the suit, and it developed into a trial of the respective equities of the two manufacturing companies, and resulted in a decree that the patent was void for lack of invention, that the defendant was guilty of unfair competition, and that it be enjoined from selling or dealing in plowshares made by the Star Company marked with the monogram "M. Co." standing in association with a star, and that the complainant was entitled to an accounting and to the costs of the suit.

[1] Both parties have appealed, and the first complaint of the Moline Company is that the court did not adjudge the fifth claim of the patent to Lindgren valid and infringed. That claim reads as follows:

"5. The improved plowshare composed of hard steel having a soft metal reinforcing patch welded to its lower or reverse face, said patch being of an area to extend backward from the landside edge of the share adjacent the top edge, to a point back of the first bolt hole, and a landside welded to the share over the soft metal patch, thereby avoiding breakage and facilitating the attachment of the landside."

The purpose of the improvement described in the specification and here claimed was to strengthen the thin, brittle, hard steel plowshare and prevent its breaking, and at the same time to provide at the place of junction of the landside of the plow and the plowshare a soft thick surface to which the landside could be welded more readily than to the hard steel surface of the share. Lindgren accomplished this object by welding to the under or reverse side of the share a patch of soft steel, extending from a point near the longitudinal center of the upper edge of the share to a point adjacent the forward end of the landside, which, after the application of the patch, was welded over it to the share. He states in his specification that plowshares are most liable to break at the forward bolt hole provided to bolt them to the mold boards, that to prevent this the

soft metal patch is extended in his invention over the point where this bolt hole is formed both fore and aft of and below it, so as to reinforce and strengthen the share in the vicinity of this bolt hole. In his improved plowshare the soft metal patch extends backward from the landside edge of the share adjacent to the top edge to a point back of the first bolt hole. But the evidence is clear and convincing that as early as 1882 it was the common practice of blacksmiths to weld a patch of soft metal onto a blank plowshare before welding the latter to the landside of the plow for the purpose of gaining thickness and strength for the share, that this patch was of no specific size, that sometimes it would come up to the first bolt hole, and sometimes it would extend around and beyond it, but that the makers had no specific intention regarding this extension. Counsel argue that the patches of the prior art do not anticipate Lindgren's improvement, because those who made and used them had no purpose or intention of strengthening the specific part of the plowshares around the first bolt hole. But there can be no doubt that any mechanic skilled in the art presented with the problem of strengthening a plowshare around and in the vicinity of a bolt hole. and with the fact that patches of soft metal had been welded onto such shares to strengthen other parts of them, would have had no difficulty in solving that problem, by welding such a patch upon the share around the bolt hole, or by extending a patch about to be placed on the share beyond the bolt hole. There was no invention in perceiving or forming the device of Lindgren.

[2] Since the year 1870 the Moline Plow Company has been manufacturing plows, and has had and has a trade-mark consisting of the letters "M. P. Co." in the form of a monogram. Since 1870 the Star Manufacturing Company has been making parts of agricultural implements, and has had a trade-mark consisting of the letters "M. Co." in monogram form inclosed in the representation of a star. The trade-mark of the Moline Plow Company antedates the trademark of the Star Company. About the year 1905 the Star Company commenced to make plowshares fitted to replace plowshares upon plows made by the Moline Plow Company and others fitted to replace shares upon plows made by other manufacturers. When the representation of the star which surrounds the monogram of the Star Company in its trade-mark is omitted the two monograms after

1905 were in these forms:







Defendant's Mark.

The Moline Plow Company made plows of many styles and sizes. It also made plowshares of different qualities, styles, and sizes fitted to replace the plowshares on the plows of its manufacture when the latter became worn or broken. One of these shares was a solid steel plowshare of substantially uniform thickness, but such a share

cannot be sufficiently hardened on the surface to secure effective scouring in some soils. Another and more expensive and valuable plowshare which it made was a soft center share, consisting of soft steel extra hardened on both sides, so that when finished it consisted of a very hard layer of steel on each side and a layer of soft steel between them. Its price for these soft center plowshares is \$2.25 each, while its price for similar solid steel shares is \$1.80 each. The defendant sells the solid steel shares to replace these soft center shares for \$1.70 each. The soft center shares secure more effective scouring and greater durability. The very hard steel on the surface does not wear as rapidly as the softer solid steel shares, and it scours better. The Moline Company stamped or cut in the reverse or under side of all its soft center shares its trade-mark to denote that they were the genuine product of the Moline Company, the representation of a star to denote the quality of the share, that it was a soft center share, and such letters and figures as "W. 14," "W. H. 16," "H. 116," called stock marks, to indicate the respective styles and sizes of Moline plows which they would fit.

Since 1904, but not earlier, the Star Company in competition with the Moline Company's soft center shares has been making and selling solid steel shares fitted to replace the former into the under or reverse side of which it has stamped or cut into the metal its trademark—that is to say, its monogram within the representation of the star—and the letter and figures "W. 14," or such similar letters and figures as would denote the size and style of Moline plows they would fit. On the face or upper side of the shares it has stenciled in comparatively small letters the words "Made by Star Mfg. Co." on the next line in much larger letters the words "Carpentersville, Ill.," and in the middle of the face of the shares in bold type twice as large as those in which the words "Made by Star Mfg. Co." are stenciled, and occupying two lines, the words "For 14 in. Moline Soft Center." It has also pasted on each of the shares a paper label containing a printed statement that the share was made by the Star Company and is guaranteed to be a duplicate of the original share and to fit the plow for which it is intended. The Star Company has also made, and sold in competition with the Moline Company's solid steel shares, plowshares fitted to replace them, stamped with its trade-mark and with the stock marks of the Moline Company, some of which bear no stenciled words on their face, except in bold type such words as "For 14 in. Moline." The defendant, the Omaha Iron Store Company has been and is buying from the Star Company and selling to its customers these shares of different types and sizes made and marked as described above. The decree enjoins the defendant from dealing in plowshares made by the Star Company bearing its monogram standing in association with the representation of a star.

The Moline Company complains that the decree does not prohibit the defendant from dealing in such shares marked with a star or with the Moline Company's stock marks, such as "W. H. 16," "W. 14," "H. 116." The Star Company objects to the decree because it grants an injunction, and because, if an injunction were granted, it was not lim-

ited to a prohibition of the use of its trade-mark upon shares made

by it to replace plowshares made by the Moline Company.

[3-4] The manufacturer of particular goods is entitled to the reputation they have acquired, and the public is entitled to the means of distinguishing between those and other goods and to protection against unfair dealing, whether there be a technical trade-mark or not. The essence of the wrong consists in the sale of the goods of one manufacturer for those of another. Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365. The sale of the goods of one manufacturer as those of another is unfair competition, and constitutes a fraud which a court of equity may lawfully prevent by injunction. The duty is imposed upon every manufacturer or vendor, especially when he enters upon a field previously occupied by his competitor, to so distinguish the articles he makes, or the goods he sells, from those of his rival that neither their names nor their dress will be likely to deceive the public or to mislead the ordinary buyer into purchasing his goods as those of his competitor, or create confusion in the trade between the rival articles. Seixo v. Provezende, 1 Chan. App. 192, 194; Mfg. Co. v. Spear, 4 N. Y. Super. Ct. 599; Coats v. Merrick Thread Co., 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; Shaver v. Heller & Merz Co., 108 Fed. 821, 831, 48 C. C. A. 48, 58, 65 L. R. A. 878; Allen B. Wrisley Co. v. Iowa Soap Co., 122 Fed. 796, 798, 59 C. C. A. 54, 56.

This duty the Star Company failed to discharge. For years the Moline Company had stamped its monogram trade-mark upon the plowshares it made before 1905, when the Star Company commenced to make copies of them. The Star Company stamped into these copies the monogram of its trade-mark, which is so similar to the trade-mark of the Moline Company as to be indistinguishable from it by an ordinary purchaser. It stamped into these copies the marks of quality, style, and size placed upon the original plowshares by the Moline Company. It stenciled upon the face of the shares in large bold type such words as "For 14 in. Moline Soft Center" or "For 16 in. Moline," and placed in small inconspicuous type the words "Made by Star Mfg. Co.," and it placed in small type on an easily destructible paper label a printed statement that the shares were made by it and guaranteed to be duplicates of the originals. This paper label was of too ephemeral a nature to overcome the effect of the more permanent marks stamped into and the words stenciled upon the shares. Prest-O-Lite Co. v. Heiden, 219 Fed. 845, 846, 847, 135 C. C. A. 515, 516, 517, and the word "Moline" is made so prominent and the "Star Mfg. Co." so inconspicuous that the ocular demonstration of the view of the shares leaves little doubt that these marks must create confusion in the trade. and that they are more likely to deceive ordinary purchasers, and lead them to buy the shares made by the Star Company for those made by the plaintiff, than they are to lead them to purchase such shares as the product of the Star Company. The complainant was clearly entitled to an injunction.

[5] The argument of counsel for the defendant that the complainant is estopped from maintaining any suit for this relief by its laches

has received consideration and reflection. It is based on the fact that the Star Company has been making and selling copies of the Moline Company's shares since 1905; that in 1907 the Moline Company brought a suit against Harbison-Modica Manufacturing Company for dealing in such shares made by the Star Company and subsequently dismissed that suit; that it brought this suit in 1910, but failed to prosecute it to decree until 1915. But these suits came to the knowledge of the Star Company, and they constituted notice to it that the Moline Company neither consented to nor acquiesced in the former's simulation of the marks and dress of its shares, so that its silence or acquiescence could not have been the inducing cause of its wrongdoing. The record contains no substantial evidence of an abandonment of its rights by the Moline Company, and constant or continuing trespasses neither deprive the victim of his equitable right to an injunction against their continuance in the future, nor confer upon the trespasser any right to perpetuate them. Stearns-Roger Mfg. Co. v. Brown, 114 Fed. 939, 944, 52 C. C. A. 559, 564; Layton Pure Food Co. v. Church Dwight Co., 104 C. C. A. 475, 481, 182 Fed. 35, 41, 32 L. R. A. (N. S.) 274. The defense of laches cannot be sustained.

[6] Nor was the court without jurisdiction to render the decree because only three plowshares of the value of but \$5 were proved to have been sold by the Omaha Iron Company. There was a diversity of citizenship of the parties and an averment in the complaint that the profits the plaintiff was entitled to recover exceeded \$5,000, and that it would suffer irreparable injury unless the defendant was en-joined from continuing its trespasses. The defendant denied that the plaintiff had sustained, or would sustain, any damage whatever. The court found that the plaintiff had been injured, and adjudged an accounting to ascertain the amount of its damages and an injunction. Since the decree the accounting has been waived, but during the trial and until the waiver the amount in controversy was the \$5,000 profits alleged to have been received by the defendant, or the \$5,000 damages alleged to have been sustained by the complainant, plus the value of the right of the complainant to prevent future unfair competition by an injunction. What the profits or damages that had occurred were was unknown when the decree was rendered, and the amount in controversy at that time under the pleadings was then more than the \$5,-000 which the complainant was still claiming. And, aside from the profits and damages that had accrued, the value of the right to the injunction was sufficient to sustain the jurisdiction of the court below. For a federal court of equity is not without jurisdiction to render a decree for an injunction against continuing trespasses, where threatened irreparable injury is alleged, by the mere fact that no proof has been made of the specific amount of that injury. Gannert v. Rupert, 127 Fed. 962, 964, 62 C. C. A. 594; Griggs, Cooper & Co. v. Erie Preserving Co. (C. C.) 131 Fed. 359, 360.

[7] But the injunction granted was too broad. It should be restricted to a prohibition of dealing in plowshares bearing the objectionable marks, words, and figures, which are fitted for use on plows made by the Moline Company, because the latter company sustains no ac-

tionable injury from the sale by the defendant of shares, bearing the Star Company's marks, which are fitted for use on the products of other manufacturing companies, but not upon the products of the Moline Company.

[8] The Moline Company insists that the decree should have prohibited the sale of the Star Company's shares bearing the marks of the representation of a star, or "W. H. 16," "W. 14," "H. 116," or any other stock marks of the plaintiff. These marks were and are used by the company to designate the quality, sizes, and styles of the plows and shares it makes, and their use by manufacturers of specific shares to replace the original Moline Company shares is permissible, when it does not tend to confuse the trade, or to lead purchasers to buy the products of the latter for the manufactures of the Wolf Bros. & Co. v. Hamilton-Brown former, but not otherwise. Shoe Co., 165 Fed. 413, 416, 417, 418, 91 C. C. A. 363, 366, 367, 368; Deering Harvester Co. v. Whitman & Barnes Mfg. Co., 91 Fed. 376, 380, 33 C. C. A. 558, 562; Bender v. Enterprise Mfg. Co., 156 Fed. 641, 84 C. C. A. 353, 17 L. R. A. (N. S.) 448, 13 Ann. Cas. 649. But inasmuch as the manufacturers and dealers in the extras or repair parts not made by the original manufacturer appropriate, use, and have the benefit of the latter's stock marks, it is their duty to see that the purchasers are duly notified that such parts are not made by the original manufacturer. The star was and is stamped on its soft center shares by the Moline Company for the purpose of showing that they are made of two layers of steel extra-hardened with a layer of soft steel between them. The Star Company ought not to be permitted to stamp or use this star on the shares it makes, because the latter are not made of such layers, but of hard steel, and because the use upon the repair parts of the star, which is a part of the Star Company's trade-mark, tends to create a confusion in the trade and to mislead the purchasers. The letters and figures "W. H. 16," "W. 14," "H. 116." and others of a similar character, designate the sizes and styles of the Moline plows which the shares so marked fit, and the Star Company may use them for that purpose on its replacement shares on condition, but not otherwise, that it stamps or stencils on each share in plain bold letters of equal style, size, and prominence, except that the letters in the word "Not" shall be twice the height and size of the other letters, the words "Not made by Moline Plow Co., but by Star Manufacturing Company of Carpentersville, Illinois."

Let the second paragraph of the decree be amended, so that it shall read: "It is further ordered and decreed that the defendant be, and the same is hereby, perpetually enjoined and restrained from directly or indirectly selling, or offering for sale, or otherwise dealing in, plowshares made by the Star Manufacturing Company of Carpentersville, Illinois, or others, fitted to replace plowshares on plows made by the Moline Company and bearing thereon the marks consisting of the monogram 'M. Co.' standing in association with the figure of a star, or the monogram 'M. Co.' standing separately, or the representation of a star standing separately. But the defendant is not forbidden to sell or deal in plowshares made by the Star Com-

pany fitted for use on plows made by the Moline Company bearing such stock marks of the latter company as 'W. H. 16,' 'H. 116,' 'W. 14,' denoting merely the sizes and styles of its plows or shares, on condition, but not otherwise, that there are stamped or stenciled on each of said shares in plain bold letters of equal size and height, except that the letters in the word 'Not' shall be twice the size and height of the other letters, the words 'Not made by Moline Plow Company, but by Star Manufacturing Company of Carpentersville, Ill.,' nor is the defendant forbidden to sell such plowshares made by the Star Company fitted for use on plows made by the Moline Company as it has on hand in stock, provided it shall securely cover and conceal the monogram 'M. Co.,' the star, and any other letters or marks thereon tending to lead purchasers to buy them for plowshares made by the Moline Company"—and let the decree so amended be affirmed.

LEDERER v. GARAGE EQUIPMENT MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. May 2, 1916.)

No. 2329.

1. PATENTS \$\iff 328\$—VALIDITY AND INFRINGEMENT—AUTOMOBILE BUMPER.

The Lederer patent, No. 1,035,610, for an automobile bumper, held not anticipated, valid, and infringed.

2. PATENTS \$\infty 324(5)\$\to APPEAL\$\to Review.

On appeal from an interlocutory order granting an injunction against infringement of a patent, the Circuit Court of Appeals cannot consider questions of accounting, which can only be reviewed on appeal from the final decree.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 606; Dec. Dig. \$324(5).]

Appeal from the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

Suit in equity by Friederich Lederer against the Garage Equipment Manufacturing Company. Decree for complainant, and defendant appeals. Affirmed.

The following is the opinion of Geiger, District Judge, in the court below:

This case is not unlike others in this respect: There is quite a large prior art in a general sense—that is to say, an automobile bumper art; and I believe that the patent here must be considered in the light of this further fact, that it is an art which has had rather a rapid development. The patents to which reference has been made—seven or eight—have all been granted, naturally, within the recent years of automobile development. Now, a striking feature about the art, as exhibited in defendant's proofs, is that apparently from an early date in the recent years of the automobile growth the matter of bumpers has received attention; and practically all of these prior art patents have three things in common, the round bar, the supporting arm, and the connection, which latter in most cases consisted either of the close

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

and permanently fitting collar, or one adjustable through the means of a set screw. Taking all these patents together, and using them as the courts have said as a background against which this patent in suit is to be thrown, it stands out as distinctive the defenses against these four claims—two of which relate to the buffer bar equipment as a whole, and the other two more particularly to the supporting arms, and the connection—are noninvention, because of the state of the art, anticipation by the defendant's prior manufacture, and noninfringement.

Without very much discussion, I feel that the court is bound to give to all of these prior art patents the presumption of validity; that to say, they are exhibited here as recognition by the government of the various steps of the art, and many of them have features similar to this device here in suit. But they have been accorded invention. Now, it being the fact that the physical make-up of the Lederer device is distinctive from all of these prior patents in the particulars mentioned, principally the use of the channel bar, the flange, and the adjustable clamping connection, as well as the supporting arms and use of the spring, the last-named element being under some coactive relation to the connection, it seems like saying a great deal in that situation to conclude that the field of invention had been entirely explored when Lederer entered; that there was no room for invention in the automobile bumper art; that whatever else is to be added to the art as shown in these patents, had to be added by mere mechanical skill. I do not think that conclusion can be reached at all. These prior patents are exhibited, not as anticipations. In answer to the general proposition that there was no more room for invention, the fact that this patent, in respect to these four claims, was granted by the government, apparently without question, I think shows rather persuasively that the Patent Office was entirely willing to recognize the distinctiveness of the step taken by Lederer, as compared with the steps taken by his predecessors in the art, and, of course, that being so, he is entitled to the full presumption of having invented something.

It may be true that the channel bar was well known—and it was—so was this idea of telescoping members that was found in other arts; but at the same time these men who came into the field, the automobile field, to meet a demand that undoubtedly existed, and exists to-day, for some device that would serve as a bumper, are entitled to the same credit for drawing upon the other arts and bringing into this something that was peculiarly available in this art, that has been accorded to other inventors. He simply chose from his own knowledge of the other arts, and combined something new and useful in the particular art. I do not believe, upon the record here, that the court would be justified in saying there was no invention here, because no possibility of invention. I assume that these prior patents, under the pleading and concession of counsel, must be eliminated as being anticipations. The single proposition is whether, upon the survey of the whole art, the court can say the field of invention was closed at the time Lederer conceived his device. I do not think the conclusion is justified.

This brings us to the next proposition, respecting anticipation of this patent by the defendant's own prior manufacture; and if validity be given to this patent as containing the elements to which I have referred, namely, the channel bar, with the flange and nut connection, as well as the other elements, the supporting bar or bracket, that of itself differentiates the Lederer structure from those which the defendant has manufactured. I do not believe the defendant reached the point that Lederer did until after he came into the field. These catalogues which are exhibited as corroborating evidence of the fact of manufacture, assuming they illustrate what was made, the structures therein disclosed are different from the defendant's as the prior art structures apparently are.

But, even if the defense were to be considered on other grounds, I do not believe the defendant has carried the burden which rests upon it with respect to the degree of certainty of prior manufacture by it of the structure embodied in the Lederer patent. It is not sufficient merely to use witnesses without fixing the time definitely, to show that a device was manufactured at

a certain time without showing some effort to get some of the structures, without showing why those efforts were unavailing. If it be true that the structures which are claimed to anticipate the Lederer structure so precisely that they must defeat his invention were manufactured by the defendant to the extent it says they were manufactured, it is probable that some one could be found who had such a structure. In any event, some effort should be made to find and produce one here in court. It is easy for a witness to go upon the stand, especially an interested witness, and then recall his anticipatory structure and prior use in the light of the patent which is under consideration. It is very easy to forget differences, and equally easy to find resemblances that do not in fact exist. It is done honestly, but under the stress of interest, and to my mind the case here to-day illustrates the wisdom of the rule requiring strict proof in those matters; and I do not believe the defendant has met the case by carrying the burden that rests upon it. No good reason is shown for failing to exhibit one of its structures, which it says were made within so recent a time as four or five years, and in such large numbers as it is averred they were made.

This brings us to the question of infringement. I am satisfied that defendant's structures infringe. As to its admitted structure No. 1, the mere use of a second piece, which is really a flange, or serves the purpose of a flange riveted in, instead of being the channel shape and turned inward, I do not think amounts to anything more than the clearest sort of evasion. The plaintiff here, if his patent has any validity at all, if the Patent Office recognized, as I believe it did, that he made an advance by getting away from the round bar and collar, and introducing the channel and flange as a basis for a clamping connection, his departure from the art is so distinctive that he is entitled to a fair range of equivalency. If he takes the bar and turns it in for the purpose of making a flange, another one who recognizes the merits of the structure cannot make an ordinary channel and then rivet on some flanges. That would be distinctive, but functionally it is as much an equivalent as two things can be.

So, too, with the sliding nut inside. That it seems to me is an evasion which the Lederer structure itself would suggest; but there is nothing in the art which suggests that particular connection of the round nut on the inside, and that other nut to clamp. That, of course, was known in other arts; but Lederer incorporated it into this art, and the defendant here adopted it. It has incorporated it into its structure, and it is fair to presume it did so because of its merit as a departure disclosed by Lederer.

With reference to structure No. 2, that may not be so clearly an infringement; but, the moment the rectangular bar is adopted, the defendant has put itself into a position where it has come to reject the feature distinctive in the prior art, and resorts to what, in effect, is a flange and clamping structure. I said during the course of the taking of the testimony that I did not believe that defendant's structure No. 2 embodied what in strict mechanical terminology is fairly called a flange; but it had all of the flange function and effect just as though, if a man cuts out the side of a box and leaves a portion of the cover of the box, leaves a portion on each side of the rectangle, no one could say he had made a flange, because he had not. He cut out one side of the box, but he left what is a plain equivalent of what he would have had, had be made a channel and then turned over some of the sides; and I think a fair definition and interpretation of claim 9 demands that the use of the rectangular hole in the bar, which is rectangular in cross-section, is an evasion, an attempted evasion, but in reality a clear equivalent of the flange element.

Just one further observation. There was a suggestion made that in defendant's structure No. 1, in the arm, and in connection with the spring, there was an additional advantage resulting from a better adjustability—that is to say, the spring responded more readily, and adjusted itself more readily to varying pressure. Assuming that was intentionally true, and not an incident, it does not really relieve from the charge of infringement. The mere fact of introducing some additional advantage, adding to it, ought not to relieve defendant from the charge of infringement.

What I have thus observed informally may, in case of appeal, be treated as my opinion in the case. Plaintiff may take decree adjudging his patent valid and infringed.

F. E. Dennett, of Milwaukee, Wis., for appellant. Arthur L. Morsell and L. O. French, both of Milwaukee, Wis., for appellee.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

PER CURIAM. [1] This is an appeal from an interlocutory decree finding that claims 9, 10, 11, and 12 of patent No. 1,035,610, granted to appellee on August 13, 1912, for an automobile bumper, are valid and infringed, enjoining appellant from further infringement thereof, and referring the case to a master for an accounting of profits and damages. On the grounds stated by Judge Geiger at the trial, we concur in the findings of fact that the claims in suit are valid and

infringed.

[2] Appellant, assigning error on the court's action in striking out a portion of its answer, which denies appellee's right to an accounting of damages in addition to profits, has argued at great length that the statute which authorizes an assessment of damages in an equity suit upon a patent is violative of the Seventh Amendment to the Constitution of the United States. It suffices to say that this appeal is under section 7 of the Court of Appeals Act, section 129 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [Comp. St. 1913, § 1121]), giving us appellate jurisdiction over interlocutory decrees of injunction, and that at this time no question can be considered concerning the rightfulness of any final accounting decree which may hereafter be rendered.

The interlocutory injunctional decree is affirmed.

COLMAN et al. v. AMERICAN WARP DRAWING MACH. CO.

(District Court, D. Massachusetts. August 12, 1915.)

No. 594.

PATENTS \$\infty 283(1)\$\to Suit for Infringement—Counterclaim.

The defendant in an infringement suit cannot set up as a counterclaim under equity rule 30 (198 Fed. xxvi; 115 C. C. A. xxvi) a cause of action to obtain a patent for the same invention under Rev. St. § 4915 (Comp. St. 1913, § 9460), if in any case it appears from the answer (1) that the court would not have had "cognizance" of an original suit for that purpose, because of the residence of the parties; (2) that defendant is not the "applicant" whose application was refused, and to whom alone the right of action is expressly given, and the applicant is not a party to the infringement suit, but an assignee; (3) that a suit by such applicant and defendant jointly to obtain the patent is pending in another jurisdiction; and (4) that more than a year has elapsed since final rejection of the application.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448-450, 452; Dec. Dig. &=283(1).]

In Equity. Suit by Howard D. Colman and others against the American Warp Drawing Machine Company. On motion of complainants to strike out a part of the answer pleading a counterclaim. Motion granted.

Horace Van Everen, of Boston, Mass., for plaintiffs.

Emery, Booth, Janney & Varney and Charles D. Lanning, all of Boston, Mass., for defendant.

DODGE, Circuit Judge. The bill charges the defendant corporation with infringing United States patent No. 1,115,399, issued October 27, 1914, to the plaintiff Colman, assignor to himself and two other plaintiffs. The three plaintiffs describe themselves as copartners, doing business as Barber-Colman Company.

The patent has 107 claims in all. Nineteen of them are infringed,

according to the bill, which seeks an injunction and an account.

The answer, not denying the issuance of the patent sued on, does deny that Colman was first inventor of the improvements covered by it, and denies that the patent was lawfully issued to him. It prays

dismissal on these grounds.

All the above is contained in the first 28 paragraphs of the answer, as filed under the head "I. Answer." These paragraphs constitute the answer proper. They are followed by 23 paragraphs under the head "II. Counterclaim," in which is set out what the defendant contends to be a counterclaim under equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi). In them are recited at length successive proceedings had in the Patent Office, in the Supreme Court of the District of Columbia, and in the Court of Appeals of said District, relating to an interference declared in the Patent Office October 9, 1906, between an application filed June 23, 1898, by one Field, and an application filed May 18, 1906, by the plaintiff Colman. According to the recital, the Examiner of Interferences held Colman entitled to priority June 4,

1910; an appeal to the Examiners in Chief resulted in Colman's favor December 27, 1911; an appeal to the Commissioner of Patents also resulted in Colman's favor June 12, 1912; an appeal to the Court of Appeals for the District of Columbia again resulted in Colman's favor June 3, 1913; a writ of certiorari to review the latter judgment was denied by the Supreme Court of the United States October 29, 1913; Field was then notified by the Commissioner that his claims involved in the interference were finally rejected February 24, 1914; and on October 27, 1914, the patent in suit was issued to Colman and the other plaintiffs in this case.

The defendant also recites, as part of its so-called counterclaim, that Field assigned his application to one Clark, trustee, on June 15, 1898; that Clark assigned it to the defendant October 27, 1906; that the right to issuance of patent on said application has been thus vested

in the defendant; and that it—

"has no remedy for the further prosecution of said Field's claim for patent except by remedy in equity * * * under the provisions of Rev. St. § 4915."

The defendant goes on to allege that the Patent Office proceeding, affirmed as above by the Court of Appeals for the District of Columbia, "has arbitrarily and without warrant of law deprived the defendant and said Field" of certain rights alleged in substance to be the presumptive right to patent arising from Field's prior application, the right to prove Field to have anticipated Colman, the right to compel Colman to prove that he anticipated Field by evidence other than that accepted as sufficient by the various tribunals above mentioned.

What then follows in the answer as filed is under the head "III. Prayer." It asks the court to adjudge and decree as specified in 8 numbered paragraphs following. Those numbered 5-8 are the only ones asking relief relating to the bill and answer proper, viz.: Paragraph 5 asks that the patent in suit be held void as to all its claims involved in the Field interference, or based on the invention described in Field's application; paragraph 6, that 7 of its claims (80-84, 86, 87) be held invalid, because not based on any disclosure in it; paragraph 7, that it be held invalid as to all the 19 claims in suit, because anticipated; paragraph 8, that, in any event, the 7 claims mentioned in paragraph 6 and also 7 others (2, 74, 88-91) be held invalid, because covering no invention patentable over the prior art. But of the above specified claims 5 only are among the 19 now sued on—Nos. 2, 74, 87, 90, and 91.

The remaining paragraphs under this last head, numbered 1–4, inclusive, relate only to the matters alleged under the so-called counterclaim. Paragraph 4 is the only one asking relief according to Rev. St. § 4915 (Comp. St. 1913, § 9460). The court is therein asked to adjudge and decree that the defendant is entitled, according to law, to receive a patent for Field's inventions as specified in his claims involved in the above interference. Paragraphs 1–3, inclusive, only ask the court to make certain rulings or findings tending (as the defendant contends) to support that conclusion.

What appears as above in the answer under the heading "II. Coun-

terclaim," and in paragraphs 1-4 under the heading "III. Prayer," might be the subject of an independent suit in equity against the plaintiffs, because of the express provision in Rev. St. § 4915, that the applicant to whom a patent has been refused, either by the Commissioner of Patents or by the court to which an appeal is taken from his decision, "may have remedy by bill in equity"; that such remedy is to be administered by "the court having cognizance thereof, on notice to adverse parties"; and that the remedy is to consist, so far as the court is concerned, in a judgment that such applicant is entitled to the patent.

But, unless it is clear that such an independent suit could properly be called a cross-suit by the present defendant against the present plaintiffs, and brought upon a "claim" against them such as can be rightly described as a "counterclaim" within the meaning of rule 30, the court cannot properly pronounce a final judgment in this case both upon the original claim and the so-called "cross-claim," and the plaintiffs' motion to strike out should be granted.

As has appeared, it is Field's claim for patent, further prosecution whereof the defendant seeks to accomplish by the portion of its answer here in question. The complaint therein made is that Field, as well as itself, has been deprived of the right to obtain a patent on Field's application. It also alleges that it has already brought, jointly with Field, a suit under section 4915 for the same purpose, and making the same complaints, in an Illinois District Court. To this suit further reference is made below.

"The applicant" in the interference proceedings is the only party to whom section 4915 expressly gives the remedy by bill in equity, and on the defendant's allegations Field was the only applicant in the interference proceedings here involved. Field is nowhere made a party to the present suit. Under the Patent Acts of 1836, 1837, and 1839, the assignee to whom an applicant had transferred his rights after final refusal of a patent was held entitled to the statutory remedy by bill in equity in his own name. It was said that he was "at least within the spirit," if not within the letter, of the statutory provisions. Gay v. Cornell, 1 Blatch. 506, Fed. Cas. No. 5,280 (1849). But even if this defendant, under the somewhat different provisions of the act of 1870, now Rev. St. § 4915, might be regarded as "the applicant," and entitled to the statutory remedy in its own name independently of Field, it can hardly claim this position in view of its own allegations above referred to. Field, it would seem, might in any case bring the statutory bill in his own name as applicant, and maintain it in the absence of intervention by the defendant. Wende v. Horine (C. C.) 191 Fed. 620. Under equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii), it would also seem, Field could bring the bill in his own name without joining the defendant, even if it be true that the defendant is the real party in interest, because, as "the applicant" he is the party expressly authorized by statute. It would be difficult, in view of all the above, to call the independent suit in equity under section 4915 a cross-suit between the parties to the infringement suit, with which Field has no connection.

The difficulty of doing so is increased by the difference in scope and character of the relief sought in the two proceedings. The relief obtainable in this suit, if any, is an injunction forbidding the defendant to infringe further the patent issued to the plaintiffs and ordering that it account to them for profits and damages; a decree which this court would have the power to carry into effect. The relief obtainable, if any, by the defendant and Field, under section 4915, is a decree that Field, instead of the plaintiffs, is entitled to receive a patent for his invention as specified in his rejected application. Such a decree, when filed in the Patent Office, is to "authorize" the issue of such a patent, but with its entry the power of this court in the proceedings is exhausted. Such a patent would not necessarily be issued to the defendant. Though it might be so issued, under Rev. St. 4895 (Comp. St. 1913, § 9439), whether it should be issued to the defendant or to Field would be within the commissioner's discretion. See Elliott-Fisher Co. v. Underwood Co. (C. C.) 176 Fed. 372: Thoma v. Perri (D. C.) 205 Fed. 632.

It can hardly be said, therefore, that in adjudging, under section 4915, that Field is entitled, as between himself and Colman, his opponent in the interference, to a patent for the inventions involved in that controversy, the court would be "pronouncing a final judgment" upon a "cross-claim" by the present defendant against the present plaintiffs, in the ordinary sense of the words. Still less would it be pronouncing a final judgment upon any "counterclaim" by this defendant against these plaintiffs, if, as I have held in Terry, etc., Co. v. Sturtevant, etc., Co. (D. C.) 204 Fed. 103, it is not every claim capable of being asserted by suit in equity that can be called a "counterclaim" within the meaning of rule 50.

It is said that an adjudication according to section 4915, in favor of Field's right to a patent as against Colman, might have been had upon a cross-bill filed in such a case as this, prior to the adoption of the new equity rules, and that rule 30 therefore entitles the defendant to maintain a counterclaim asking for the same relief. Appert v. Brownsville, etc., Co. (C. C.) 144 Fed. 115 (W. D. Pa. 1904), Laas v. Scott (C. C.) 161 Fed. 122 (E. D. Wis. 1908), are cited; also the remarks in Schmertz, etc., Co. v. Pittsburg, etc., Co. (C. C.) 168 Fed. 73, relating to Appert v. Brownsville, etc., Co., by the same learned judge who decided it. Both the first-mentioned cases were infringement suits, and in each a cross-bill for relief under section 4915 was filed, heard, and its merits determined. But in neither case does any objection appear to have been raised on the part of the plaintiffs to the propriety of the cross-bill, so that neither Circuit Court can be said to have decided any question which might have been raised by such objection. In Kilbourn v. Hirner (C. C.) 163 Fed. 539 (E. D. Pa. 1908), a suit in equity under section 4915, a cross-bill by the defendant charging infringement by the plaintiffs of the patent awarded him as against them in the interference, was stricken out as not germane to the original bill. Citing Appert v. Brownsville, etc., Co., the court said:

"No doubt, if the situation were reversed, and if this were a suit for infringement brought by the complainants, and the defendant were seeking to file a cross-bill to secure the hearing provided for by section 4915, the defense thus offered would perhaps be legitimate and germane."

For the proposition that the defendant's "counterclaim" would be proper matter for a cross-bill in this suit, nothing more convincing in the way of authority is found than the above suggestion. But if, as held in Kilbourn v. Hirner, above cited, and as does not seem to be disputed, relief against infringement of a patent could not be had by cross-bill in a suit under section 4915 brought by an applicant to whom the same patent had been refused—and this for the reason that the subject-matter and the relief sought are not germane—I do not find sufficient ground for holding the contrary to be true when the situation is reversed.

The defendant's allegations regarding the suit it has already brought under section 4915 jointly with Field are that it and Field—

"as joint plaintiffs, filed a bill of complaint against these plaintiffs as defendants, in the District Court of the United States for the Western Division of the Northern District of Illinois, which proceeding is now pending, these plaintiffs as defendants having duly appeared therein, as hereinabove set forth."

The above quotation is from paragraph 15 under the heading "II. Counterclaim." In paragraph 26, under the heading "I. Answer," there are similar allegations as to the bringing of the same suit, from which it further appears that the defendants' appearance was entered "some months prior to the filing of the bill of complaint herein," on December 22, 1914.

The present plaintiffs live at Rockford and at Evanston, Ill., carrying on their business in Rockford. By filing their bill for relief under section 4915 in the District Court there having jurisdiction, the defendant and Field resorted to "the court having cognizance thereof," which section 4915 authorizes to act in such cases, as has been admitted by the present plaintiffs when they duly appeared as defendants to answer the present defendant and Field in that court. There is nothing to show that any other court answered that description, as might have been the case could the plaintiffs have been "found" in any other jurisdiction. See Thoma v. Perri, above cited.

By coming into this court some months later with their bill for infringement of the patent which had been granted them, the plaintiffs cannot be said, in my opinion, to have made this "the court having cognizance of" the claim by the defendant and Field to relief under section 4915; nor of the same claim, whether presented by Field alone, or by the defendant alone after discarding Field. When, as here, the fact that he neither resides, nor is found for purposes of service, within the jurisdiction of the court, would prevent a non-resident plaintiff from being held to answer an alleged counterclaim if presented in that court as an independent proceeding, jurisdiction over him for that purpose can exist only by the consent on his part, implied from his resort to that court for the purposes of his original suit. Of course, there is such implied consent when there are statutory provi-

sions for the jurisdiction in such cases. Thus in this state there is legislation, held applicable in the federal courts, permitting an independent cross-suit to be founded on jurisdiction so obtained. Arkwright Mills v. Aultman, etc., Co. (C. C.) 128 Fed. 195. But to be within this statute the cross-suit must be of such nature that the judgment in the one case can be set off against that in the other. The statutory jurisdiction of the court cannot be enlarged by any rule. Rule 30, therefore, cannot be so construed as to effect such a result; nor can it afford any basis for implying consent or waiver of objection to such enlargement on the plaintiffs' part. Unless the present "counterclaim" can be said to "arise out of the transaction which is the subject-matter of the plaintiff's bill," so that, independently of the new rules, a cross-bill could have been maintained upon it against the plaintiffs' objection, I can find no ground for saying that they have impliedly submitted the questions it raises to the determination of this court.

The difference above referred to between the infringement suit begun by the plaintiffs' bill and the proceeding under section 4915 sought to be begun by the defendant's "counterclaim," in the scope and character of the two proceedings, in the parties respectively involved, and in the nature of the relief sought, prevent me from believing that the defendant's claim to the relief it seeks would be proper matter for a cross-bill in the plaintiffs' suit, or is a proper "counterclaim" within the meaning of rule 30. The defendant urges that what it calls the "interference jurisdiction" of the court is merely auxiliary and supplementary to its "infringement jurisdiction," that the plaintiffs' bill raises what is in reality "strictly an interference contest," that there is in reality "a perfect analogy between the case at bar and an interference suit based on two interfering patents" under section 4918 (Comp. St. 1913, § 9463), and that, so viewed, the defendant's application for relief under section 4915 is a proper and necessary part of its defense to the patent in suit. These contentions it has urged at great length and with much learning and ability. I am obliged, however, to agree with the plaintiffs that there is no such connection between the jurisdiction given the federal courts over questions of interference and that given them over questions of infringement as will support the conclusion sought. The patent having issued, the courts are authorized to restrain violations of rights secured by it according to the ordinary course and principles of courts of equity. They act in questions of interference only after a final result reached by the executive authorities or tribunals to which the determination of such questions primarily belongs, and then only according to special statutory provisions. While their proceedings in such cases, under section 4915, are not appeals, but independent suits in equity (Greenwood v. Dover, 194 Fed. 91, 114 C. C. A. 169), they are nevertheless "in fact and necessarily a part of the application for the patent" (Gandy v. Marble, 122 U. S. 432, 439, 7 Sup. Ct. 1290, 30 L. Ed. 1223), and "something in the nature of a suit to set aside a judgment, and as such not to be sustained by a mere preponderance of evidence" (Morgan v. Daniels, 153 U. S. 120, 124, 14 Sup. Ct. 772,

38 L. Ed. 657). So far as anything set up in the defendant's "counterclaim" is necessary or material to its defense to the plaintiffs' suit, it is, of course, entitled to and will get the full benefit thereof under its answer. If it prevails on the issues thereby raised, the plaintiffs' patent will be held invalid or wrongfully obtained, and the bill therefore dismissed. But in the suit thereby begun, the court, having reached the above result, cannot be called upon also to determine whether or not the evidence has gone far enough beyond a mere preponderance to warrant setting aside the judgment rendered June 3, 1913, in Colman's favor, and the consequent final rejection of Field's claim, and to adjudge that Field is entitled according to law to receive a patent therefor. I am unable to believe its authority for those purposes sufficiently established.

If Field and the defendant had delayed their resort to the court in Illinois for relief under section 4915 until more than one year from June 3, 1913, had expired, there would have been a failure on the applicant's part to prosecute Field's application within one year after it had been refused upon appeal from the Commissioner, and the application would have had to be regarded as abandoned, according to Rev. Stats. § 4894, as amended in 1897, c. 391, 29 Stats. 693 (Comp. St. 1913, § 9438). Gandy v. Marble, 122 U. S. 432, 7 Sup. Ct. 1290, 30 L. Ed. 1223; Westinghouse, etc., Co. v. Ohio, etc., Co. (C. C.) 186 Fed. 518. Field, as the applicant and appealing party before the Court of Appeals of the District of Columbia, could not say that notice was not given him, on the day it was rendered by that court, of the decision affirming the Commissioner's rejection of his application. I agree with the plaintiffs that the notice he subsequently received from the Commissioner, dated February 24, 1914, cannot be taken to have extended the period within which section 4894 required the next step in prosecution of his application to be taken, if he was not content to have it treated as abandoned. McKnight v. Metal, etc., Co. (C. C.) 128 Fed. 51. February 1, 1915, the date on which the "counterclaim" was filed in this case, would therefore have been too late. No excuse for the delay is therein suggested.

If, therefore, the proceedings begun under section 4915 in the Illinois District Court May 29, 1914, should be dropped and go for nothing, it would seem to follow that the Field application must thereupon be regarded as abandoned. The defendant states in paragraph 15 of its "counterclaim" that, having filed this answer and "counterclaim," it "will now proceed to secure" a suspension of further proceedings in said District Court in Illinois. Whether or not it can secure such suspension is, of course, for that court to determine. While the proceedings there, begun May 29, 1914, remain pending, it cannot be said that Field's application stands abandoned; but I am unable to believe that jurisdiction of those proceedings can be transferred to this court by beginning them over again here under the guise of a "counterclaim," after a lapse of time following the refusal therein complained of which would require their dismissal if then begun here. I think the plaintiffs are entitled to have their suit proceed here upon bill and answer, without regard to the proceedings in Illinois, except that, as a matter of convenience, the hearing here might well await the final result there, if sought with due diligence on the part of Field and the defendant.

The plaintiffs' motion to strike out is therefore allowed.

THE CHICAGO.

(District Court, E. D. New York. September 4, 1916.)

1. MARITIME LIENS \$\sime 28\$—Contract with Charterer.

An agreement with the charterer of a boat, made in pursuance of the charter, is binding upon the owner, if of such a nature as to constitute a lien against the boat, even though the owner is not a direct party thereto.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 46, 47; Dec. Dig. ⊗ 28.]

2. SEAMEN €=27—LIEN FOR WAGES—"MASTER."

One employed to perform the ordinary duties of master of a barge, but who was not the enrolled master, is not a "master" in such sense as to defeat his right to a lien for his services.

IEd. Note.—For other cases, see Seamen, Cent. Dig. §§ 4, 141, 157–169; Dec. Dig. € 27.

For other definitions, see Words and Phrases, First and Second Series, Master.]

3. SEAMEN €=27—LIEN FOR WAGES—LACHES.

Libelant was employed by the charterer to attend to the navigation of a barge at agreed wages, and continued in such employment for 7 or 8 years. He received less each year than the full wages, and at the end charged up the balance due him, and credited the account with payments subsequently received, so that at the end of the time there was due him more than a year's wages. Held, that such acts did not constitute laches which debarred him of the right to enforce a lien against the boat for the balance due him; it appearing that he relied on the credit or the vessel.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 4, 141, 157–169; Dec. Dig. ⇐⇒27.]

4. SEAMEN @==2-DEFINITION-PERSONS RENDERING INCIDENTAL SERVICES.

A person contracting to work for another for hire, and incidentally rendering services upon a vessel, does not acquire a lien for services as "seaman," if the services are not, according to the contract, to be rendered to the vessel or charterer as such.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 1-3; Dec. Dig. 2.

For other definitions, see Words and Phrases, First and Second Series, Seaman.]

In Admiralty. Suit by Charles Perry Finkle against the barge Chicago. Decree for libelant.

Hyland & Zabriskie, of New York City, for libelant.

B. W. Stryker, of Castleton, N. Y., for claimant.

CHATFIELD, District Judge. The libelant sues to recover the total balance remaining unpaid to him as wages for services upon the barge Chicago, during the past 7 or 8 years, and amounting in the aggregate to \$743.34. It appears from his account that during each of these

years he has received less than the sum of \$50 a month, which was the agreed rate at which he was to be paid. It also appears that the libelant, at the beginning of each season on the boat, charged up the unpaid balance from the preceding year. He then credited payments as they were received, until the back balance was wiped out, and applied all further payments to the current year. But small amounts were paid during the years 1913, 1914, and 1915, and the balance due runs back to about the beginning of the season of the year 1914.

It is not disputed that the libelant was engaged at the rate claimed, that the amount of charges and credits is correct, and that the balance claimed by the libelant has not yet been received by him; but it is shown that the libelant has spent considerable time living upon the boat when it was either moored at a dock or substantially lying idle at Castleton, N. Y., where the libelant had a home within a few rods

of the wharf.

It appeared that this boat was purchased by the claimant, who raised money by mortgage to buy her in, and who then registered his purchase in the custom house and enrolled himself as her master. This claimant is a farmer, who happened to be the father-in-law of the man who had been operating the boat, and who continued to operate her under a charter, but who did not accompany the boat upon her voyages, nor act as navigator. This son-in-law (Miller) was conducting a hay and produce business, to which he had succeeded upon his father's death. The father of the libelant had been in the employment of the senior Miller for many years. The agreement which the libelant had as to his services upon the boat was made with the junior Miller, who was, as has been said, son-in-law of the claimant.

[1] An agreement with the charterer of a boat, made in pursuance of the charter, is binding upon the owner, if it constitutes a lien against the boat, even though the owner is not a direct party thereto. The International (D. C.) 30 Fed. 375; The Atlantic (D. C.) 53 Fed. 607.

- [2] The claim of the libelant for his services and the amount of payments to him are admitted by the charterer and not disputed by the owner. Therefore the amount of the lien is fixed, if the lien be valid. It appears that the libelant performed the ordinary duties of master of the barge, but was in no sense a master, who could not have a lien for services. The A. H. Chamberlain (D. C.) 206 Fed. 996; The J. S. Warden (D. C.) 175 Fed. 314; The Pauline (D. C.) 138 Fed. 271. The registered master was the claimant. If the boat were of such a character that the master had authority which would defeat his claim of lien against the vessel, the record would establish the claimant as the described individual. The Ticeline, 221 Fed. 409, 137 C. C. A. 207. This libelant could claim his lien, as he was not the record "master." This boat was not a canal boat within the meaning of section 4251, R. S. (Comp. St. 1913, § 7996).
- [3, 4] The only question which could be raised upon the testimony is the contention that the libelant contracted personally with the charterer, and was a mere servant, who did not rely upon the credit of the boat, or who, in other words, through the different years of his employment, was the servant of the charterer of the vessel. A person

contracting to work for another for hire, and incidentally rendering services upon a vessel, could not later claim a lien against the vessel, if a definite contract to enter into the personal employment of the individual could be affirmatively shown, and if the services were not to be rendered to the vessel or to the charterer of the vessel as such. Such an employé would not be a seaman. The Atlantic, supra.

The claimant herein contends that the long forbearance of the libelant, and his carrying over of a balance from year to year, until the total debt exceeded the payments received in the last year or so, indicate an intent to rely upon the personal obligation of the individual who contracted with him for his services. The claimant also contends that these acts show such laches on the part of the libelant that his lien has been lost, if it ever existed.

Inasmuch as the lien, if valid, is claimed for the balance due upon a continued account, upon which all previous payments were entered as partial payments, and inasmuch as the lien, if valid, has been asserted before the claimant's rights have been affected, there seems to be no foundation for a defense of laches. Nor does the evidence indicate that the libelant failed to realize at all times his right to claim the payment of wages from the boat herself. On the contrary, the testimony would show that he has expected to receive his pay as an employé upon the vessel, and that he has at all times expected to receive the full amount, even though he was not compelled to work hard throughout the entire period. The evidence also indicates that the libelant had confidence that the charterer would try to pay him his wages, but he rested content because his contract was similar to that of an ordinary seaman.

There seems to be no reason why the libelant should not be given a decree, even though the services rendered by the libelant may have at times seemed to be earning extravagant compensation, when viewed from the standpoint of the claimant, for the amount of work done.

UNITED STATES v. ASSOCIATED BILL POSTERS et al.

(District Court, N. D. Illinois, E. D. March 14, 1916.)

No. 30887.

Monopolies \$\infty\$12(2)—What Constitutes—Sherman Act.

Where, by an association of bill posters, who refused to accept advertising from persons patronizing competitors, competition was practically stifled and a monopoly established, such monopoly is in violation of the Sherman Act, though the monopoly produced a general improvement in the bill-posting business.

|Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. &=12(2).]

In Equity. Bill by the United States against the Associated Bill Posters and others. Decree for complainants.

Charles F. Clyne, of Chicago, Ill., George W. Wickersham, of New York City, J. A. Fowler, of Washington, D. C., and Stanley D. Mont-

gomery, of New York City, for the United States.

Russell Whitman, Davis & Rankin, and Ringer, Wilhartz & Louer, all of Chicago, Ill., Alexander, Cohn & Sondheim, of New York City, Wm. H. Leahy, of Pittsburgh, Pa., and Wilson, Moore & McIlvaine, Harris Carman Lutkin, Goss & Rooney, and Chytraus, Healy & Frost, all of Chicago, Ill., for defendants.

LANDIS, District Judge. The defendant organization is composed of bill posters owning billboards in several thousand of the most desirable cities and towns throughout the United States. The object of the organization is to control the business of national poster advertising throughout the country, and to limit the display of national posters at prices fixed by the organization to the boards of members of the organization, there being but one member in each city or town.

To accomplish this, the members agreed to post and display on their boards the posters of only such advertisers as limit their patronage to members of this organization, and to refuse to post, and to exclude from their boards, the posters of such advertisers as should patronize the boards of a competing bill poster or nonorganization member in any locality where there are billboards of members of the organiza-

tion.

As a means to this end the business of soliciting the poster advertising of national advertisers was, by agreement of the members, limited to seven or eight designated persons and corporations, called "official solicitors," such solicitors paying an annual fee to the organization. To secure to these solicitors a monopoly of the business of soliciting advertisements, it was agreed that the members should pay these solicitors as their compensation $16\frac{2}{3}$ per cent. of all moneys received by such members from advertisers for posting their advertisements, and that the member would pay no compensation for soliciting advertiser's business to any advertising solicitor who was not an official solicitor.

To secure obedience to the organization plan by members and official solicitors and advertisers, it was agreed that penalties should be inflicted upon such members, official solicitors, and advertisers as failed to observe and adhere to the plan. The result is that the members of this organization now have a practical control of the posting of national advertising in the several thousand cities and towns throughout the United States where boards of such members are located, and that such national advertising in those localities is practically excluded from independent boards.

Evidence was presented by the defendants of a general improvement in, and development of, the whole bill-posting business during the existence of the organization and its predecessor. But, granting to this evidence all that defendants claim for it, the court is of the opinion that the decree must go to the complainant, for the reason that the whole spirit and policy of our law is opposed to agreements among persons and corporations designated to exclude other persons from legitimate commerce. The Sherman Law was expressly conceived and enacted to this end.

The rule of "reasonable restraint" has no application here, for the reason that this is not a case of mere restraint, but of total exclusion. Even perfection in any line of business is not to be thus procured.

LINDENBERGER COLD STORAGE & CANNING CO., Limited, v. J. LIN-DENBERGER, Inc., et al.

(District Court, W. D. Washington, N. D. July, 1916.)

No. 79.

1. Corporations &=633—Official Recognition—English Companies Act.

Under the provision of English Consolidated Companies Act 1908, § 87
(2), that "the registrar of companies shall, on the filing of this statutory declaration, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled," a certificate so issued, which is made conclusive evidence of the ultimate right to do business, necessarily includes precedent regularity in all matters both of law and fact, and such right is not open to collateral attack.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2503; Dec. Dig. &—633.]

2. Corporations 34(7)—Legality of Incorporation—Estoppel.

One who acted for incorporators in forming a corporation cannot deny its capacity to sue on the ground that it did not comply with the law in its organization.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 93, 96; Dec. Dig. €=34(7).]

3. WAR \$==16-EFFECT-CONTRACTS.

A contract was made in June, 1914, between complainant, an English corporation, corporations of states of the United States and a German firm for the sale by the American corporations to complainant of property in the United States and Alaska. It contained a further provision by which the American corporations and the German firm guaranteed dividends on the preferred stock of complainant for five years. The contract provided that it should be governed by the law of England. Held, that it was not rendered void by English Trading with the Enemy Acts Dec. 23, 1915, or Jan. 27, 1916, and that complainant could maintain a suit for specific performance against the American parties; no question on the guaranty being involved.

4. SPECIFIC PERFORMANCE &== 16—CONTRACTS ENFORCEABLE—EFFECT OF ALTERED CONDITIONS—WAR.

Complainant was organized by the persons owning and controlling the American corporations and another, who, with his father and brother, all German subjects, composed the German firm, and who was to be the managing director of complainant; all the parties were members of the same family. The contract provided for the conveyance, not only of the property, but of the trade-name, good will, and business of the American companies which were engaged chiefly in the fish-packing industry, with their principal market in Germany, through the agency of the German firm, the purpose being to unite all the business in one company and establish a London credit and financial connection. A considerable amount of complainant's stock was allotted to the members of the Ger-

Relying on the contract a London bank lent complainant \$100,000 on its debentures, which was used by the American companies in preparing for the season's business. When the time came, owing to the impending war and its probable effect, such companies refused to transfer the property and business, and an American company was formed, to which they were conveyed instead, thus leaving complainant with no property as security for its debentures. Under English Trading with the Enemy Acts, complainant, if it had entered upon the contemplated business, would have been subject to proceedings to wind it up and to impound the proceeds because of its German stockholders, and their interests could not have been transferred. Held, that under such circumstances a court of equity would not decree a specific performance of the contract, but that as a condition of such refusal it would require of defendants, including the new American company, the repayment of the loan to the creditor bank, with contract interest, on equitable terms, and also other expenses connected with complainant's organization.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 29, 35, 36; Dec. Dig. \$\sime_{16.}\]

5. PRINCIPAL AND AGENT € 107(2)—CONSTRUCTION OF POWER OF ATTORNEY— EXTENT OF POWER GRANTED.

Powers of attorney are strictly construed, and a power of attorney to sell property confers no authority to borrow money.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 315] 366; Dec. Dig. \$\sim 107(2).]

6. PRINCIPAL AND AGENT ≈ 107(2)—Power of Attorney—Extent of Power Granted.

A power of attorney to borrow money does not authorize the attorney to borrow for the use of another than his principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 315, 366; Dec. Dig. ⇐⇒107(2).]

7. Corporations \$\sim 30(1)\$—Organization—Contract with Promoters.

A contract between the incorporators of a corporation and a promoting syndicate, by which the promoter was to pay all expenses of organization and sell stock of the corporations, and receive payment for its services from the proceeds of the shares sold, held not sufficiently certain as to the consideration for such payment as to entitle the promoter to recover from the incorporators, beyond the amount actually expended, where without their fault the purpose for which the corporation was formed could not be carried out, and no stock was sold.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 97; Dec. Dig. ⇔30(1).]

In Equity. Suit by the Lindenberger Cold Storage & Canning Company, Limited, against J. Lindenberger, Incorporated, and others. Decree for defendants.

Teal, Minor & Winfree, of Portland, Or., and Oldham & Goodale, of Seattle, Wash., for plaintiff.

Bernstein & Cohen, of Portland, Or., and Jones & Riddell and C. E. Claypool, all of Seattle, Wash., for defendants.

CUSHMAN, District Judge. This is a suit to impress a trust upon certain property held by the defendants, and to compel the specific performance of a contract to convey such property to the plaintiff, for an accounting and general relief. As a condition, upon refusing to appoint a receiver, the court required the deposit in the registry of the court of \$23,000. By subsequent payments required, the amount now in the registry of the court is \$40,000.

The plaintiff is an English corporation. Defendants are citizens of the states of Washington and Oregon. The plaintiff alleges: That on June 18, 1914, and prior thereto, the corporate defendants and J. Lindenberger, a firm duly registered according to the German law, were carrying on, in conjunction—the proceeds being pooled—certain businesses near the West Coast of the United States, consisting of curing, freezing, and canning fish, general merchandising business and subsidiary businesses in connection with which certain described lands and other property were owned and used. That on such date the first three named corporate defendants, hereinafter called the "Vendor Companies," agreed to sell to complainant the property owned by them and the good will of each, with certain exceptions: Except the book and other debts owing them on the 1st day of June, 1914, that defendants were to discharge all their debts existing on June 1, 1914; furnish plaintiff evidence of title to their properties, defendants to remain in possession to July 30, 1914, maintaining the businesses as going concerns, but should be deemed from the 1st day of June, 1914, to have been carrying on such businesses on behalf of the plaintiff herein, and should respectively account and be entitled to be indemnified accordingly.

The contract was as follows:

"This agreement made the eighteenth day of June one thousand and nine hundred and fourteen, between J. Lindenberger, Incorporated, a company incorporated under the laws of the state of Oregon in the United States of America, the Lindenberger Packing Company, a company incorporated under the laws of the state of Washington in the said United States and the West Coast Trading Company, a company incorporated under the laws of the said state of Washington (which three companies are hereinafter collectively referred to as the Vendor Companies) by Hermann Lindenberger, their attorney of the first part, J. Lindenberger of 31 Georgenkirch Strasse, Berlin, a firm duly registered according to German law, of the second part, and the Lindenberger Cold Storage & Canning Company, Limited (hereafter referred to as the Purchasing Company) of the third part: Whereas the Vendor Companies have their respective headquarters at Seattle in the said United States and for some time past they have each of them been carrying on business at various places on or near to the West Coast of the said United States; and whereas the business so carried on by J. Lindenberger, incorporated, has been the business of catching, freezing, pickling, curing and cold storage of fish and other produce and the manufacture of ice and other subsidiary businesses and the business so carried on by the Lindenberger Packing Company has been the business of packing and canning fish and other subsidiary businesses, and the business so carried on by the West Coast Trading Company has been the business of a general merchandise store and other subsidiary businesses; and whereas all the said businesses have been worked and carried on in conjunction and the profits derived therefrom pooled; and whereas in connection with the said businesses the Vendor Companies or some or one of them are entitled to the lands or rights and privileges over lands of which short particulars are set forth in the schedule hereto; and whereas the Purchasing Company has been formed in England under the Companies Acts 1908 and 1913 with a nominal capital of two hundred and fifty thousand pounds divided into one hundred and twenty-five thousand cumulative participating preference shares of one pound each and one hundred and twenty-five thousand ordinary shares of one pound each, with a view amongst other things to the acquisition of the said businesses; and whereas by clause 3 of the articles of association of the Purchasing Company it is provided that the Purchasing Company shall enter into the agreement therein referred to, being this agreement; and whereas the said J. Lindenberger has agreed to join in these presents for the purposes of entering into the agreement on their part hereinafter contained: Now it is hereby agreed as follows:

"1. The Vendor Companies shall sell and the Purchasing Company shall purchase as from the first day of June one thousand nine hundred and four-teen:

"First, the good will of the said businesses and each of them with the right to use the name Lindenberger as part of the name of the Purchasing Company and to represent the Purchasing Company as carrying on the said businesses in continuation of and succession to the Vendor Companies respectively and all trade-marks and registered labels or brands connected with the said businesses or any of them.

"Secondly, all the lands and rights and privileges over or in regard to lands

of which short particulars are set out in the schedule hereto.

"Thirdly, all the plant machinery, office furniture, patents, licenses, horses, wagons, carts, implements, and utensils, ships, barges, boats, launches and scows and the tackle and pulleys connected therewith, all fishing nets and tackle and all other existing and necessary articles of every description requisite for carrying on the business which the Vendor Companies or any of them are, is or may be entitled in connection with the said businesses or any of them.

"Fourthly, the full benefit of all pending contracts and engagements to which the Vendor Companies or any of them are, is or may be entitled in connection

with the said businesses or any of them.

"Fifthly, all other property or rights and privileges of every or any description to which the Vendor Companies or any of them are, is or may be entitled in connection with the said businesses or any of them, provided always that there shall be deemed to be excepted out of the sale hereby agreed to be made (first) all the book and other debts owing to the Vendor Companies, or any of them, in connection with the said businesses, or any of them, on the said first day of June, one thousand nine hundred and fourteen, and the full benefit of all securities for such book debts, and (secondly) all cash in hand and at the bank and all bills and notes of the Vendor Companies or any of them in connection with the said businesses or any of them on the same day.

"2. Part of the consideration for the said sale shall be the sum of one hundred and eighty-nine thousand pounds which shall be paid and satisfied as follows, namely: As to the sum of sixty-five thousand pounds by the allotment to the Vendor Companies, or one of them, or their respective nominees, of sixty-five thousand fully paid-up cumulative participating preference shares of one pound each in the capital of the Purchasing Company to be numbered 1 to 65,000, inclusive, and as to the sum of one hundred and twenty-four thousand pounds by the allotment to the Vendor Companies or one of them or their respective nominees of one hundred and twenty-four thousand fully paid-up ordinary shares of one pound each in the capital of the Purchasing Company, to be numbered 1 to 124,000, inclusive. As between the Vendor Companies the said sixty-five thousand preference shares and the said one hundred and twenty-four thousand ordinary shares shall be divided as shown in the following table, namely:

Name of Vendor Company.	Number of Preference Shares to be Allotted to Each Company or its Nominees and Denoting Numbers of Such Shares.	be Allotted to Each Company
J. Lindenberger, In- corporated The Lindenberger Packing Company The West Coast Trading Company	Nos. 1 to 32,000, inclusive 39,000 Nos. 32,001 to 62,000, inclusive	65,000 Nos. 1 to 65,000, inclusive 54,000 Nos. 65,001 to 119,000, inclusive 5,000 Nos. 119,001 to 124,000, inclusive

[&]quot;The residue of the consideration shall be the amount expended by the Vendor Companies, respectively, before the first day of June, one thousand nine hundred and fourteen, in making preparation for the new season's pack over

and above the value of twenty-thousand dollars, which is to be for the benefit of the company. Such amount if not otherwise agreed on is to be determined by a single arbitrator in accordance with the Arbitration Act 1889, provided that the company shall only be called upon to make such payment as and when it receives funds through the sale of its stock.

"3. The Vendor Companies shall undertake to pay and satisfy all their debts and liabilities in connection with the said businesses, or any of them, existing on the said first day of June, one thousand nine hundred and fourteen.

"4. The Vendor Companies shall furnish to the Purchasing Company such evidence as the Purchasing Company shall reasonably require that the Vendor Companies, or some or one of them, have or has a good title to the lands and rights or privileges over land of which short particulars are set out in the schedule hereto, and until such lands and rights and privileges over lands have been vested in or transferred to the Purchasing Company according to American law the said one hundred and twenty-four thousand ordinary shares part of the purchase consideration shall not be allotted to or vested in them.

"5. Copies of the licenses, permits or other documents under which the Vendor Companies are entitled to the rights and privileges, of which short particulars are set out in the second, third, fourth and fifth parts of the said schedule hereto, having been supplied to the solicitors of the Purchasing Company, the purchasing company shall be deemed to have full notice of the contents and effect of such licenses, permits and other documents and of the rights and privileges conferred thereby.

"6. The Vendor Companies shall respectively execute and do, or concur in executing and doing, all such deeds, instruments, acts or things as shall be necessary or reasonably proper to enable the said respective rights and privileges to be vested in or transferred to the Purchasing Company or as it shall direct.

"7. The purchase shall be completed on the thirtieth day of July, one thousand nine hundred and fourteen, at the office at Cecil House, Holburn Viaduct, in the city of London, of Messrs. C. Urquhart Fisher & Co., solicitors, when possession of the premises shall as far as practicable be given to the Purchasing Company, and the consideration aforesaid shall be paid and satisfied subject to the provisions of this agreement, and thereupon the Vendor Companies and all other necessary parties, if any, shall execute and do all assurances and things necessary for vesting the premises in the Purchasing Company and giving to it the full benefit of this agreement as shall be reasonably required.

"8. Possession of the said premises shall be retained by the Vendor Companies respectively up to the said thirtieth day of July, one thousand nine hundred and fourteen, and in the meantime they shall respectively carry on the said respective businesses in the same manner as heretofore and so as to maintain the same as going concerns, and they shall respectively as from the said first day of June, one thousand nine hundred and fourteen, be deemed to have been and to be carrying on such businesses on behalf of the Purchasing Company and shall respectively account and be entitled to be indemnified accordingly.

"9. For the purpose of ascertaining stamp duty payable in respect hereof the property locally situate out of the United Kingdom and the goods, chattels and other effects capable of manual delivery and forming part of the purchase property shall be taken to be of the value of £189,000.

"10. The Vendor Companies and the said J. Lindenberger shall enter into a joint and several covenant with the Purchasing Company for the benefit of the members thereof holding preference shares in the Purchasing Company, guaranteeing that the net profits of the Purchasing Company in respect of the said businesses during each of the five years following the thirty-first day of December, one thousand nine hundred and fourteen, shall amount to such a sum as will enable a dividend of not less than seven per cent, per annum to be paid on the capital for the time being paid up or credited as paid up on the preference shares in the Purchasing Company which may for the time being have been issued, and that if there shall be no profits or a deficiency of profits, in any of such five years the Vendor Companies, or some or one of them, or their

respective successors or assigns, or the said J. Lindenberger, shall immediately after the same shall have been ascertained and notice thereof given to the Vendor Companies, or the said J. Lindenberger, in manner hereinafter provided for, pay to the Purchasing Company in trust for the members thereof for the time being holding preference shares in the Purchasing Company a sum sufficient to make up the amount guaranteed. The certificate in writing of the auditor or auditors for the time being of the Purchasing Company, as to the amount at any time payable under this clause shall as against the respective Vendor Companies or the said J. Lindenberger, be conclusive evidence thereof for the purposes of this clause. Until the said period of five years shall have expired and thereafter until the whole of the amount or amounts (if any) payable under this clause shall have been fully paid and satisfied fifteen thousand of the preference shares and fifty thousand of the ordinary shares in the Purchasing Company to be allotted as part of the purchase consideration shall stand charged with and be a security for the amounts payable under this clause and the certificates for such preference and ordinary shares shall for the purpose of giving effect to such charge be deposited and remain with the bankers for the time being of the Purchasing Company.

"11. The validity of this agreement shall not be impeached on the ground that the Vendor Companies, or any of them, or any director or directors of the Vendor Companies, or any of them, as promoters or otherwise, stand in the fluctiary relation to the Purchasing Company, or that the directors of the Purchasing Company by reason of any of them being a director or directors of or otherwise interested in the Vendor Companies, or any of them, or for

any other reason, do not constitute an independent board.

"12. Unless before the thirtieth day of July next the Purchasing Company shall have become entitled to commence business either of the parties hereto may by notice in writing to the other determine this agreement, and such determination shall not give rise to any claim for compensation expenses or otherwise.

"13. Any notice hereunder may be served on the Vendor Companies by sending the same through the post addressed to the Vendor Companies, care of Messrs. J. Lindenberger, 31 Georgenkirch Strasse, aforesaid, and shall be deemed to have been served at the expiration of seven days after the same

is posted.

14. This agreement is to be construed and take effect as a contract made in England and in accordance with the law of England, and the Vendor Companies hereby respectively submit to the jurisdiction of the High Court of Justice in England and hereby respectively appoint Reuters Bank, Limited, of 43 Coleman street in the city of London, and every officer or clerk for the time being of that bank, to be the agent in London of the Vendor Companies, respectively, for the purpose of accepting service on behalf of the Vendor Companies, respectively, of any writ, notice, order, judgment or other legal process or document in respect of any matter arising out of this agreement, and such appointment shall not be revocable, and service of any document on such appointee shall be deemed to be good service on the Vendor Companies, respectively, for all purposes, and the Vendor Companies respectively elect domicile at the registered office of the said bank.

"15. The Purchasing Company shall cause this agreement to be duly filed with the registrar of companies pursuant to section 88 of the Companies (Consolidation) Act 1908, and also in case of shares allotted to the nominees of the Vendor Companies, or any of them, shall cause a sufficient contract to be so

filed constituting the title of such nominees.

"16. This agreement is provisional only and is not to become absolute unless

and until the company has become entitled to commence business.

"In witness whereof the said Hermann Lindenberger as attorney for and on behalf of J. Lindenberger, Incorporated, the Lindenberger Packing Company and West Coast Trading Company, Incorporated, has hereunto set his hand and seal, and the said Hermann Lindenberger, as a partner in the registered firm of J. Lindenberger duly authorized in that behalf, has hereunto set his hand and seal, and the Lindenberger Cold Storage & Canning Company, Limited, has caused its common seal to be hereto affixed the day and year first above written.

"The Schedule Above Referred to. "First Part.

"1. Land and Real Property Owned in Fee Simple.

"Site of cold storage plant in the city of Astoria, county of Clatsop, state of Oregon,

"All of lots numbered three (3) and four (4) in block seven (7) also all and singular the tideland and wharfing rights, privileges and easements north and in front of the said lots numbered three (3) and four (4) to the ships' channel of the Columbia river, all in the city of Astoria as laid out and recorded by John McClure in the said county and state save and except therefrom so much of the above land as was heretofore conveyed by Charles H. Page on the 25th of September, 1900, to one J. J. Kenney, as recorded in Book Forty, page 358, Deeds of Clatsop County, Oregon (being a strip of ten feet north and south and one hundred feet east and west off of the south end of said lots), subject to that certain right of way to the Astoria & Columbia River Railroad Company, executed on the 18th day of April, 1895, by E. C. Crow.

"2. Freehold Property on Nushagak River, Alaska.

"A piece of land located at Snag Point, Alaska, on the west bank of Nushagak Bay, described as follows: 'Beginning at post at high-water mark on Nushagak river, Alaska, at a place known as Big Fetes lot in Fred town at a pine post 3x3 marked No. 1 S. W.; thence to post No. 2 (N. W. 500 W. 365 feet); thence to No. 3 post S. 7600 E. 355 feet; thence to post No. 4 (S. 700 W. 188); thence to No. 1 post S. 8500 W. 218.' The corners of this tract of land are or were marked by posts 3x3 scantling, and marked as follows: 'No. 1 S. W.,' 'No. 2 N. W.,' 'No. 3 N. E.,' 'No. 4 S. E.,' formerly the property of Emil Anderson of Snag Point aforesaid, and sold to J. Lindenberger, Incorporated, by deed dated 27th May, 1910.

"Second Part.

"Rights and Privileges Over Sites of Cannery Plant.

"1. Site of Cannery Plant at Craig, Alaska.

"Permission to use a tract of ground lying on the west coast of Prince of Wales Island, described as all that portion of the Craig town site (exclusive of streets) lying between mean high-tide line on the north and west Main street on the south and Third street on east, containing within its limits the original area 600 feet long and 300 feet wide as surveyed and granted under permit of W. A. Langville, February 4, 1908, for mild-cure and cannery purposes for the purpose of maintaining and operating a salmon cannery mild-cure plant and merchandise store under a special use permit dated the 1st April, 1913. Rent payable \$100 annually.

"Right to use a flume right of way over a strip of land 8 feet wide extending in an easterly direction from the said cannery at Craig for a distance of 7,780 feet, for the purpose of maintaining a pipe line or flume to convey fresh water under a special use permit dated the 1st January, 1912. No rent payable while public receives use of water free.

"2. Site of Cannery Plant at Roe Point, Behm Canal, Alaska.

"Right to use 17.23 acres located on the east shore of Behm canal, approximately 3 miles south of Roe point mainland within the Tongass National Forest, Alaska, for the purpose of a commercial fish cannery under a special use permit dated the 16th October, 1911. Rent payable \$25 annually.

"Right to use a flume right of way over lands beginning near the left bank of the creek at the intersection of the bank line of the cannery site survey, thence extending up the right bank of the creek a distance of 1,522 feet in length and 25 feet wide an area of .9 acres located on the east shore of Behm canal, approximately three miles south of Roe point mainland and within the Tongass National Forest aforesaid for the purpose of conducting waters to the last mentioned cannery under a special use permit dated the 10th June, 1913. Rent payable \$5 annually.

"Third Part.

"Rights and Privileges over Sites of Cold Storage Plant.

"1. Site of Cold Storage Plant and Wharf at Pittsburg (Formerly Black Diamond) State of California.

"Right to erect, construct and maintain a wharf on certain overflowed and submerged lands belonging to the state of California bordering on the San Joaquin river, situated in township number six in the county of Contra Costa, state of California and described as being within the following boundaries, to wit: Beginning at a point where the prolongation of the east line of Black Diamond street in the town of New York Landing intersects the southern shore of San Joaquin slough; thence north 16% degrees to ships' channel; thence at right angles westerly 125 feet; thence southerly at right angles 75 feet; thence at right angles easterly 75 feet; thence southerly and on line of the west line of Black Diamond street to the southern shore line; thence at right angles easterly 50 feet into place of beginning, containing an area of 12,000 square feet more or less and situate in Judicial township number six and in Supervisor district number four Contra Costa county, state of California, and to take toll for the use of the same for a term of twenty years under a license or grant of the board of supervisors of the said county of Contra Costa, dated 16th March, 1896.

"Immediately south of and adjoining at the shore line of the Pittsburg property held by franchise a lot owned by J. Lindenberger, Incorporated, description of which is as follows:

"All that certain lot, piece or parcel of land situate, lying and being in the town of Black Diamond, now the city of Pittsburg, county of Contra Costa,

state of California and more particularly described as follows, to wit:

"Lot No. 2 in block No. 21 under Hooper's addition to the town of New York Landing (now the city of Pittsburg) in said county of Contra Costa as same is laid down and delineated upon a certain map or plan thereof and filed in the office of the county recorder of said county of Contra Costa on the 10th day of September, 1903.

"This lot is approximately 33 feet on Front street by 75 feet deep extending

to the shore line of San Joaquin slough.

"2. Site of Cold Storage Plant at Craig Aforesaid.

"Rights to use the therein described lands situated near and adjoining the Lindenberger mild-cure plant at Fish Egg for the purpose of constructing and operating a fish cannery under a special use permit dated the 14th December, 1911. Rent payable \$25 annually.

'Tourth Part.

"Rights and Privileges over Merchandise Store at Craig Aforesaid.

"Right to use a tract of land 264 by 600 feet and erect thereon one cold storage building 30 by 40 feet and a lumber dwelling and store building 16 by 20 feet, located on the North side of Bergman Island near Egg Island at the south end of Klawak inlet on the west coast of Prince of Wales Island, Alaska, for the purpose of conducting a fish curing establishment and a general merchandlse store, under a special privilege agreement dated 21st Nov. 1908. Rent payable \$20 annually.

"Fifth Part.

"Rights and Privileges in Respect of Fish Trap Locations and Cabin Sites.

"Thirty-one fish trap locations.

"The right to use thirty-one tracts of land, each 300 by 200 feet, as cabin sites under special use permits of various dates. Rent payable \$3 annually in respect of each cabin site.

Hermann Lindenberger,

"Agent and Attorney. [L. S.]

"Signed, sealed and delivered by J. Lindenberger, Incorporated, the Lindenberger Packing Company and West Coast Trading Company, Incorporated, by

Hermann Lindenberger, their attorney, duly authorized in that behalf, in the presence of Kenelm H. H. Smith, Cecil House, Holborn Viaduct, London, E. C., Solicitor. Hermann Lindenberger,

"Partner of the Firm of J. Lindenberger. [L. S.]

"Signed, sealed and delivered by the said J. Lindenberger, by Hermann Lindenberger, a partner in such firm duly authorized in that behalf, in the presence of Kenelm H. H. Smith.

"The common seal of the Lindenberger Cold Storage & Canning Company, Limited, was hereto affixed in the presence of Samuel Weiss, A. W. Hajduska, Directors.

William E. Stone, Secretary Pro Tem. [Seal.]"

It is further alleged that plaintiff has performed its part of the contract, paying the vendor companies £189,000, as part consideration, a part being by the allotment, issuance, and delivery of preferred and common shares of stock in the plaintiff company; that plaintiff has paid the residue of the consideration, that is, the expense, prior to June 1st, of preparing for the new season's pack over and above \$20,000; that plaintiff tried to sell its shares, but has received no funds therefor; that this has been prevented by defendants' failure to perform; that plaintiff has made the registration required of it by the contract to entitle it to do business on and after July 30, 1914, and is willing and able to perform its contract; that, after plaintiff had advanced the defendants, and they had expended under paragraph 8 of the contract, \$100,000, defendants objected to transferring the legal title of the properties to plaintiff because of conditions growing out of the present European war, finally, on February 24, 1915, refusing to so transfer or surrender possession, or account for the income of the businesses since June 1, 1914; that defendants have conspired to avoid the contract, dissolving the three Vendor Companies, transferring the properties in question to the defendants Bernard Lindenberger and Hermann Lindenberger; that under section 8 of the contract Bernard Lindenberger and Hermann Lindenberger accepted employment with the plaintiff as joint managing directors, taking constructive possession for plaintiff of all the properties alleged to be of the value of \$925,000; that these individuals have organized a new corporation, the defendant Lindenberger Packing Company, to which they have, in turn, transferred the property; that this was done without consideration, and with full knowledge on the part of such company of the contract with plaintiff; that defendants' company has conducted the business since June 1, 1914, and refused to account to plaintiff for the funds obtained therefrom.

The defendants J. Lindenberger, a firm registered according to the German law, and Hermann Lindenberger, subjects of Germany, were dismissed by the court from the cause for want of jurisdiction over them.

The Vendor Companies having been dissolved, the Lindenberger Packing Company and Bernard Lindenberger answered the amended complaint, denying generally the merits of the bill of complaint and averring substantially as follows:

That they admit that Hermann Lindenberger is now a resident of the state of Washington, but deny that he was at all the times in question. It is admitted that plaintiff never received any funds from the sale of stock; that the Vendor Companies prepared to carry out the contract, and that they now refuse to deliver possession of the property described. It is admitted that the Vendor Companies have been dissolved and have transferred their property to the new American company, the Lindenberger Packing Company, which now holds and owns all the property; that such transfer was made with the plaintiff's consent and full knowledge on the part of all persons interested in the new American company of the conditions of the contract above set out, averring that it was with the further knowledge that the contract could not be carried out, and without intent to evade any of its terms. It is further admitted that, since June 1, 1914, defendants have carried on the businesses as the same were before carried on by the Vendor Companies; that they have used the income therefrom and have refused to account to plaintiff therefor.

It is averred that the defendant company is able to respond in damages, and that plaintiff has a full and complete remedy at law for any loss sustained; that the answering defendant company was organized and took over the property because it became impossible to carry out the plan of having the Vendor Companies become one in the English Company; that a meeting of the officers of the plaintiff company was to have been held July 30, 1914, but that all plans of the parties to this action were ended by the beginning of war; that, prior to the beginning of war, Reuters Bank of London advanced to the Vendor Companies £20,000, the greater part of which reached them prior to the beginning of war; that, on account of the impossibility of carrying out the contract on account of the war, to which all parties agreed, new negotiations were had between the representative of plaintiff and Reuters Bank, resulting in an agreement that the Vendor Companies should dissolve, a new American company should be organized to take over the property in question and take care of the money advanced by the bank (evidently meaning thereby to satisfy the bank's claim): that in these negotiations there was a misunderstanding as to the amount of the annual payments to be made the bank. those on one part believing the agreement was \$5,000 per annum, and those on the other part thinking it was £5,000; that prior to the meeting of the parties to these negotiations the Vendor Companies had been dissolved, as all parties were informed and approved; that the representative of the bank in these negotiations was to submit the terms of this agreement to his principal; that, in pursuance of the agreement, the Vendor Companies were dissolved, the new American company organized, which took over and still holds all the property of the Vendor Companies, and still conducts the businesses thereof.

The answer avers Reuters Bank to be the only party in interest, and tenders the \$23,000 then in the registry of the court in part satisfaction of its claim, tendering a like sum on the 15th day of December of each year until the full amount is paid. It further avers that the defendant Lindenberger Packing Company has assets of over \$1,000,000 and debts of less than \$350,000; that it would be a hardship and inequitable to be required to repay the bank's claim at one time, or other than as arranged when it was advanced; that, since the war,

Reuters Bank has been compelled to change its name, and is now known as the "British Commercial Bank, Limited."

Defendants pray that an accounting and receivership be denied; that the injunction against the transfer of its property heretofore issued be dissolved; that, upon the payment as tendered and admitted to be owing, the answering defendant companies be decreed fully discharged from all obligations to plaintiff and Reuters Bank; that these payments be for the benefit of the plaintiff or Reuters Bank as their interests may appear; and that the plaintiff be enjoined from obtaining the money in, or to be paid into, the registry of the court until it shall interplead the bank.

The affirmative allegations of the answer and cross-complaint are

denied by the plaintiff.

It is clear from the evidence that any negotiations between Kenelm H. H. Smith and the defendants in December, 1914, looking to an adjustment and settlement of differences between the defendants, plaintiff, and Reuters Bank, were not consummated. It is clear that the Vendor Companies have been dissolved, and all their property and interests which were the subject-matter of the contract are now owned and held by the defendant Lindenberger Packing Company, a corporation; that it took the same with full notice and knowledge on its own behalf and all persons interested in it of plaintiff's rights, if any, in such property under its contract with the Vendor Companies. War between England and Germany was declared August 4, 1914.

Only such evidence will be stated as is necessary to apply the court's findings and conclusions. A comprehensive statement will not be

attempted.

[1, 2] Defendants' first contention is that the plaintiff company was never authorized to do business and, consequently, to maintain this suit under the express terms of the sixteenth section of the contract. In order to obtain the certificate from the registrar entitling the company to transact business, which certificate is referred to in the evidence as the "blue certificate," it was represented to the registrar of joint-stock companies that the qualification shares of certain of the directors had been paid for in cash, whereas this was not true. Section 87 of the Consolidated Companies Act of 1908 provides:

"(2) The registrar of companies shall, on the filing of this statutory declaration, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled."

The concluding language of this section is very like that of section 17 of the original act of 1862:

"The certificate of incorporation of any company by the registrar shall be conclusive evidence that all the requisitions of this act in respect to registration have been complied with.

No case has been called to the court's attention, interpreting section 87.

Section 17 was under consideration in Re National Debenture & Assets Corporation (1891) 2 Chanc. 505, where it was held, in effect, that the certificate, while conclusive as to the incidents of registra-

tion—that is, the regularity of the procedure—was not conclusive as to the jurisdiction of the registrar to issue the certificate; that the law required the signatures of seven to the articles, when only six had signed, and the registrar was deceived as to this, and thereby induced to issue the certificate; that it was not conclusive. This case was reversed upon appeal upon the facts. The appellate court evidently conceded the correctness of the ruling as a matter of law. After this decision, the section was amended to read:

"The certificate of incorporation given by the registrar in respect to any association shall be conclusive evidence that all the requirements of this act in respect of registration or matters precedent or incidental thereto have been complied with and that the association is a company authorized to be registered and duly registered under this act." Section 17, Act of 1908.

It has been argued upon the defendants' part, on the authority of the foregoing case, that, the registrar having been misled by the incorporators' representations that the qualifying shares of stock of certain of the directors were paid for in cash—the registrar being thereby induced to issue the blue certificate—he did not have jurisdiction to issue the certificate, and the plaintiff company never became entitled to transact business. I cannot so hold. While the language of the two sections—17 and 87—is similar, there is this important distinction: Section 17 makes the certificate of incorporation conclusive evidence that all requisitions of the Act in respect to registration have been complied with. The court held, in effect, that the requirement of the act went to procedure, and that fraud was something outside of the act, and that the certificate was not conclusive against it. But the provision of section 87 is not that the certificate shall be conclusive evidence of facts, but that it shall be conclusive evidence of the ultimate right to do business, which necessarily includes precedent regularity in all matters of law and fact.

It is also true that Hermann Lindenberger, acting for the defendants in the incorporation of the plaintiff company, would be presumed to know the law of England, and that, if there was anything wrongful in securing the blue certificate, through him, the defendants are chargeable with it, and cannot take advantage of that wrong.

Defendants' next contention is that the contract became void at the outbreak of the war. This question is also affected by the Trading with the Enemy Acts, passed by Parliament at different times since the beginning of the war. If the contract were alone between subjects of belligerents, opposed in war, it would doubtless be the court's duty to stay, or suspend, proceedings until the conclusion of peace. But the defendants are citizens of the United States, the contract being between citizens of the United States, an English corporation and a German firm. Paragraph 10 of the sales contract provides:

"The Vendor Companies and the said J. Lindenberger shall enter into a joint and several covenant with the Purchasing Company for the benefit of the members thereof holding preference shares in the Purchasing Company guaranteeing that the net profits of the Purchasing Company in respect of the said businesses during each of the five years following the thirty-first day of December, one thousand nine hundred and fourteen, shall amount to such a

sum as will enable a dividend of not less than seven per cent. per annum to be paid on the capital for the time being paid up or credited as paid up on the preference shares in the Purchasing Company, which may for the time being have been issued, and that if there shall be no profits, or a deficiency of profits, in any of such five years the Vendor Companies, or some or one of them or their respective successors or assigns, or the said J. Lindenberger, shall immediately after the same shall have been ascertained and notice thereof given to the Vendor Companies, or the said J. Lindenberger, in manner hereinafter provided for, pay to the Purchasing Company in trust for the members thereof for the time being, holding preference shares in the Purchasing Company, a sum sufficient to make up the amount guaranteed. The certificate in writing of the auditor, or auditors, for the time being of the Purchasing Company as to the amount at any time payable under this clause shall, as against the respective Vendor Companies or the said J. Lindenberger, be conclusive evidence thereof for the purposes of this clause. Until the said period of five years shall have expired and thereafter until the whole of the amount, or amounts (if any), payable under this clause shall have been fully paid and satisfied fifteen thousand of the preference shares and fifty thousand of the ordinary shares in the Purchasing Company to be allotted as part of the purchase consideration shall stand charged with and be security for the amounts payable under this clause and the certificates for such preference and ordinary shares shall, for the purpose of giving effect to such charge, be deposited and remain with the bankers for the time being of the Purchasing Company."

Section 103 of the articles of association of the plaintiff company provides:

"The said Bernard Lindenberger and Hermann Lindenberger shall be the first managing directors and shall hold office as such managing directors for the period of five years from the incorporation of the company if they respectively so long live."

The agreement for sale to the plaintiff company provides:

"14. This agreement is to be construed and take effect as a contract made in England and in accordance with the law of England, and the Vendor Companies hereby respectively submit to the jurisdiction of the High Court of Justice in England and hereby respectively appoint Reuters Bank, Limited, of 43 Coleman street in the city of London and every officer or clerk for the time being of that bank to be the agent in London of the Vendor Companies respectively for the purpose of accepting service on behalf of the Vendor Companies respectively of any writ, notice, order, judgment or other legal process or document in respect of any matter arising out of this agreement, and such appointment shall not be revocable, and service of any document on such appointeshall be deemed to be good service on the Vendor Companies respectively for all purposes, and the Vendor Companies respectively elect domicile at the registered office of the said bank."

It is agreed that contracts entered into prior to the war which, in their future performance, involved trading with the enemy or commercial intercourse with the enemy were rendered void by the outbreak of war; that contracts which have been performed and under which an alien enemy has become indebted to a British subject prior to the war can be enforced by the British subject in a British court, and that an alien enemy's right to enforce a contract with a British subject is suspended during the war.

At common law, an alien enemy was a person of any nationality residing or carrying on business in enemy countries. This common-law definition has been modified by the Trading with the Enemy

Acts, particularly by the Acts of December 23, 1915, and January 27, 1916. The first-mentioned act provides:

"1. (1) His Majesty may by proclamation prohibit all persons or bodies of persons, incorporated or unincorporated, resident, carrying on business or being in the United Kingdom from trading with any persons or bodies of persons not resident or carrying on business in enemy territory or in territory in the occupation of the enemy (other than persons or bodies of persons, incorporated or unincorporated, residing or carrying on business solely within His Majesty's dominions) wherever by reason of the enemy nationality or enemy association of such persons or bodies of persons, incorporated or unincorporated, it appears to His Majesty expedient so to do, and if any person acts in contravention of any such proclamation he shall be guilty of a misdemeanor triable and punishable in like manner as the offense of trading with the enemy. * *

ishable in like manner as the offense of trading with the enemy. * * * (3) The provisions of the Trading with the Enemy Acts, 1914 and 1915, and of the Customs (War Powers) (No. 2) Act 1915, and all other enactments relating to trading with the enemy, shall, subject to such exceptions and adaptations as may be prescribed by order in council, apply in respect of such persons and bodies of persons as aforesaid as if for reference therein to trading with the enemy there were substituted references to trading with such persons and bodies of persons as aforesaid, and for references to enemies there was substituted references to such persons and bodies of persons as aforesaid, and for references to offenses under the Trading with the Enemy Acts, 1914 and 1915, or any of those acts, there were substituted references to offenses under this act."

Counsel have informed the court that no case has been found involving the enforcement of an executory tripartite agreement, such as the one in question, where two of the parties are subjects of countries opposed to one another in war—that is, each an alien enemy of the other—and the third party a citizen of a neutral state.

In Janson and Dreifontein Consolidated Mines (1902 Appeal Cases, 484 at 509) the House of Lords held that: "War * * * dissolves all contracts which involve trading with the enemy." In this decision the court relied upon Esposito and Bowden (7 Ellis & Blackburn, 763), which was a case where a neutral shipowner contracted with the defendant, a British subject, to load a cargo at Odessa, a Russian port, for England, before it could be loaded, the Crimean War intervened, in which England and Russia were opposed. It was held that the contract was rendered invalid at the outbreak of war. The court said:

"If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the government of the country, the agreement is absolutely dissolved."

Zinc Corporation, Ltd., v. Hirsch (1916, 1 K. B., at 556) was a case where a German firm had contracted, before the war, to take for a term of years the entire output of zinc concentrates from an English company. For the German firm it was contended, under certain provisions in the contract, that the effect of the war was to suspend delivery until the end of the war. The court held the contract was dissolved by the war, as, were the contention to prevail, the effect would be to store the output for the enemy. The court said:

"The result is that the outbreak of war has dissolved the contract between the parties as far as regards future performance after August 4, 1914. The remedy of either side for what had previously been carried out remains in abeyance until the termination of the war."

The court, at page 560, said:

"This agreement being incapable of continued performance during the war, the end of which cannot be foreseen, is prima facie dissolved, abrogated, and avoided by the war."

In the Appeal Cases (1916, at page 510) it is said:

"With regard to the effect of a declaration of war, there is certainly, however, one presumption. It has been expressed in various decisions, but it was clearly stated by Lush, J., in Geipel and Smith: 'A state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like this.'"

To the same effect is Distington Haematite Iron Co. (1916) W. N. 117.

In Porter v. Freudenberg (1915 1 K. B. Division, 857), the question being whether a British subject had the right to sue an alien enemy, the court says (at page 880):

"Prima facie, there seems no possible reason why the law should accord immunity during hostilities to the alien enemy against the payment of just debts or demands due British or neutral subjects. The common law suspending the alien enemies' right of action is based upon public policy, but when considerations of public policy are apparent, it would justify preventing the enforcing of the British neutral subjects to a right of action against the enemy."

In the case of Rex v. Kupfer (1915, Law Journal, King's Bench Division, vol. 84, page 861), it is said:

"The firm became indebted to a neutral in Holland in respect of transactions which had taken place between the Frankfurt partners and the neutral. The neutral looked to the Frankfurt partners for payment, and there was no suggestion that he had threatened legal proceedings against the prisoner in respect to the debt. Acting upon instructions from his Frankfurt partners, the prisoner, after the date of the proclamation, paid the amount of the debt to a firm of foreign bankers in London, who had a branch in Holland, with directions to them to credit the neutral through the Holland branch with the amount paid to them in London, and the foreign bankers did so credit the neutral. He also paid to the London branch of another neutral who carried on business in Rotterdam and London the amount of debt owing by his Frankfurt partners to the neutral in Rotterdam. * * *

"Held, that as the effect of payments to the neutrals was to extinguish the obligations of the Frankfurt partners to pay the debts to the neutrals, the resources of individuals in Germany were, to that extent, augmented and those of Great Britain diminished, and the payments were therefore for the benefit of an emeny, within the meaning of paragraph 5 of the proclamation."

"Held, that the words 'for the benefit of an enemy,' in paragraph 5 of the proclamation, were introduced for the purpose of preventing devices, tactics, and various means by which mercantile houses might seek, but for those words, to make payments indirectly, notwithstanding that there is an express prohibition of a direct payment. The words are very wide, and must be construed to have a very wide application, and are intended to cover the making of payment to an enemy by any device or by any recourse to indirect means."

In Continental Tire Company v. Daimler (1915, 1 King's Bench Division, page 893), the headnote is as follows:

"The plaintiff company was incorporated in England, and carried on business at their registered offices in London. It had a capital of £25,000 in £1 shares. It was formed as a subsidiary company by a German company to promote the sale in the United Kingdom of tires made in Germany by the German company. All its directors were German subjects resident in Germany, and the whole of its shares (except one) were held by German subjects residing in Germany. Held by Lord Reading, C. J., Lord Cozens, Hardy, M. R., Kennedy, L. J. Pillimore, L. J., and Pickford, L. J. (Buckley, L. J., dissenting) that the company did not change its character of an English company because of the outbreak of war; all the shareholders and directors resided in alien enemy country and became alien enemies; that once a corporation has been created in accordance with the requirements of the law, it is an English company notwithstanding that all its shareholders may be aliens; that payment of a debt to a plaintiff company was not a payment to the alien enemy shareholders or for their benefit; and that the right of the plaintiff company to recover in an action brought to recover a debt due to them was therefore not affected by the fact that practically the whole of the shares were held by alien enemies,"

This case involved alone the question of the right of the English company to sue. The question of when, if at all, the German stockholders would benefit by the recovery was not before the court. The last decision was rendered prior to the act of January 27, 1916, above referred to, which act provides:

"1. (1) Where it appears to the Board of Trade that the business carried on in the United Kingdom by any person, firm or company, is, by reason of the enemy nationality or enemy association of that person, firm or company, or of the members of that firm or company or any of them, or otherwise, carried on wholly or mainly for the benefit of or under the control of enemy subjects, the Board of Trade shall, unless for any special reason it appears to them inexpedient to do so, make an order either—

"(a) Prohibiting the person, firm or company from carrying on the business, except for the purposes and subject to the conditions, if any, specified in the

order; or

"(b) Requiring the business to be wound up."

In the dissenting opinion in the last-mentioned case, it is pointed out that the holding of the majority is contrary to the decision of Justice Marshall in Bank of the United States v. Deveaux, 9 U. S. (5 Cranch), 61, 3 L. Ed. 38.

War is a very practical science. The thing aimed at—both at common law and under statutes—is to prevent assistance in any form reaching the enemy. The opportunity to take something from the enemy is not denied, unless it involves an exchange. Indeed, taking from the enemy is one of the practices, if not the objects, of war.

Under the English law adopted by the contract, and upon which alone this phase of the case has been presented, the English subject may sue and recover from the alien enemy upon contracts which have been performed prior to the existence of war. It would therefore appear that the plaintiff could accept the contract of guaranty, provided for in paragraph 10, as an English subject, and certainly would be permitted to do directly what it could accomplish indirectly by means of a suit.

The contract now before the court does not, therefore, in its performance, directly involve trading with the enemy. That is, the specific performance prayed would not, if such performance was had,

itself be an act of trading with the enemy. If the guaranty of interest and dividends by the German firm, contemplated by section 10 of the contract, were enforced, from the German point of view, it might constitute trading with the enemy, providing the state of war still existed when the guaranty was sought to be enforced. This fact, in my opinion, saves the contract from becoming invalid at the outbreak of war, although it would affect the question of whether the contract was voidable or not and the question of what equity requires under the circumstances—questions to be hereafter considered.

[4] For the defense it is also contended that the foundation and basis of the contract has been destroyed by the outbreak of war; that thereby the contract was "snapped off," leaving the parties remediless, so far as it was concerned, each in the position in which the outbreak of the war found them. The object of the Vendor Companies, in forming the plaintiff company was to unite, in one company, their various businesses, and to establish a London credit and financial connection. Prior to the war, the main trade of the Vendor Companies was with Germany. The plaintiff company was to acquire the trade name of "Lindenberger" and the good will of the Vendor Companies.

The first English case in support of this principle, adopting the Roman law, is Taylor v. Caldwell, 3 B. & S. 826, 32 L. J. (Q. B.) 164, which was a case where a company of entertainers had hired the Crystal Palace for a certain length of time and, after they had given certain performances, it was burned down. The contract was held dissolved, neither party remaining under obligations to the other.

Horlock v. Beal, 1916 Appeal Cases, was a case of a partly executed contract. The dependents of a sailor sued for his wages, the ship, an English vessel, having been detained and confiscated in Germany and the sailor having been arrested and imprisoned in Germany during the course of the voyage. The court said:

"I do not go through all the decisions, but I think it right to mention the case of Krell and Henry, inasmuch as I desire to attach my respectful and pointed concurrence in the opinion delivered by Vaughn Williams, L. J., in this passage: 'Whatever may have been the limits of the Roman law, the case of Nickell and Ashton makes it plain that the English law applies the principle, not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or nonexistence of an express condition or state of things going to the root of the contract'"

(The case of Krell and Henry, so pointedly approved in the fore-going case, will be considered hereafter.)

It is further said in this case:

"When the deed is sought to be made effectual on an event unexpected to both parties, the party seeking to enforce it is unjust and inequitable in his demand, and when parties have presupposed some facts or rights to exist, or that they will hereafter exist, as the basis of their proceedings, which in truth do not exist or are prevented from happening by unforeseen causes in mutual error, under circumstances material to their character and consequence, the contract is on general principles inoperative and invalid. * * * It will be observed that the contract so dissolved was not a mere executory contract, but a contract in part performed."

Under the contract in the instant case, Hermann Lindenberger, a German subject, was to be a managing director of the plaintiff company. Any enemy subject found in England is liable to internment and, if interned under the Alien Restriction Act, becomes a prisoner of war, and is not entitled to a writ of habeas corpus. This was held in Rex and Vine Street Police Superintendent (1916, 1 K. B. 268), the headnote being as follows:

"A German subject who has obtained his discharge from German nationality, but has not become a naturalized British subject is, under the provisions of German law, in a privileged position, and does not become entirely divested of the rights belonging to the natural born German. He is therefore an alien enemy. The crown is entitled, in the exercise of its prerogative, to imprison an alien enemy, and the King's Bench Division has no jurisdiction to interfere with the exercise of the prerogative. An alien enemy resident in the United Kingdom who, in the opinion of the executive government, is a person hostile to the welfare of this country and is on that account interned may properly be described as a prisoner of war, although not a combatant or a spy, and application by him for a writ of habeas corpus will be refused."

It is manifest that if such treatment were accorded Hermann Lindenberger, his usefulness as a managing director would be greatly impaired.

In Westlake on International Law (2d Ed. pt. 2, pp. 53, 54) it is said: "While the enemy directors, who cannot continue to fill their places while their duties would be in abeyance, must be regarded as deprived of that character from the outbreak."

In Robinson & Premier Oil Pipe Line, Ltd. (1915, 2 Chancery, p. 124), it is said:

"The learned judge Gray, in the case of Kershaw v. Kelsey, which is reported in 100 Mass. page 561 [97 Am. Dec. 124, 1 Am. Rep. 142], states the law in our opinion correctly when he says, 'The law of nations as judicially declared prohibits all intercourse between citizens of two belligerents which is inconsistent with the state of war between their countries,' but we respectfully disagree with him when he holds that nothing comes within that principle except commercial intercourse. That this transaction is such a contingency is clear. The proposed exercise of the vote is for the purpose of obtaining control and management, or a large voice in them, of a British trading company which owns, amongst other things, large property in the enemy's country, and that this may be to the detriment of the interest of this country and the advantage of the enemy cannot be doubted. We think also that the rejection of these votes may be justified on the narrower ground that this was a commercial transaction. Commercial intercourse is not confined to making contracts between the alien enemy and the British subject, and such a transaction as this, directed to the obtaining control of a trading company, is, in our opinion, commercial. It follows from what has been said that the employment of a British subject as proxy to exercise the voting power is an intercourse between him and the alien enemy which is also prohibited."

What are known as the "Coronation Cases" are a series of cases growing out of contracts entered into, relying upon the taking place of the King's coronation ceremonies, reviews, processions, and the like, which ceremonies did not take place on account of the King's illness. The first of these cases was that of Krell and Henry (1903, 2 K. B. 740), which was a case where a landlord brought action to recover the rent of a room hired from him by certain sightseers, which the sightseers had not used on account of the coronation's not taking

place. It was held that the landlord was not entitled to his rent. The court, at pages 747 to 749, says:

"The real question in this case is the extent of the application in English law of the principle of the Roman law which has been adopted and acted on in many English decisions, and notably in the case of Taylor v. Caldwell. (1) That case at least makes it clear that: 'Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract, they must have contemplated such continued existence as the foundation of what was to be done. There, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.' Thus far it is clear that the principle of the Roman law has been introduced into the English law. The doubt in the present case arises as to how far this principle extends. The Roman law dealt with obligations de certo corpore. Whatever may have been the limits of the Roman law, the case of Nickoll v. Ashton (1901, 2 K. B. 126) makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or nonexistence of an express condition or state of things, going to the root of the contract, and essential to its performance. It is said, on the one side, that the specified thing, state of things, or condition the continued existence of which is necessary for the fulfillment of the contract, so that the parties entering into the contract must have contemplated the continued existence of that thing, condition, or state of things as the foundation of what was to be done under the contract, is limited to things which are either the subject-matter of the contract or a condition or state of things, present or anticipated, which is expressly mentioned in the contract. But, on the other side, it is said that the condition or state of things need not be expressly specified, but that it is sufficient if that condition or state of things clearly appears by extrinsic evidence to have been assumed by the parties to be the foundation or basis of the contract, and the event which causes the impossibility is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made. In such a case the contracting parties will not be held bound by the general words which, though large enough to include, were not used with reference to a possibility of a particular event rendering performance of the contract impossible. I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or nonexistence of some thing which is the subject-matter of the contract, or some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but if required, from necessary inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the nonexistence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited."

Another one of these cases was Blakeley and Mueller (1903, 2 K. B. 760), a case where an intended sightseer had paid in advance, and, there being no coronation, he did not use the site, but sued to recover his money. It was held he could not do so.

Another case was that of Civil Service Co-operative Society and the General Steam Navigation Company (1903, 2 K. B. page 756). The case, as stated in the headnote is as follows:

"By a charter party dated March 22, 1902, the defendants agreed to let, and the plaintiffs agreed to hire, the defendants' steamer for the term of three days from the hour she was placed at the plaintiffs' disposal in London on the day preceding that of the naval review to be held at Spithead on the occasion of the King's coronation in June or July, 1902. The steamer was to take up passengers at London and Southampton, and proceed to Spithead, arriving in time for the review, and returning to London on the third day of the hiring; and the amount to be paid by the plaintiffs for the hire was a lump sum of £1,500, payable '£250 on signing the charter and the balance ten days before the date of the review.' The usual exceptions from owners' liability in respect of perils of the seas, etc., were contained in the charter party. The plaintiffs paid to the defendants £250 on signing the charter party, and the balance, £1,250, on June 18th, the review having in the meantime been fixed to take place on June 28th. The review was, in consequence of the King's illness, postponed on June 25th, and thereupon notice that the plaintiffs would not require the steamer was given by them to the defendants, and accordingly she was not placed at the plaintiffs' disposal. The defendants, before the postponement of the review, had incurred expenses amounting to £500 in fitting out the steamer and in doing other things by way of part performance of the contract, or in order to enable them to perform it. The review was not held until the month of August, 1902, and the plaintiffs sued the defendants to recover the £1,500 as money paid on a consideration which had failed. At the trial before a judge alone, it appeared that there had been some negotiations for a settlement of the dispute, and the judge expressed his desire that the matter should be left to him to say what, under the circumstances and apart from the strict legal rights of the parties, should be done. The defendants would not agree to that course being taken, and they also declined to accept the judge's suggestion that they should be content to retain the amount of the expenses they had incurred and have their costs. In the result the judge gave judgment for the defendants, but ordered that each of the parties should bear their own costs. Held, on an appeal by the plaintiffs from the judgment for the defendants, that the plaintiffs were not entitled to recover the money they had paid."

Herne Bay Steam Boat Company v. Hutton (1903, 2 K. B. 683) is described in the headnote as follows:

"In consequence of the public announcement of an intended royal naval review at Spithead on June 28, 1902, an agreement in writing was entered into between the plaintiffs and the defendant that the plaintiffs' steamship Cynthia should be 'at the disposal' of the defendant on June 28th to take passengers from Herne Bay 'for the purpose of viewing the naval review and for a day's cruise round the fleet; also on June 29th for similar purposes; price £50 down, balance before ship leaves Herne Bay.' On the signing of the agreement the defendant paid the £50 deposit. On June 25th the review was officially canceled, whereupon the plaintiffs wired to the defendant for instructions, stating that the ship was ready to start, and also requesting payment of the balance. Receiving no reply, the plaintiffs, on June 28th and 29th, used the ship for their own purposes, thereby making a profit. On June 29th the defendant repudiated the contract in toto. During the two days in question the fleet remained anchored at Spithead.

"In an action by the plaintiffs to recover the balance less the profits made by their use of the ship during the two days, held, reversing the judgment of Grantham, J., that the plaintiffs were entitled to recover, because: (1) The venture was the defendant's, the risk being his alone; and (2) the happening of the naval review was not the sole basis of the contract, so that there had been no total failure of consideration, nor a total destruction of the subject-matter of the contract.

"Held, further, that the contract did not operate as a demise of the ship."

It was said in this case (at page 691):

"From the correspondence it appears to me to be clear that this venture was the venture of the defendant alone, and that although the plaintiffs assisted him by selling tickets and posting notices of what was proposed to be done, yet the risk was entirely that of the defendant."

London and Northern Estates, Ltd., v. Schleisinger (1916, 1 K. B., Division, p. 20) is reported in the Current Digest 1915, column 288, as follows:

"By a tenancy agreement dated March 19, 1914, the defendant became tenant to the plaintiff company of a flat at Westcliff-on-Sea for a term of three years from Lady Day, 1914. By the terms of the agreement the defendant was to occupy the rooms only as private dwelling rooms, and was not to assign or underlet without license, such license not to be unreasonably withheld. By the Aliens Restriction (Consolidation) Order 1914, made on September 9, 1914, an alien enemy was prohibited from residing within certain specified areas, which included Westcliff-on-Sea. The defendant was an alien enemy. The action was brought to recover the quarter's rent due under the agreement on Lady Day 1915. The defense was that, before the rent became due, the tenancy was put an end to by the above-mentioned order. The common serjeant held that the prohibition by law of defendant's personal occupation of the premises did not extinguish the tenancy, and he gave judgment for the plaintiffs. The defendant appealed. The Division Court held, affirming the court below, that the personal residence of the defendant, on the demised premises was not the foundation of the contract of tenancy, for he might have derived advantage from them otherwise, as by letting them to a tenant or lending them to a friend, and that the ground for contending that the tenancy was extinguished by the order consequently failed."

The war has so dislocated and broken up the objects and purposes of the contract now in question as to give rise to strong equities in defendants' favor; but there has been, thereby, no such complete destruction of the subject-matter and foundation of the contract as to bring the case within the principle of the case of Taylor v. Caldwell, supra.

In determining whether the nature and extent of the change in condition brought about by the war are such as to warrant the court in refusing to decree specific performance, it is necessary to consider a

number of facts, other than those already recited.

The Lindenbergers controlling the Vendor Companies are Bernard and Robert. They have no interest in the Berlin firm. The members of the Berlin firm are Hermann, his father, and another brother. The Lindenbergers of both firms are members of one family. The business established by the Vendor Companies extends into Washington, Oregon, California, and Alaska. The output of these companies, prior to the war, was distributed in Europe mainly by the Berlin firm. The plaintiff company was an agency which the Vendor Companies invoked in order to get their various businesses into one company and to establish financial connections in London. At a meeting of the board of directors, held on June 18, 1914, shares of the company were allotted as follows: 30,000 7 per cent. cumulative preference shares to Crescole Syndicate, Ltd.; 10,000 7 per cent. cumulative preference shares to Eugen Friedmann, of Berlin; 18,500 7 per cent. cumulative preference shares to Josef Lindenberger, of Berlin. The

remaining 60,000 preference shares were to be sold to the public through the Crescole Syndicate, under an agreement hereafter considered. The ordinary shares allotted were not to be turned over to the Vendor Companies until after the transfer of their property. These shares were then to be allotted: 12,400, by direction of Hermann Lindenberger to Crescole Syndicate; 50,000 to Hermann Lindenberger.

denberger; 61,600 to Josef Lindenberger.

Hermann Lindenberger and Josef Lindenberger being German subjects and both being members of the German firm, doing business in Germany, and the main part of the trade to be turned over to the plaintiff company being with Germany, jeopardizes, not only the holdings of all interested in the plaintiff company, but the existence of the plaintiff company itself, as, under the Trading with the Enemy Acts, the plaintiff company, if carrying on the business for which it was organized, could be wound up and the interest of alien enemies—which would include the business associates of alien enemies at common law—would be sold and placed in the hands of the public custodian, waiting the end of the war. This result would be made possible by reason of the enemy association attaching to all on account of the connection of Hermann Lindenberger and Josef Lindenberger with the transaction.

Since the war, letters to the defendant company from Denmark and Norway, as well as from England, have been opened by the British censor. Thirty thousand dollars worth of fish shipped by the Vendor Companies to Denmark have been seized as prize, and are now in a prize court in London. The plaintiff company has intervened in the prize court proceeding to claim these goods. I do not consider this action upon the plaintiff's part hostile to the defendant, or in disregard of the proceedings in this court; but this seizure illustrates the peril in which the entire property would be placed should it pass to the plaintiff company, for I have no doubt that it was in great part the foregoing enemy association which caused the seizure.

After the incorporation and the raising of £20,000 for the use of the American businesses and £15,000 delivered to the Berlin firm, a meeting was to have been held in London, July 30, 1914, for the transfer of the property. It is apparent that this meeting was not held because of the realization of impending war. Hermann Lindenberger left England the latter part of July for the United States, landing in New York on the 10th day of August. War was declared August 4th. He came to Seattle directly, where steps were being taken for the dissolution of the Vendor Companies, looking to the transfer of the property to the plaintiff company.

The £20,000 was loaned upon debentures of the plaintiff company, a security under the English law, which, when registered with the registrar at Somerset House became a lien on all the assets of the company. Very soon a question arose as to making these debentures a lien upon the American property. When it was proposed to place a mortgage of record, the Vendor Companies objected upon the ground of the resultant injury to their credit.

A further obstacle in performing the contract was encountered in

the fact that the trap licenses and permits in Alaska could not be transferred to the alien corporation. Another difficulty appeared in the fact that, if the boats of the Vendor Companies passed to the plaintiff company, they would forfeit the right to engage in the coastwise trade. The plaintiff also objected to the dissolution of the Vendor Companies because of a certain guaranty, contained in paragraph 10 of the contract, made in their name by Hermann Lindenberger.

Ways were sought to obviate these difficulties. No agreement could be reached for making the debentures a lien upon the American property. Finally, in December, 1914, the solicitor of plaintiff, who was also solicitor for the London bank which had advanced the £20,000, came to Seattle with a view to an adjustment. A plan was proposed for an American company, instead of an English one, which plan embraced other details to get around the difficulties which had arisen and yet preserve the main features of the agreement. Mr. Smith, the solicitor of the plaintiff and the bank in these negotiations, while approving of the new plan, made it plain that he was without power to bind his principals in this particular and could only recommend its adoption to them. He left the United States in December, 1914, for London, promising to submit the proposed arrangement to his principals and advise the Vendor Companies at an early date of their action. Owing to a "hitch" in the audit of the books of the Vendor Companies—responsibility for which it is not necessary to determine—this answer to the proposition was not given for The proposal was at length rejected. It is not several months. therefore necessary to recite its terms.

The £20,000 loaned by the bank was received by Bernard Lindenberger, president of the Vendor Companies, part of it before the declaration of war and part after; but all of it before the passage of the Trading with the Enemy Acts. None of these acts, nor the proclamations under them, were known to the Vendor Companies prior to November, 1914, at which time, on account of such acts, objection was made by them to the proposed transfers.

Although the stockholders are generally represented by the corporation and the courts will not look through the corporation to the stockholders, it is not always so. When it is made to appear that the interests of the corporation are no longer safe from the fraud of the directorate, a stockholder may sue to protect the rights of a corporation under equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv).

In February, 1915, the Vendor Companies, through their president, Bernard Lindenberger, declined to complete the transfer to plaintiff, giving as a reason therefor the conditions arising out of the war and the Trading with the Enemy Acts. Owing to the dissolution of the Oregon corporation, J. Lindenberger, Incorporated, and the pending dissolution of the other two Vendor Companies and their imperiled status as corporations empowered to do business and sue in the courts, as well as their liability for penalties under the law, the defendant company Lindenberger Packing Company was organized, taking over all the property of the Vendor Companies, the control and interest of the old companies being preserved in the new.

Negotiations continued, looking to an adjustment, until the bringing of this suit November 1, 1915. No want of good faith or laches is chargeable to any one. Neither is the defendant estopped by reason of the acceptance of a portion of the loan for which shares in the plaintiff company were pledged. After the outbreak of the war, the nature and extent of the danger to the interests involved was not at once realized by either party. The stringent, searching and far-reaching Trading with the Enemy Acts had not yet been passed. The parties on both sides hoped for a speedy determination of the war. This latter fact was evidently one reason for delay, after Mr. Smith's return to England, in answering the proposed plan for adjustment made at the Seattle meeting.

If Hermann Lindenberger cannot act upon the board of directors, transfer his shares in the plaintiff company, or obtain dividends earned until after the war, the court is asked to give a German's property to an English company to use, knowing that that company will not pay for its use when due, although it promised so to do, or, if at all, until the conclusion of the war. The Ouachita Cotton, 6 Wall. 521, 18 L. Ed. 935; U. S. v. Grossmayer, 9 Wall. 72, 19 L. Ed. 627; Mitchell v. U. S., 21 Wall. 350, 22 L. Ed. 584. When it comes to determining whether equity requires specific performance of the contract, the court is not greatly concerned with the question whether it is the plaintiff or the government of which it is a creature that proposes to break the contract.

The evidence shows that the main trade of the Vendor Companies, prior to the war, was with Germany; that through the efforts of Great Britain any such trade directly with Germany has been destroyed; that, if any part of it is preserved, it is carried on indirectly through certain houses or agencies in the neutral countries of Norway, Sweden, and Denmark; that several of these houses have been placed, by English authorities, upon the trading with the enemy black list, the effect of which is to give them the status of an alien enemy and prohibit any trading with them by any subject of England, corporate or otherwise. Since the case was tried, this black list has been extended to a number of firms, or companies, of the United States, of which the court takes judicial notice.

Under the contract the plaintiff was to acquire the good will of the Vendor Companies, which would include the German trade. From the circumstances, it is clear that it was the implied understanding that the German trade was to be fostered and preserved. By the outbreak of the war, Trading with the Enemy Acts, proclamations, and black lists, this contract duty of the plaintiff company has not only been destroyed, but the opposite duty has been cast upon it to use its utmost efforts to destroy that trade which it contracted to preserve.

While there are certain facts, if standing alone, that might warrant a finding of a constructive delivery of the property of the Vendor Companies, yet, in view of all the facts and circumstances, it is clear that such was not the intention at any time. On the whole, equity requires, rather, a decree for the payment of the debts incurred than to so greatly jeopardize \$1,000,000 worth of property to its

ultimate owners, the Vendor Companies, on account of something over \$100,000 that has been advanced on the strength and credit of the plaintiff corporation. 36 Cyc. 617c; 31 Cyc. 1311c.

It is next necessary to consider what, in the nature of alternative relief or terms or conditions should be imposed in denying specific performance.

The £20,000 advanced by Reuters Bank was loaned upon debentures of the plaintiff company. These debentures were given and the money advanced thereon at a time when there was no doubt in the minds of any of the parties that the property of the Vendor Companies would immediately be turned over to the plaintiff company. By direction of the plaintiff company, the money was forwarded by the bank to Bernard Lindenberger, the president of the Vendor Companies, and he was also agreed upon as one of the managing directors of the plaintiff company. The defendant company Lindenberger Packing Company had the benefit of the entire amount. Under these circumstances, it would be wanting in equity not to require of the defendants the payment to the bank of this money, with interest at the contract rate. Certain items of interest have already been paid the bank on this loan. Clearly the plaintiff has no interest in this money to be repaid, other than to see it paid the bank because it was raised on debentures issued by the plaintiff. The immediate payment of this entire amount would doubtless work an unwarranted hardship upon the defendants. I conclude that the terms outlined upon the interlocutory order are fair and reasonable in this respect; that is, that the defendant company be required to pay the British Commercial Bank, Limited (Reuters Bank) at least \$23,000 yearly in reduction of the principal, on or before the 15th day of December of each year until paid, interest at the contract rate of 7 per cent. from July 9, 1914, to be paid semiannually. Either the injunction in existence against the disposition of any assets of the defendant company, except in the ordinary course of trade, should be continued in effect, or a bond required of defendant for the deferred payments; this matter to be determined on settling the decree.

The evidence shows, as stated, that plaintiff has asserted a claim to \$30,000 worth of fish in prize proceedings not yet concluded in London. The payment of the last \$30,000 of the amount due the bank will not be made until after the final determination of the prize court proceedings, and, if the plaintiff should be successful in its assertion of the claim in those proceedings, it will be required to either turn over the fish to the defendants or account to the defendants for the proceeds; this matter to be settled upon the signing of the decree.

The creditor, Reuters Bank, now British Commercial Bank, is not a party to this litigation. The decree is therefore not conclusive upon it. The court in its interlocutory order, as a condition of denying a receivership, required the deposit by the defendants in the registry of the court of certain sums, now amounting to \$40,000. Unless this money is accepted by the bank and an agreement made for the full discharge by it of the defendants on account of this deben-

ture loan, upon the final payment as herein decreed, or an appeal taken, each to be within a reasonable time, then the money now held in the registry of the court should be returned to the defendants. Unless the plaintiff also releases the defendants from any claim on account of the debenture loan, the bank will be required, if accepting the money, to give a bond to hold the defendants harmless, should the plaintiff appeal upon this question, against the results of such appeal.

.It has been further contended that, in case of the denial of specific performance, the defendants should be required to repay the £15,000 delivered by the bank to the Berlin firm of J. Lindenberger. Several days after the contract of June 18th for the sale of the properties—that is, on June 25th—the loan of £15,000 was obtained upon the following instrument:

"This indenture, made the twenty-fifth day of June, one thousand nine hundred and fourteen, between J. Lindenberger, Incorporated, a company incorporated under the laws of the state of Oregon in the United States of America, the Lindenberger Packing Company, a company incorporated under the laws of the state of Washington in the said United States of America, and West Coast Trading Company, Incorporated, a company incorporated under the laws of the said state of Washington (hereinafter called the Borrowers) of the first part, Hermann Lob Lindenberger, of Berlin in the German Empire, but now residing at the Hotel Cecil, London, merchant of the second part, Bernard Lindenberger, of Seattle, Washington, aforesaid, merchant of the third part, J. Lindenberger, of 31 Georgenkirch Strasse, Berlin, aforesaid, a firm duly registered according to German law, by the said Hermann Lindenberger, a member of that firm of the fourth part, and Reuters Bank, Limited (hereinafter called the Bank), of the fifth part: Whereas by an agreement dated the eighteenth day of June, one thousand nine hundred and fourteen, and expressed to be made between the Borrowers by the said Hermann Lindenberger, their attorney, of the one part and the Lindenberger Cold Storage & Canning Company, Limited, a company incorporated under the English company laws and having its registered office at 27 Mincing Lane, London,, E. C. (hereinafter called the purchasing Company), of the other part, the Borrowers have agreed to sell and the purchasing Company has agreed to purchase the good will of the business carried on by the Borrowers and the assets of such business (except than certain book debts and cash) for a sum of one hundred and eighty-nine thousand pounds (£189,000) to be paid and satisfied as to sixty-five thousand pounds (£65,000) part thereof by the allotment of sixty-five thousand fully-paid preference shares in the purchasing company numbered 1 to 65,000, inclusive, and as to one hundred and twenty-four thousand pounds (£124.000) the residue thereof by the allotment of one hundred and twentyfour thousand fully-paid ordinary shares in the purchasing Company numbered 1 to 124,000, inclusive; and whereas the Borrowers have requested the Bank to lend to them the sum of fifteen thousand pounds (£15,000) which the Bank has agreed to do upon having the repayment thereof with interest and commission thereon at the respective rates hereinafter mentioned, secured in manner hereinafter appearing; and whereas upon the treaty for the said loan the Bank stipulated that the said Hermann Lindenberger, Bernard Lindenberger and J. Lindenberger (hereinafter collectively called the Guarantors) should concur in these presents for the purposes and in manner hereinafter appearing which they, the Guarantors, respectively agreed to do: Now this indenture witnesseth as follows:

"I. In consideration of the sum of fifteen thousand pounds (£15,000) now advanced by the Bank to the Borrowers (the receipt whereof they the Borrowers do and each of them doth hereby acknowledge and the payment whereof in manner aforesaid they, the Guarantors, do and each of them doth hereby also acknowledge) the Borrowers hereby jointly and severally covenant with the Bank to repay to the Bank on demand the said sum of fifteen thousand pounds (£15,000) and also until the whole thereof shall have been repaid to pay to the

Bank interest and also commission thereon or on so much thereof as shall not for the time being have been repaid from the date hereof at the rates hereinafter mentioned.

"2. The interest and commission to be paid by the Borrowers to the Bank as hereinbefore mentioned shall be at the rates following; that is to say, the interest shall be at the rate of six per cent. per annum and the commission shall be at the rate of one-fourth of one per cent. per calendar month or part thereof. The said interest and commission shall be payable quarterly on the thirty-first day of March, the thirtieth day of June, the thirtieth day of September and the thirty-first day of December of each year.

"3. Any such demand as is hereinbefore mentioned shall be sufficiently made if made by a notice in writing signed on behalf of the Bank by any official of the Bank and sent through the post in a prepaid letter addressed to the Borrowers, or any of them, at 31 Georgenkirch Strasse, Berlin, aforesaid.

- "4. The Borrowers as beneficial owners hereby declare that the thirty thousand preference shares in the Purchasing Company numbered 1 to 30,000, inclusive (being part of the sixty-five thousand like shares to be allotted as part of the consideration for the said sale to the purchasing Company), shall stand and be charged with the payment of the principal sum, interest and commission hereinbefore covenanted to be paid, and the Borrowers hereby undertake and agree to deliver to the Bank forthwith after the said thirty thousand shares shall have been allotted the certificate or certificates for the same.
- "5. The Borrowers, and each of them, hereby appoints Emil Wolff chief accountant of Reuters Telegram Company, Limited, and Arnold Wolfgang Hajduska manager of the bank, and other persons, or person, who may from time to time hold such respective offices, and each and every of them, the attorneys and attorney of the Borrowers, and each and every of them in the names of the Borrowers or name, of any of them, to execute and perfect such transfers as may be necessary or thought proper to transfer the said thirty thousand shares, or any of them, after such shares have been allotted into the name of the Bank, or the names or name of any persons or person as trustee, or a trustee, for the Bank, to the intent that the shares so transferred may be more effectually made a security for the moneys intended to be hereby secured.

"6. The Borrowers and each of them hereby declare that after the said thirty thousand shares, or any of them, shall have been allotted in pursuance of the said agreement for sale they, the Borrowers, or such of them to whom such shares shall have been so allotted, or other the persons or person to whom the same, or any of them, may be so allotted shall stand possessed thereof in trust for the Bank subject to such right or equity of redemption as may for the time being be subsisting by virtue of these presents.

"7. The said Hermann Lindenberger and the said Bernard Lindenberger hereby jointly and severally undertake with the Bank that whilst any part of the principal, moneys and interest hereby secured remain due and owing neither of them will exercise the right given to them, or either of them, by the articles of association of the company of nominating and appointing a director of the company.

"8. The Guarantors hereby jointly and severally undertake and agree with the Bank that at least one-half of the said sum of fifteen thousand pounds (£15,000) together with all interest and commission for the time being payable in respect of the whole of such sum shall be paid by the Borrowers to the Bank on or before the twenty-fifth day of June one thousand nine hundred and fifteen, and that the whole of such sum with all interest and commission payable in respect thereof shall be paid by the Borrowers to the Bank on or before the twenty-fifth day of June one thousand nine hundred and sixteen, and that if the Borrowers shall not make such payments or any part thereof they, the Guarantors, or some or one of them, will make such payments to the Bank within the respective periods aforesaid.

"9. Provided always and it is hereby agreed that although as between the Borrowers and the Guarantors the Guarantors are only sureties for the Borrowers, yet as between the Guarantors and the Bank the Guarantors and each of them shall be considered as principals and a principal as regards all the obligations on the part of the Guarantors herein expressed, so that none of

the Guarantors, nor their respective heirs, executors, administrators or successors, shall be released by time being given to the Borrowers, or any of them, or any person or persons claiming through or under them, or any of them, or by any other variation in the provisions of these presents, or any other thing whatsoever whereby the Guarantors, or any of them, or their respective heirs, executors, administrators or successors as sureties or a surety only, would have been so released.

"10. This instrument is to be construed and take effect as a security made

in England and in accordance with English Law.

"In witness whereof the said Hermann Lob Lindenberger as attorney for and on behalf of J. Lindenberger, Incorporated, the Lindenberger Packing Company and West Coast Trading Company, Incorporated, has hereunto set his hand and seal, and the said Hermann Lob Lindenberger on his own behalf has hereunto set his hand and seal, and Bernard Lindenberger has hereunto set his hand and seal, and Hermann Lob Lindenberger, as a partner in the registered firm of J. Lindenberger duly authorized in that behalf, has hereunto set his hand and seal, and Isaac Lindenberger and Nathan Lindenberger, both partners in the above firm, have hereunto set their hands and seals the day and year first above written.

"Hermann Lindenberger,

"As Agent and Attorney. [Seal.]

"Signed, sealed and delivered by J. Lindenberger, Incorporated, the Lindenberger Packing Company and West Coast Trading Company, Incorporated, by Hermann Lob Lindenberger, their attorney duly authorized in that behalf, in the presence of Kenelm H. H. Smith, Cecil House, Holburn Viaduct, E. C., Solicitor.

Hermann Lindenberger. [Seal.]

"Signed, sealed and delivered by Hermann Lob Lindenberger, in the presence of Kenelm H. H. Smith.

Hermann Lindenberger,

"As Attorney. [Seal.]

"Signed, sealed and delivered by Bernard Lindenberger, by Hermann Lob Lindenberger, his attorney duly authorized in that behalf, in the presence of Kenelm H. H. Smith. Hermann Lindenberger,

"Partner of the Firm of J. Lindenberger. [Seal.]

"Signed, sealed and delivered by the said J. Lindenberger, by Hermann Lob Lindenberger, a partner in such firm duly authorized in that behalf, in the presence of Kenelm H. H. Smith.

Isaac Lindenberger. [Seal.]
"Nathan Lindenberger. [Seal.]

"Signed, sealed and delivered by the above-named Isaac Lindenberger and Nathan Lindenberger, in the presence of Kenelm H. H. Smith."

It is contended by the plaintiff that the Vendor Companies had knowledge of the execution of this "security" by Hermann Lindenberger for them at the time of its execution, and that they sanctioned it. But the evidence does not support that claim. It would rather appear that Hermann Lindenberger presumed upon the good nature of his brothers, and acted in this particular without authority. It is shown that Bernard Lindenberger, president of the Vendor Companies, promptly repudiated any liability on account of this "security" agreement, upon learning of it. In so far as the Vendor Companies are concerned, the only authority for entering into this agreement was certain powers of attorney given Robert Lindenberger in March, 1913, under which powers of attorney he executed a substitution power of attorney to Hermann Lindenberger in June, 1913. The powers of attorneys executed by the Vendor Companies are in like form. The one given by the Lindenberger Packing Company is as follows:

"Know all men by these presents that Lindenberger Packing Company, a corporation duly organized, existing and carried on under the laws of the

state of Washington, does hereby make, constitute and appoint Robert Lindenberger its true and lawful attorney for and in its name, place and stead and for its use and benefit to grant, bargain, sell, remise, release, convey and quitclaim, to whom and on such terms as the said attorney may deem advisable, all of its right, title and interest, claim and demand, both in law and equity, as well in possession or in expectancy, either in whole or in part, all its properties, real, personal and mixed wherever found and of whatever nature, together with all the good will of the business, all stock on hand, all accounts due, all franchises, rights and privileges acquired by it together with machinery and any and all things connected with said business and the carrying on of same, including any fleets or boats or fishing rights or privileges or any and all things in connection with its business; and for these purposes to execute and acknowledge by deed or deeds, or any other assurance or assurances, with any covenant whatsoever as he may deem expedient, and by these presents further to receive, confirm, make, execute and deliver any contracts, deeds, conveyances or other instruments whatsoever, and for all these purposes to make and execute any release, compromise, composition, agreement or contract, by deed or otherwise, in his opinion necessary and expedient in the premises, and generally to do and perform all matters and things, transact all business, make, execute and deliver all contracts, orders, deeds, assignments and other rights and assurances and instruments of every kind which may be requisite or proper and necessary to effectuate all or any of the premises; to receive, receipt for and quittance give for any moneys, certificates of stock or other things of value in its name, and for its use and benefit, in connection with the premises, with the same power to all intents and purposes and with the same validity as it could do if personally present.

"Giving and granting unto its said attorney full power to substitute one or more attorneys under him with full power of revocation at his pleasure, hereby ratifying and confirming whatever its said attorney or a substitute

shall or may do by virtue of these presents in the premises.

"In witness whereof, the said Lindenberger Packing Company has caused these presents to be executed, signed by its president and its seal attached hereto, on this 20th day of March, 1913, by authority of the board of directors heretofore duly passed.

Lindenberger Packing Co.,

"By B. Lindenberger, President. [Corp. Seal.]

"Signed and sealed in the presence of

"G. E. Pain, "C. G. Rose.

"State of Washington, County of King-ss.:

"This certifies that before me, a notary public, within the above-named county and state, personally appeared Bernard Lindenberger, as president of the Lindenberger Packing Company, who is known to me to be the identical individual who as such president executed the foregoing power of attorney and instrument in writing and who acknowledged to me that he executed the same as such president by order of the board of directors and for the uses and purposes as therein set forth. March 23, 1913.

E. S. Dungan,

"[Notarial Seal.] Notary Public for Washington."

The evidence shows that no part of the £15,000 loaned upon the security passed, directly or indirectly, to either the defendants or the Vendor Companies. It is shown that it was taken by Mr. Smith, the solicitor of the bank, to Berlin and delivered to I. Lindenberger, father of Hermann Lindenberger and head of the German firm of J. Lindenberger, of which Hermann Lindenberger was a member. This firm at that time was indebted to the Vendor Companies, and still is indebted to the defendant company in a considerable amount.

[5] Powers of attorney are strictly construed. 31 Cyc. 1407. The authority given by the powers of attorney was to sell. Such a power can give no right to borrow. There is no evidence that this £15,000

was in any way a part of the purchase price given by the plaintiff for the holdings of the Vendor Companies. The fact that the Berlin firm also executed the security is inconsistent with its being part of the

purchase price.

[6] The plaintiff and bank had full knowledge of the relation of Hermann Lindenberger, both as to the Vendor Companies and his interest in the German firm. Even were the power of attorney broad enough to include the power to borrow, he could not use the power to borrow for himself or the firm in Berlin. American Surety Co. v. Pauly, 170 U. S. 133, at 156, 18 Sup. Ct. 552, 42 L. Ed. 977. The bank also knew that a week before the execution of this "security" the contract for the sale of all of the property of the Vendor Companies to the plaintiff had been executed. Under these circumstances, the defendants are not required, in equity, to return any part of this loan.

Hermann Lindenberger, as a part of the security for the £15,000, deposited with the bank 30,000 preference shares of the plaintiff company belonging to him. Specific performance being denied, these shares are, of course, worthless; but Hermann Lindenberger was the owner of an interest in the Vendor Companies, the exact extent of which does not appear. All interests in these companies have, under

the evidence, been preserved in the defendant company.

Upon the intervention of the bank, the decree may provide that no part of the interest of Hermann Lindenberger, or the German firm—either shares of stock or dividends—the extent of which to be fully disclosed, shall be paid, assigned, or transferred, or recognized by the defendant company, until such time as the liability of Hermann Lindenberger and the German firm to the bank, on account of the security, shall be ascertained, which questions, on account of their being subjects of countries opposed in war, cannot be determined until the end of the war. This stay should expire within a reasonable time after the conclusion of peace.

[7] Upon the same day that the sale contract was executed, the specific performance of which is sought, the following contract was entered into between the plaintiff and the Crescole Syndicate, Limited:

"This agreement made the eighteenth day of June one thousand nine hundred and fourteen, between Hermann Lindenberger, of Berlin, at present residing at the Hotel Cecil, London, as agent for and on behalf of J. Lindenberger, Incorporated, The Lindenberger Packing Company and West Coast Trading Company, Incorporated, being companies incorporated under the laws of the states of Oregon and Washington in the United States of America (hereinafter called the proposed Vendors) of the first part, J. Lindenberger, of 31 Georgenkirch Strasse, Berlin, aforesaid, a firm duly registered according to German law, of the second part, and Crescole Syndicate, Limited, whose registered office is at Cecil House, Holburn Viaduct, in the city of London (hereinafter called the Syndicate) of the third part: Whereas the proposed Vendors carry on business in the United States of America and they are desirous that an English Company (hereinafter referred to as the proposed Company) should be formed under the Companies Acts 1908 and 1913, for the purpose of acquiring their said business and the assets thereof; and whereas with a view to the acquisition of the said businesses by the proposed Company the proposed Vendors are desirous that the Syndicate should promote the proposed Company and should arrange to find such sums as are necessary to provide the

expenses of the registration formation and flotation of the proposed Company which the Syndicate has agreed to do but as a condition of its so doing the Syndicate has stipulated that the proposed Company should when formed enter into the agreement on its part with the Syndicate hereinafter mentioned, and that the proposed Vendors and the said J. Lindenberger should enter into such agreements on their respective parts as are hereinafter expressed; and whereas it is intended that the proposed Company should have a nominal capital of two hundred and fifty thousand pounds divided into one hundred and twenty-five thousand cumulative participating preference shares (hereinafter referred to as preference shares) of one pound each and one hundred and twenty-five thousand ordinary shares of one pound each; and whereas the draft of the memorandum and articles of association of the proposed Company have been prepared and a copy thereof has for purposes of identification been signed by Kenelm Henry Hallett Smith, a solicitor of the Supreme Court; and whereas it is intended that the good will of the said businesses of the proposed Vendors and all the assets thereof (other than and except certain book debts and cash) should be sold to the proposed Company and that the consideration for such sale should be the sum of one hundred and eighty-nine thousand pounds to be paid and satisfied as to sixty-five thousand pounds part thereof by the allotment of sixty-five thousand fully-paid preference shares of one pound each in the proposed Company, and as to one hundred and twenty-four thousand pounds the residue thereof by the allotment of one hundred and twenty-four thousand fully paid ordinary shares of one pound each in the proposed Company; and whereas the draft of the agreement for sale to the proposed Company has been prepared and has for purposes of identification also been signed by the said Kenelm Henry Hallett Smith; and whereas the said draft agreement for sale contains amongst other clauses a clause (hereinafter referred to as the dividend guarantee clause) by which in effect the proposed Vendor and the said J. Lindenberger undertake to guarantee that the profits of the proposed Company shall for the period of five years therein mentioned be sufficient to pay a dividend at the rate of seven per cent, per annum on the capital for the time being paid up on the preference shares in the proposed Company which may for the time being have been issued, and secure such guarantee by a charge on fifteen thousand of the said preference shares and fifty thousand of the ordinary shares to be allotted as part of the purchase consideration for the said sale: Now these presents witness as follows:

"1. The Syndicate agrees that it will in due course promote and register the proposed Company under the Companies Acts 1908 and 1913, having the capital hereinbefore mentioned and with a memorandum and articles of association in the form, of the draft memorandum and articles of association hereinbefore referred to, with such modifications (if any) as may be agreed to by the proposed Vendors.

"2. The proposed Vendors agree that they will, when the proposed Company has been incorporated, enter into an agreement for the sale of their said businesses and the assets thereof (except as hereinbefore mentioned) in the terms of the draft agreement for sale hereinbefore referred to with such modi-

fications only therein as may be agreed to by the Syndicate.

"The proposed Vendors and the said J. Lindenberger respectively undertake and agree that as soon as the proposed Company is entitled to commence business it will enter into an agreement with the Syndicate substantially in the terms of the draft agreement set out in the schedule hereto, with such modifications only therein as may be approved by the parties hereto, and the Syndicate hereby agrees that if the proposed Company is formed and within one week from the date hereof has become entitled to commence business and is willing to enter into such agreement as is mentioned in this clause, the Syndicate on its part will enter into such agreement with the proposed Company.

"4. The proposed Vendors and the said J. Lindenberger hereby jointly and severally undertake that at least one-half of the sums to become payable by the proposed Company to the Syndicate under the said agreement to be entered into as aforesaid between the proposed Company and the Syndicate, together with all interest and commission for the time being, payable in re-

spect of the whole of such sums, shall be paid by the proposed Company to the Syndicate on or before the expiration of one year from the date of the incorporation of the proposed Company, and that the whole of such capital sums and all interest and commission payable in respect thereof shall be paid by the proposed Company to the Syndicate on or before the expiration of two years from the date of the incorporation of the proposed Company, and that if the proposed Company shall not make such payments, or any part thereof, within the periods aforesaid they, the proposed Vendors, and J. Lindenberger, or some or one of them, will make such respective payments to the Syndicate within the respective periods aforesaid.

"5. As consideration for the services to be rendered by the Syndicate the proposed Vendors agree that they will cause to be allotted or will transfer to the Syndicate, or as the Syndicate shall direct, six thousand five hundred of the said sixty-five thousand preference shares in the proposed Company and also twelve thousand four hundred of the one hundred and twenty-four thousand fully paid-up ordinary shares in the proposed Company to be allotted as part of the consideration for the proposed sale to the proposed Company.

"6. If within one calendar month from the date hereof the proposed Company is not incorporated and entitled to commence business or if though so incorporated and entitled to commence business within that period the proposed Company does not within six weeks from the date hereof enter into an agreement with the Syndicate in the terms of the draft agreement set forth in the schedule hereto with such modifications (if any) as may be approved by the proposed Vendors, then the proposed Vendors and the said J. Lindenberger jointly and severally agree with the Syndicate that they, or some or one of them, will pay to the Syndicate the sum of not exceeding one thousand five hundred pounds as a consideration for the expenses it will have been put to.

"7. This agreement is to be construed and take effect as a contract made in England and in accordance with the law of England.

"In witness whereof the said Hermann Lindenberger, as agent for and on behalf of J. Lindenberger, Incorporated, the Lindenberger Packing Company and West Coast Trading Company, Incorporated, has hereunto set his hand and seal, and the said J. Lindenberger have hereunto set their hand and seal, and the Company has caused its common seal to be hereunto affixed the day and year first above written.

"The Schedule Above Referred to.

"This agreement made the 18th day of June, one thousand nine hundred and fourteen, between the Lindenberger Cold Storage & Canning Company Limited (hereinafter called the Company) of the one part and Crescole Syndicate, Limited (hereinafter called the Syndicate) of the other part: Whereas the Company has been formed and incorporated under the Companies Acts 1908 and 1913 with a capital of two hundred and fifty thousand cumulative participating preference shares (hereinafter called preference shares) of one pound each and one hundred and twenty-five thousand ordinary shares of one pound each; and whereas by an agreement (hereinafter referred to as the sale agreement) dated the 18th day of June, one thousand nine hundred and fourteen, and expressed to be made between J. Lindenberger, Incorporated, the Lindenberger Packing Company and the West Coast Trading Company (therein and hereinafter called the Vendor Companies) by Hermann Lindenberger, their attorney, of the one part, and the Company of the other part, the Vendor Companies have agreed to sell and the Company has agreed to purchase the good will of the businesses (except as in the sale agreement is mentioned) for a sum of one hundred and eighty-nine thousand pounds to be paid and satisfied as to sixty-five thousand pounds part thereof by the allotment of sixty-five thousand fully-paid preference shares in the Company and as toone hundred and twenty-four thousand pounds the residue thereof by the allotment of one hundred and twenty-four thousand fully-paid ordinary shares in the Company; and whereas the Company is desirous of making arrangements which will enable the expenses of and incidental to the incorporation and formation of the Company to be provided and of also making such arrangements as are hereinafter mentioned in relation to the issue of the balance of the said preference shares beyond those which by the sale agreement are to be allotted in satisfaction of the purchase consideration for the said sale, and with a view thereto the Company and the Syndicate have agreed to enter into such agreement as is hereinafter expressed: Now these presents witness that it is hereby agreed as follows:

"1. The Syndicate agrees that it will pay, satisfy and discharge all the expenses of and incidental to the negotiation, preparation and execution of these presents the sale agreement and the memorandum and articles of association of the Company and the formation and registration of the Company, the completion of the said sale and the transfer to the Company of the premises by the sale agreement agreed to be sold to the Company other than and except any fees in respect of such transfer which are or may be payable in the United States of America, which last-mentioned fees it is hereby expressly declared are to be payable and paid by the Company.

"2. In consideration of the agreement on the part of the Syndicate contained in the preceding clause the Company agrees to pay to the Syndicate the sum of five thousand pounds and also until payment to pay to the Syndicate interest and also commission thereon, or on so much thereof as shall for the time being remain unpaid from the date of these presents at the rates herein-

after mentioned.

"3. The Company agrees that until the thirty-first day of December, one thousand nine hundred and fifteen, the Syndicate shall be at liberty to require the Company to issue a prospectus offering to the public any of the said preference shares in the Company which shall for the time being not have been issued and to employ the Syndicate to issue such prospectus accordingly.

"4. If at any time before the said thirty-first day of December, one thousand nine hundred and fifteen, the Syndicate shall require the Company to issue such prospectus as is named in the last preceding clause the Syndicate agrees that it will undertake the issue of such prospectus on behalf of the Company, and will cause the same to be advertised and circulated in a sufficient and effective manner, and that it will in due course, after the issue of such prospectus for and on behalf of the Company apply for and use its best endeavors to obtain a settlement and official quotation on the London Stock Exchange for the shares to be offered by such prospectus, and that it will pay, satisfy and discharge all the expenses of and incidental to the issue, advertisement and circulation of such prospectus and the issue of the shares applied for in response to such prospectus and the said application for such a settlement and official quotation as aforesaid.

"If the Syndicate shall before the date aforesaid require the Company to issue such a prospectus as aforesaid the Company agrees to pay to the Syndicate as consideration for the services to be rendered and the work to be done by the Syndicate under the provisions of the last preceding clause the further sum of five thousand pounds and also until payment to pay to the Syndicate interest and also commission thereon or on so much thereof as shall for the time being remain unpaid from the date of the issue of the said

prospectus at the rates hereinafter mentioned.

"6. The interests and commission to be paid by the Company to the Syndicate as hereinbefore mentioned shall be at the rates following; that is to say, the interest shall be at the rate of six per centum per annum and the commission shall be at the rate of one-fourth of one per centum per calendar month or any part thereof. The said interests and commissions shall be payable quarterly on the thirty-first day of March, the thirtieth day of June, the thirtieth day of September, and the thirty-first day of December in each year.

17. If the Syndicate shall before the date aforesaid require the Company to issue such a prospectus as aforesaid the Company agrees that the sums to be received in respect of the issue of the shares to be offered by the said prospectus shall be applied so far as they are required for such purposes in payment or repayment to the Syndicate of the said two sums of five thousand

pounds and the interest and commission thereon.

"8. If the Syndicate shall, before the date aforesaid, require the Company to issue such a prospectus as aforesaid no part of the shares to be offered to the public by such prospectus which may not be applied for in response to

such prospectus shall so long as any part of the said two sums of five thousand pounds or any interest or commission on such respective sums or any part thereof shall remain due to the Syndicate afterwards be issued or sold, or otherwise disposed of by the Company, except on the terms that the proceeds of such shares shall be applied so far as may be required in payment to the Syndicate of so much of the said respective sums and the interest and com-

mission thereon as shall remain due to the Syndicate.

"9. If the Syndicate shall not, before the date aforesaid, require the Company to issue such a prospectus as aforesaid, none of the said preference shares shall so long as any part of the first-mentioned sum of five thousand pounds or any interest or commission on such sum remains due to the Syndicate, be issued or sold or otherwise disposed of by the Company after the said thirty-first day of December, one thousand nine hundred and fifteen, except on the terms that the proceeds of such shares shall be applied so far as they may be required in payment to the Syndicate of so much of such sum of five thousand pounds and the interest and commission thereon as shall remain due to the Syndicate.

"10. Any prospectus to be issued to the public in relation to the said Prefer-

ence Shares shall be approved by both parties hereto.

"In witness whereof the Companies have caused their respective common seals to be hereunto affixed the day and year first above written.

"Hermann Lindenberger,

"Agent and Attorney. [Seal.]

"Signed, sealed and delivered by the above-named Hermann Lindenberger as agent for and on behalf of the above-named J. Lindenberger, Incorporated, the Lindenberger Packing Company and West Coast Trading Company, Incorporated, in the presence of William E. Stone, Cecil House, Holburn Viaduct, E. C., Solicitor's Clerk. Hermann Lindenberger,

"Partner in firm of J. Lindenberger. [Seal.]

"Signed, sealed and delivered by Hermann Lindenberger, a partner in the above-named firm of J. Lindenberger, duly authorized to sign on behalf of such firm, in the presence of William E. Stone.

"The common seal of Crescole Syndicate, Limited, was hereunto affixed in

the presence of A. W. Hajduska, Director and Secretary. [Seal.]"

The Crescole Syndicate is a corporation controlled by Reuters Bank, organized for the purpose of carrying out transactions deemed not advisable to be carried out by the bank directly, a promoting syndicate financed by the bank. Although the evidence was not clear and the transcript of it does not agree with my recollection, the impression gained by me from such evidence was that the receipts from the transactions by the Syndicate "found their way" to the bank. Mr. Hajduska, manager of the bank, was the sole director, manager, and secretary of the Syndicate.

On account of the trouble in Ireland in the summer of 1914, and the further fact that the summer was a dull time, so far as business was concerned, Mr. Hajduska counseled delaying until winter for the issuance of the prospectus and offering of preference shares to the public, provision for which was made in this agreement, the bank to finance the business in the meantime. The war intervened; the Syndicate did not require the issuance of the prospectus offering such

shares to the public, and no such shares have been sold.

As this contract is dependent upon the main contract, in which specific performance has been denied, its performance becomes impossible.

It is contended that the £5,000 mentioned in paragraph 2 of the contract have been earned; that, though it was contemplated that it

should be paid from the proceeds of the sale of preference shares to be offered the public, that method of payment becoming impossible upon the denial of specific performance of the main contract, equity requires the payment of that amount to the Syndicate as a condition of the denial of specific performance.

It is shown that, in the payment of stamp taxes, fees, and charges connected with the incorporation and registration, the Syndicate paid in "out of pocket expenses" £750. Equity requires the payment of this amount with interest at 6 per cent. from the date of in-

corporation, June 15, 1914.

Some portion of the remaining £4,250 of this item has doubtless been earned, in the way of services in connection with the incorporation of the plaintiff company and the matters referred to in paragraph 1 of the contract, but it is clearly apparent that something besides the mere labor in connection with this matter was involved.

As already stated, one of the chief objects of the Vendor Companies in creating the English company was to establish a London credit. The officers of the Syndicate, who were to acquire shares of stock under the agreement and be paid the money in question, were the officers of the bank relied upon for the desired credit. It is shown that Mr. Smith, in all these transactions, acted as the solicitor for the bank and the Syndicate, as well as for the Lindenberger Company. In connection with service of incorporating and registering the plaintiff company, Hermann Lindenberger promised and delivered to Mr. Smith 2,000 common shares of the new company. Hermann Lindenberger testifies that these shares were given to Mr. Smith to pay for these services, and some fault is found with the manner in which certain of these services were discharged.

As Mr. Smith was the regular solicitor for both the bank and the Syndicate, it is not to be expected that the Lindenbergers, their interests being opposed to those of the bank and Syndicate, would obtain any undue advantage in these matters, especially as Hermann Lindenberger, who represented them, was not well versed in the English language. Mr. Smith testifies that the 2,000 shares were not in payment of his services, but a present made to him by Hermann Lindenberger; that he only represented the bank and the Syndicate and that he obtained the consent of his principals before accepting the 2,000 shares; that, at the beginning of the incorporation, he advised Hermann Lindenberger to secure some one else to represent him, but that Hermann Lindenberger expressed himself as satisfied to leave the matter entirely in the hands of Mr. Smith. Hermann Lindenberger denies that he was so advised. Mr. Weiss, chairman of the board of directors of the plaintiff company, testifies that he heard Mr. Smith so advise Mr. Lindenberger. I am inclined to reject the testimony of Mr. Weiss in this matter, for the reason that, in the positive and detailed account that he gave of another matter, concerning a certain £200 left with him by Hermann Lindenberger, intended by the latter in payment of the 200 qualification shares allotted to Hermann Lindenberger and Bernard Lindenberger, on account of the directorship of each, he was thoroughly discredited. I am further so inclined because of the

fact that Weiss was not connected with the transactions in question at the beginning, when, it is claimed, Mr. Smith advised Hermann Lindenberger to secure a representative on his own behalf. This leaves Hermann Lindenberger's denial only opposed by Mr. Smith's statement. Mr. Smith fails to sustain the burden resting upon him under these circumstances

For the foregoing reasons I am inclined to the belief that the consideration for the £5,000 promised the Syndicate was not clearly expressed. The fact that it was to be paid out of the proceeds of preference shares to be sold the public by the Syndicate itself shows, at least, part of the consideration to have been the securing of further credit. If, as Mr. Smith says, Mr. Lindenberger gave him gratuitously the 2,000 shares, he being the mere solicitor of the bank, it is not unreasonable to suppose that, in dealing with the officers in direct control of the credit to be extended by that institution, Mr. Lindenberger would be still more generous, and that his gratitude was not only for past benefits, but, in part, actuated by a lively sense of favors to come.

For these reasons, the justice of the claim to that part of the £5,000 in excess of the £750 for out of pocket expenses is not established with sufficient certainty to warrant the court in imposing its

payment as a condition in denying specific performance.

In concluding that this consideration was not clearly expressed, and in giving effect to the fact that, in this transaction, Hermann Lindenberger was only represented by Mr. Smith, the regular solicitor of the bank and Syndicate, I have been influenced by another dispute which has arisen: The contract for the sale of the property of the Vendor Companies to the plaintiff, already set out, provides the manner in which the consideration shall be paid the Vendor Companies, and, in this connection, contains the following provision:

"The residue of the consideration shall be the amount expended by the Vendor Companies respectively before the first day of June, one thousand nine hundred and fourteen, in making preparation for the new season's pack over and above the value of twenty thousand dollars which is to be for the benefit of the Company. Such amount if not otherwise agreed on is to be determined by a single arbitrator in accordance with the Arbitration Act 1889, provided that the Company shall only be called upon to make such payment as and when it receives funds through the sale of its stock."

Mr. Smith testified that "stock" was intended to mean the output of the companies in the way of fish, while the defendants contend that the 60,000 preference shares to be sold by the Syndicate were in contemplation. Either Mr. Smith is wrong in his interpretation, or the minds of the parties did not meet. Owing to the fact that Mr. Smith undertook to represent all of the conflicting interests, I conclude that the minds of the parties did not meet in this particular.

Mr. Winfree, of the Portland firm of attorneys engaged by plaintiff in the summer of 1914 to attend to matters arising in America in connection with the transfer of the property of the Vendor Companies, did a considerable amount of work before it became apparent that the property would not be transferred to the English corporation. I find the reasonable value of these services to be \$2,500, which

is required to be paid by defendants as a condition of the denial of specific performance.

The plaintiff company engaged an office of Mr. Weiss, and were furnished clerical services by him. He also paid for certain stationery for the company, and was to receive, as chairman of the board of directors, £250 per annum. These items for six months, which is, approximately, the time elapsing from the formation of the company, in June, 1914, until the Seattle meeting, in December, when it became apparent that the defendants would, owing to the war, only proceed upon the basis of an American company, amount to £210. He will be allowed nothing on account of his attending the trial.

Many minor issues have been discussed, but I have not considered it necessary to state them. They are controlled by the foregoing. The amounts have been stated in pounds, rather than dollars, to make round sums

The decree will, of course, be put in terms of dollars. Specific performance being denied, an accounting will also be denied.

If the bank intervenes and accepts the foregoing terms, the debentures are to be surrendered and canceled and all title papers held by the plaintiff and bank are to be likewise surrendered. Interest will be allowed at 6 per cent. upon the items found due Mr. Weiss and the syndication from the time the same became due. Upon deposit of these amounts in the registry of the court, interest to stop, and, if the deposits remain in the registry of the court three months, unaccepted, they may be withdrawn by the defendants, unless otherwise ordered, without interest running further. Upon the acceptance of the amounts allowed Mr. Weiss, the Syndicate and Mr. Winfree's firm (Teal, Winfree & Minor), they are to give full acquittance and discharge of all claims against the defendants,

Costs on account of reporting the case and the transcript of the evidence, and any other like items, to be divided equally. Costs not allowed either party.

WEBB et al. v. SOUTHERN RY. CO.

(District Court, S. D. Alabama, N. D. August 17, 1916.)

No. 536.

1. Removal of Causes \$\&=\89(1)\$—Proceedings for Removal—Transfer of Jurisdiction.

On the filing by a defendant in a state court of a sufficient petition and bond in conformity to the removal statute, if the record on its face shows the right of petitioner to a removal, the jurisdiction of the state court ceases and that of the federal court attaches, notwithstanding the refusal of the state court to order a removal; any question of the removability of the cause being for the determination of the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 162, 165; Dec. Dig. ६—89(1); Appeal and Error, Cent. Dig. § 724.]

2. Removal of Causes \$\iftharpoonup 31\to Diverse Citizenship\to Unnecessary Parties.

In determining the removability of a cause, indispensable parties only are to be considered.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 71; Dec. Dig. \$\infty\$=31,]

3. Removal of Causes 31—Proceedings for Removal—Parties for Purpose of Removal.

To an action by the owner to recover for loss of property by fire alleged to have been caused by the negligence of defendant, insurance companies which issued and paid policies covering part, but not all, of the property destroyed are not indispensable parties for the purpose of determining the removability of the cause; the entire legal right of action-being in the owner and the insurers having only an equitable right to share in the recovery.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 71; Dec. Dig. &=31.]

4. Parties \$\iff 6(2)\$—Action for Use of Another—Construction of Statute. Such an action is not one brought by the owner for the use of the insurers within the meaning of Code Ala. 1907, \$ 2490, which provides that "in all cases where suits are brought in the name of the person having the legal right for the use of another, the beneficiary must be considered as the sole party on the record."

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 7; Dec. Dig. ⊕ 6(2).]

5. REMOVAL OF CAUSES \$31-PARTIES FOR PURPOSE OF REMOVAL—EFFECT OF LOCAL STATUTE.

The interest of the insurers in such action being a purely equitable one in the proceeds of any recovery, they could not be made indispensable parties by a local statute to deprive a federal court of jurisdiction on removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 71; Dec. Dig. &=31.]

6. Removal of Causes €== 115—Parties for Purpose of Removal—Effect of Conformity Statute.

The conformity statute (Rev. St. § 914 [Comp. St. 1913, § 1537]) cannot be invoked to deprive a federal court of its rightful jurisdiction of a cause on removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 245, 247, 248, 251; Dec. Dig. =115.]

At Law. Action by John C. Webb, individually and for the use of the Queen Insurance Company of America and the London & Lancashire Fire Insurance Company, the Queen Insurance Company of America, and the London & Lancashire Fire Insurance Company, against the Southern Railway Company. On motion to remand to state court. Denied.

Garber & Garber, of Birmingham, Ala., and King & Spalding, of Atlanta, Ga., for plaintiffs.

Pettus, Fuller & Lapsley, of Selma, Ala., for defendant.

HENRY D. CLAYTON, District Judge. This cause is submitted upon the plaintiffs' motion, which is in the nature of a motion to remand to the state court. The action in this case was instituted on August 10, 1915, in the law and equity court of Marengo county,

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Ala. There are four counts in the complaint, varying from each other in minor respects. For present purposes it is not necessary to consider more than one of them, the first, which with the above caption is in the following language:

"First Count. The plaintiffs, John C. Webb, for the use of himself and the Queen Insurance Company of America, a corporation, and the London & Lancashire Fire Insurance Company, a corporation, and the Queen Insurance Company of America, a corporation chartered and existing under the laws of the state of New York, and the London & Lancashire Fire Insurance Company, a corporation chartered and existing under the laws of the United Kingdom of Great Britian and Ireland, claim of defendant, Southern Railway Company, a body corporate, the sum of \$50,000 as damages due by reason of the wrongful act and negligence of the said defendant in this: For that heretofore on, to wit, the 26th day of January, 1915, the said defendant was running and operating a steam railway through Demopolis, Ala., in the said county of Marengo, and was running and operating thereon a steam locomotive; that the plaintiff John C. Webb, on the said date, to wit, the 26th day of January, 1915, was the owner of a certain compress building, including platforms, sheds, brick boiler house, together with the equipment of compress machinery therein contained, and a certain ice house storage building, located on the north side of the railroad track, or tracks, of the said Southern Railway in Demopolis, Ala., and near the said railroad tracks, and plaintiffs aver that said property, to wit, said buildings, machinery, and other property, so destroyed was of the value of \$50,000, and that said buildings, machinery, and other property, including said ice house storage building, were, on, to wit, the 26th day of January, 1915, destroyed by fire, which fire was occasioned by the negligence of said defendant, Southern Railway Company, as follows: Said fire was caused by sparks emitted from an engine being operated on said track or tracks of said Southern Railway Company adjoining the premises upon which said property above described was situated, said engine being operated by said Southern Railway Company. Plaintiffs aver that said Southern Railway Company's said engine was not equipped with proper spark arresters, and that the same was so imperfect that, instead of arresting the sparks therefrom, it emitted large quantities of sparks into the air, endangering said property adjacent to its tracks, and that said condition of said engine was negligence; that the failure to have spark arresters on said engine which would prevent said quantity of sparks from escaping was negligence, and that by reason of such negligence large quantities of sparks were emitted, from and by which the said compress building was ignited and it and the other said property was destroyed by fire.

"Plaintiff further avers that as a consequence of said negligence of the said defendant, its agents, servants, or employes, the said property of the value aforesaid was set on fire and destroyed by sparks from a locomotive operated by the defendant on its said track, or tracks.

"The plaintiffs aver that the said property, except the said ice house storage building, had been before, and was on the 26th day of January, 1915, insured against loss by fire by the said London & Lancashire Fire Insurance Company in the sum of \$14,500, of which amount \$689 was insurance upon the said compress building, and the sum of \$13,811 was insurance upon machinery and personal property contained on the premises aforesaid, and that said property was insured against loss by fire by the Queen Insurance Company of America, in the sum of \$21,000, of which \$14,405.50 was insurance upon said compress building, and \$6,595.50 was insurance upon said machinery and property above mentioned. Said policies were written in the name of John C. Webb & Sons, but plaintiff John C. Webb was the owner of all of said property and was insurance by said policies, and the sums hereinafter stated were paid by said insurance companies to him.

"Plaintiffs further aver that because of the issuance of the policies of insurance upon said property and of the loss by fire, the said London & Lancashire Fire Insurance Company paid to the owner thereof, to wit, the plaintiff, John C. Webb, the sum of \$12,262.66, and the said Queen Insurance

Company did pay to the said owner the sum of \$19,931,84. By reason of the said payments the said insurance companies so paying the same became and were subrogated to the claim of the said John C. Webb, plaintiff, against the said Southern Railway Company as a wrongdoer for the destruction of said building to an amount equal to the payments so made by them, and, furthermore, upon the said several payments and in consideration thereof, the said John C. Webb, the plaintiff, did assign, set over, and transfer in writing to the said London & Lancashire Fire Insurance Company all rights, claims, interests and choses in action, which he had against said Southern Railway Company, for its liability for the burning or destruction of said property to the extent of said payments above mentioned so made to him by said London & Lancashire Fire Insurance Company, and did assign and transfer in writing to said Queen Insurance Company of America all claims and demands which he had against said Southern Railway Company arising from or connected with said loss or damage to the extent of an amount equal to the above-stated sum so paid by said Queen Insurance Company of America to said John C. Webb. By reason of which said several assignments, the said plaintiffs London & Lancashire Fire Insurance Company and the Queen Insurance Company of America became and are joint owners with the said plaintiff John C. Webb in and of the right of recovery for the damage of property aforesaid against the said Southern Railway Company.

"Plaintiffs further aver that the said John C. Webb was, as was well known to the said Southern Railway Company, engaged in the business of compressing cotton at said compress, and that the destruction of said compress occurred during the season for the compressing of cotton; that by reason of the destruction of said property the said plaintiff John C. Webb was prevented from compressing 7,500 bales of cotton, which were offered to said Webb for compression at said compress after the happening of the said fire and while he was proceeding with the utmost diligence to restore said compress, and before the same could be restored; the price for compressing cotton which plaintiff Webb would have received for compressing said 7,500 bales of cotton was 81/2 cents per hundred pounds, and the profits thereof were 30 cents per bale above the cost of compression; that said cotton was shipped without being compressed because of the destruction of said compress plant and the deprivation of its said use, whereby said plaintiff John C. Webb was damaged in the sum of \$2,250, which sum he is entitled to recover as a part of the damages inflicted by said Southern Railway Company by reason of the destruction of said property and as arising out of said loss by fire, which was

occasioned by the negligence of the defendant aforesaid.

"All of which has been to the damage of the said plaintiffs in the sum first above stated."

Within the time allowed for pleading in the state court, the defendant presented its written application in proper form and substance for the removal of the cause. This application was accompanied by a bond, conditioned as required by law, which was approved by the judge of the state court. Upon the hearing that court refused to make the order of removal. Thereupon, and in due time, the defendant filed in this court a transcript of the proceedings in the state court, with a petition asking Judge Harry T. Toulmin, United States District Judge for the Southern District of Alabama, to restrain plaintiffs from the prosecution of their suit in the state court, alleging, in effect, that as a matter of law this court has jurisdiction of the controversy, and that this court should hear and determine same. Judge Toulmin issued the order, upon bond being given by the defendant, restraining the plaintiffs from the prosecution of their suit in the state court until the question of the removability of the cause to this court should be settled.

[1] 1. The defendant complied with every requirement of law governing the removal of causes from a state court to a federal court. This, in and of itself, operated as a removal provided the cause was removable. In other words, under the circumstances shown, if the cause be removable to the federal court, this court will treat it as having been removed, although the judge of the state court declined to make the proper order. Crchore v. Ohio & M. Ry. Co., 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144; Railroad Co. v. Koontz, 104 U. S. 5, 15, 26 L. Ed. 643; City of Montgomery v. Postal, etc., Cable Co. (D. C.) 218 Fed. 471. See, also, Boatmen's Bank v. Fritzlen, 135 Fed. 650, loc. cit. 653, 68 C. C. A. 288, 291, where Sanborn, Circuit Judge, for the court said:

"When a petition for removal and the bond required by the act of Congress are filed, and the record on its face shows the right of the petitioner to a removal, the jurisdiction of the state court ceases, and that of the federal court attaches."

In Chesapeake & Ohio Ry. Co. v. McCabe, 213 U. S. 207, 216, 217, 29 Sup. Ct. 430, 434 (53 L. Ed. 765), in speaking of the removal statute, the court said:

"It is apparent that these provisions are intended to confer jurisdiction upon the United States Circuit Court (now the District Court) to determine for itself the removability of a given cause, and it has been accordingly held in this court that, notwithstanding the refusal of the state court to remove the case, the party desiring a removal may file a transcript of the record in the Circuit Court (now the District Court) of the United States, and if the case was a removable one, it is immaterial that the state court has denied the petition for removal. Kern v. Huidekoper, 103 U. S. 485 [26 L. Ed. 354], and cases therein cited. And it was held in Traction Co. v. Mining Co., 196 U. S. 239 [25 Sup. Ct. 251, 49 L. Ed. 462], that, notwithstanding the refusal of the state court to make an order of removal, the controversy being removable to the United States Circuit Court (now District Court), that court might protect its jurisdiction by injunction against further proceedings in the state court."

[2, 3] 2. The complaint shows that the plaintiffs are John C. Webb, a citizen of Alabama, London & Lancashire Fire Insurance Company, a British corporation, and the Queen Insurance Company of America, a New York corporation, and that the defendant, Southern Railway Company, is a Virginia corporation.

In their written brief plaintiffs state:

"This suit was brought first to enforce the rights of the plaintiff insurance companies, claiming under subrogation, and also to enforce their rights as assignees of a partial interest in the chose in action arising out of the destruction of certain property through negligence"

-and contend that:

"Application to remove must be based on the idea that the insurance companies can be disregarded as parties plaintiff. Otherwise, the case could not be removed, as all the plaintiffs and all the defendants must possess the requisite residence and citizenship. Smith v. Lyon, 133 U. S. 315 [10 Sup. Ct. 303, 33 L. Ed. 635]."

Analysis of the complaint shows that John C. Webb owned all the property described therein at the time it was negligently, as alleged, burned by the defendant or its employés. It is further shown that the

London & Lancashire Fire Insurance Company and the Queen Insurance Company of America had insured certain parts of the property alleged to have been so destroyed; that the policies of insurance did not cover a certain "ice storage house," described in the complaint and for the destruction of which damages is asked; and, further, that the policies did not cover the alleged loss of Webb on account of the unrealized profits which he claims he would have received from compressing 7,500 bales of cotton if his compress had not been so destroyed, and which profits he avers would have been \$2,250. The complaint states that the policy issued by the London & Lancashire Fire Insurance Company was for \$14,500; and that this company paid Webb \$12,262.66 on account of the loss under such policy; and that it is subrogated to Webb's rights thereunder; and that he has assigned and transferred it to said company; and that the policy of the Queen Insurance Company of America was for \$21,000; and that this company paid Webb on account of the loss covered by this policy \$19,-931.84; and that it is subrogated to Webb's rights thereunder; and that he has assigned and transferred it to said company. It will be observed, therefore, that the amounts paid to Webb by the two insurance companies total \$32,194.50, and that damages are claimed over and above such sum for the sole benefit of the plaintiff Webb; the whole damages asked in the complaint being \$50,000. The settled rule is that:

"* * * If there are several coplaintiffs, the intention of the act (the Removal Act) is that each plaintiff must be competent to sue, and if there are several codefendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained." Smith v. Lyon, 133 U. S. 315, 319, 10 Sup. Ct. 303, 304 (33 L. Ed. 635).

And it is equally well settled that:

"* * * In controversies between citizens of different states, the jurisdiction of the federal courts depended, not upon the relative situation of the parties concerned in interest, but upon the relative situation of the parties named in the record." Coal Co. v. Blatchford, 11 Wall. 172, 175, 20 L. Ed. 179.

The question in controversy between Webb, a citizen of Alabama, the sole owner of the property and his compressing business, for the destruction of which the action was instituted, against the defendant, a citizen of Virginia, can be litigated without the presence of the Queen Insurance Company of America, a citizen of New York, and the London & Lancashire Fire Insurance Company, an alien. Neither of the insurance companies is a necessary and indispensable party to Webb's controversy with the railway company. The case here, therefore, is to be treated as between Webb, a citizen of Alabama, and the railway company, a corporation and citizen of Virginia, and if rightly reduced to this status the cause is removable, for it is a controversy between a citizen of one state against a citizen of another state. Judicial Code, § 28, Act March 3, 1911, c. 231, 36 Stat. 1094 (Comp. St. 1913, § 1010); N. Y. Const. Co. v. Simon (C. C.) 53 Fed. 1; Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514; Bacon v. Rives, 106 U. S. 99, 1 Sup. Ct. 3, 27 L. Ed. 69; Fraser v. Jennison, 106 U. S.

194, 1 Sup. Ct. 171, 27 L. Ed. 131; Wood v. Davis, 18 How. 467, 15 L. Ed. 460.

The insistence of the plaintiffs is, however, that the joinder of the Queen Insurance Company of America, a citizen of New York, as party plaintiff, with Webb, a citizen of Alabama, raises a barrier against the jurisdiction of this court; that because of such fact the case is not removable. Of course, if the New York corporation had not been made a party plaintiff, the action would then have been by a citizen of Alabama and an alien, the British corporation, as parties plaintiff, against the Virginia corporation, party defendant, and the cause would then have been removable; the requisite jurisdictional amount being shown to be involved in the controversy. On the other hand, the defendant's contention is that the New York insurance company, as well as the British insurance company, is not an indispensable party to the suit.

It must be admitted, I think, that if the New York insurance company is not an indispensable party to the suit, then this court ought to, and will, so far as this motion is concerned, not regard that company as a party to the suit. As was said in Rogers v. Penobscot Mining Co., 154 Fed. 606, loc. cit. 610, 83 C. C. A. 380, 384:

"In a determination of the jurisdiction of the national courts and the right to remove causes of action to them, indispensable parties only should be considered, because all others may be dismissed or disregarded, if their presence would oust or restrict the jurisdiction or the right."

This language was taken from Boatmen's Bank v. Fritzlen, 135 Fed. 657, 68 C. C. A. 295, and as apropos here let me quote further from that case:

"Justice is proverbially blind, but a court cannot, and ought not to, fail to see the patent facts which a record discloses, or to perceive the unavoidable deduction it compels; and, where the only rational inference from the pleadings and the record is that an improper party or a sham cause of action has been injected into a suit for the sole purpose of defeating the jurisdiction of the federal court over the real controversy, pleading and evidence to that effect aliunde are neither indispensable nor necessary, and the Constitution and the acts of Congress vest in the court the power, and impose upon it the duty, to find from the record alone the attempted fraud, and to prevent its perpetration."

3. Is the Queen Insurance Company an indispensable party? Certain it is this company has no interest in the damages sought by Webb for the destruction of the "ice storage house," nor has it any interest in the damages claimed by Webb on account of the destruction of his cotton compressing business, and also, it is indisputable that the Queen Insurance Company of America has no interest in the policy issued by the London & Lancashire Fire Insurance Company.

"An indispensable party is one who has such an interest in the subjectmatter of the controversy that a final decree between the parties before the court cannot be made without injuriously affecting his interests or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience."

"Every other party who has any interest in the controversy or the subjectmatter which is separable from the interest of the other parties before the court, so that it will not necessarily be directly and injuriously affected by a decree which does complete justice between them, is a proper party to a suit. But he is not an indispensable party, and if his presence would oust the jurisdiction of the court the suit may proceed without him. Sioux City, etc., Ry. Co. v. Trust Co. of N. A., 82 Fed. 124, 126, 27 C. C. A. 73, 75"; Rogers v. Penobscot Mining Co., 154 Fed. 606, 83 C. C. A. 380.

And, of course, the same rule obtains where the action is at law, as was the case of Rogers v. Penobscot Min. Co., supra.

Of course, all the property and business for which damages are sought in this action belonged to the plaintiff Webb, and the action could properly have been brought by him to recover on every element of damages, or for every item of injury made the basis of the complaint against the defendant railway company. But the plaintiffs say that the New York insurance company is an indispensable party because the policy of insurance issued by it was paid in part to Webb, and was by him transferred and assigned to it. According to the complaint the buildings and property were of greater value than the insurance money paid to Webb; and it is shown that the insurance companies did not pay the whole amount of the loss, or the full amount stated in the policies. It seems to me that this cause of action could have been brought in the name of Webb alone, that all damages could have been recovered which are claimed in the complaint, and that it was not necessary to make mention of the insurance companies. Indeed, the defendant would not have been allowed on the trial to even suggest that the insurance companies had issued policies on a part of the property destroyed, and that they had paid in part these policies, but not in full, or that the plaintiff Webb had assigned the claim, or had assigned the policies, to the insurance companies in consideration of the partial payments thereunder. In Hall & Long v. Railroad Companies, 80 U. S. 367, 371-373, 20 L. Ed. 594, it is said:

"In Gales v. Hailman, 11 Pa. 515, it was ruled that a shipper, who had received from his insurer the part of the loss insured against, might sue the carrier on the contract of bailment, in his own right, not only for the unpaid balance due to himself, but as trustee for what had been paid by the insurer in aid of the carrier, and that the court would restrain the carrier from setting up the insurer's payment of his part of the loss as partial satisfaction. So in Hart et al. v. Western Railway Co., 13 Metc. [Mass.] 99 [46 Am. Dec. 719], it was held that where underwriters had paid a loss by fire caused by a locomotive of a railroad corporation, the owner might recover also from the corporation for the use of the underwriters, and that he could not release the action brought by them in his name. There is also a large class of cases in which attempts have been made by insurers who had paid a loss to recover from the party in fault for it, by suit in their own right, and not in the right of the assured. Such attempts have failed, but in all the cases it has been conceded that suits might have been maintained in the name of the assured party for the use of the insurers. And such is the English doctrine settled at an early period.

"It has been argued, however, that these decisions rest upon the doctrine that a wrongdoer is to be punished, that the defendants against whom such actions have been maintained were wrongdoers, but that, in the present case, the fire by which the insured goods were destroyed was accidental, without fault of the defendants, and therefore that they stood, in relation to the owner, at most in the position of double insurers. * * * A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, and even greater, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. He is not entitled to a cession of the remains of

the property, or to have the loss adjusted on principles peculiar to the contract of insurance; and when a loss occurs, unless caused by the act of God, or a public enemy, he is always in fault. The law raises against him a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent, in fact, he has consented by his contract to be dealt with as if he were not so. He does not stand, therefore, on the same footing with that of an insurer, who may have entered into his contract of indemnity, relying upon the carrier's vigilance and responsibility. In all cases, when liable at all, it is because he is proved, or presumed to be, the author of the loss. There is nothing, then, to take the case in hand out of the general rule that an underwriter, who has paid a loss, is entitled to recover what he has paid by a suit in the name of the assured against a carrier who caused the loss."

In South. Ry. Co. v. Blunt & Ward, 165 Fed. (C. C.) 258, 262, a case similar in some respects to this, Judge Toulmin said:

"If from the pleadings it appeared that the Transportation Mutual Insurance Company had paid to the plaintiff only a part of the loss, they would be jointly interested in the recovery from the indemnitors, Blunt & Ward, and the plaintiff could maintain the action in his own name and recover the full amount of the loss. As to the amount paid by the insurance company, it would become a trustee for said company. If the insurance company had paid the plaintiff all of the loss, then this suit should be by the insurance company alone in the name of the railway company as the nominal plaintiff for the use of the insurance company. If only a part of the loss had been paid by the insurer, the insured would be entitled to the residue; and how the money recovered is to be divided between them is a question which interests them alone, and in which the defendants are not concerned. In order to recover under the complaint as now drawn, the insurance company and the railway company must be jointly interested in each of the losses counted on in the complaint. If the insurance company has paid all of any individual loss to the railroad company, then the insurance company alone would be interested in this loss, and the railroad company would have no right to recover, and unless both plaintiffs can recover, neither can. In the last amendment which the plaintiff proposes to make, the counts to be added by amendment claim only for losses sustained by the railroad company, and on which losses no insurance was in force, and no payments have been made by the insurance company to reimburse the railroad company for these losses. This would make the railway company solely interested in some of the counts of the complaint, and the insurance company solely interested in others, and this amendment cannot be allowed, as both plaintiffs must be jointly interested in the recovery to be had under each count."

And, again, it was said in that case (165 Fed. 261):

"'When an insurance company pays to the assured the amount of the loss of the property insured, it is subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. This right of the insurer against such other person is derived from the assured alone, and can be enforced in his right only. At common law it must be asserted in the name of the assured. In a court of equity or admiralty, or under the modern codes of practice, it may be asserted by the insurance company in its own name when it has paid the assured the full value of the property destroyed—citing authorities. But the rule seems to be well settled that, when the value of the property exceeds the insurance money paid, the suit must be brought in the name of the assured. In such an action the assured may recover the full value of the property from the wrongdoer, but as to the amount paid him by the insurance company he becomes a trustee; and the defendant will not be permitted to plead a release of the cause of action from the assured, or to set up as a defense the insurance company's payment of its part of the loss.' Hart v. Railroad Co., 13 Metc. (Mass.) 99, 46 Am. Dec. 719; Hall v. Railroad Co., 13 Wall. 367, 20 L. Ed. 594."

In M. & M. R. Co. v. Jurey, 111 U. S. 584, 594, 595, 4 Sup. Ct. 566, 570 (28 L. Ed. 527), the court said:

"The payment of the total loss by the insurer works an equitable assignment to him of the property and all the remedies which the insured had against the carrier for the recovery of its value. Mason v. Sainsbury, 3 Doug. 61; Yates v. Whyte, 4 Bing. New Cases, 472; Clark v. Hundred of Blything, 2 Bar. & Cress. 254; Ætna Insurance Co. v. Tyler, 16 Wend. [N. Y.] 385; Atlantic Ins. Co. v. Storrow, 5 Paige [N. Y.] 285. This rule is so strictly applied, that when two ships, belonging to the same owner, came into collision with each other, and one of them sank and became a total loss, it was held that the insurers of the lost ship did not, upon their payment of the total loss, become entitled to make any claim for the loss against the insured as the owner of the ship in fault in the collision, for their right existed only through the owner of the ship insured, and not independently of him, and as he could not have sued himself, they could have no remedy against him. Simpson v. Thompson, 3 App. Cas. 279. See, also, Globe Ins. Co. v. Sherlock, 25 Ohio St. 50.

"In Gales v. Hailman, 11 Pa. 515, it was held that 'a shipper who has received from the insurer the part of the loss insured against may sue the carrier on the contract of bailment, not only in his own right for the unpaid balance due to himself, but as trustee for what has been paid by the insurer in ease of the carrier;' and upon the trial of such a case, the court will restrain the carrier from setting up the insurer's payment of his part of the

loss as partial satisfaction.

"Insurers of a ship which has been run down and sunk by the fault of another ship are, upon their payment of a total loss, subrogated to the right of the insured to recover therefor against the owners of the latter vessel, and if their policy was a valued one, their payment of this value will give them the whole spes recuperandi, and the right to the whole damages, though the insured vessel was, in fact, worth a larger sun than the valuation named in the policy. North of England Association v. Armstrong, L. R. 5 Q. B. 244. See, also, Clark v. Wilson, 103 Mass. 219, 227 [4 Am. Rep. 532].

"The authorities above cited which relate to marine policies apply, as well as the other cases cited, to the question in hand, for in Hall & Long v. Railroad Companies, 13 Wall. 367 [20 L. Ed. 594], it was held that 'there is no reason for the subrogation of insurers by marine policies to the rights of the assured against a carrier by sea which does not exist in support of a like sub-

rogation in case of an insurance against fire on land.'

"We are of opinion, therefore, that the recovery in this case might properly have been, as it was, for the entire loss sustained by the nominal plaintiffs with regard to the amount of insurance paid. The only effect of the provision of section 2891, Code of Alabama, is to make the party for whose use the suit is brought dominus litis, and to give it the same rights as if it were the assignee of the cause of action. Its recovery is on the nominal plaintiff's cause of action. But as there is no formal assignment, and the suit is in the name of the nominal plaintiff, the party beneficially interested is only bound to establish the cause of action, without proof of his equitable right to the recovery.

"It follows from these views that the complaint was sufficient for the case as presented by the evidence, and that the evidence tended to sustain the case

stated in the complaint."

Furthermore, the defendant, against whom judgment might be rendered, would have no interest in a division of the fruits of the judgment, for that is a matter between the assured and the insurer; the former being a trustee for the benefit of the latter. The law is well stated in Long v. Kansas City, etc., Ry. Co., 170 Ala. 635, 642, 54 South. 62, 64, where it is said:

"The question of who will be entitled to the proceeds of the recovery, the insurer or the insured, is a matter between them, and constitutes no defense

to an action for the damages, caused by the wrong, which, in any event, must be brought in the name of the owner and insured, although it might be for the use of the insurer. 24 Am. & Eng. Law, pp. 308-330; Perrot v. Shearer, 17 Mich. 48, 55, 56; Clark v. Wilson, 103 Mass. 219-227, 4 Am. Rep. 532; Hayward v. Cain, 105 Mass. 213; Weber v. Morris & E. R. Co., 35 N. J. Law, 409, 10 Am. Rep. 253."

Again, the insurance companies have no such interest in the case as that they could bring the suit in their own name, because they have not paid the entire loss. Whatever interest they may have is equitable -not legal-and cannot be enforced at law in the name of the insurance company. Hall & Long v. Railroad Companies, supra. They are represented in the action by Webb, as trustee; and the residence of the trustee, and not that of the beneficiary, controls the question of jurisdiction, as in case of a suit by an executor, where his residence controls and not that of the legatee. Knapp v. Railway Co., 87 U. S. 117, 123, 124, 22 L. Ed. 328; Montgomery's Manual of Fed. Proc. p. 139. In Over v. Lake Erie R. Co. (C. C.) 63 Fed. 34, the insured had been paid only a part of the loss by a number of insurance companies, and the insured brought suit in his own name and for the use of several of the companies against the railway company. One of the insurance companies did not join in the complaint. The court held that the entire right of action was retained by the insured, Over, and that the suit should have been brought in his name alone, that the equity of the insurance company, if any, could have no effect on the right of action resting in Over, and that the assignments of loss by Over to the insurance companies of certain proportions of the claim could have no effect on the jurisdiction of the federal court. The court said:

"The cause of action for the alleged wrong accrued to Over alone. It was a right of action at law, triable by jury. It was not assignable, in whole or in part, so as to invest the assignee with a legal title. By the payment of the policies the insurers became subrogated, pro tanto, to an equitable right in the cause of action. The written assignment executed by Over to the insurance companies gave them nothing beyond an equitable right. Neither at common law nor under our statutes does the assignment of a part of the cause

It is stated in Cunningham v. E. & T. H. Ry. Co., 102 Ind. 483, 484 [1 N. E. 800, 804, 52 Am. Rep. 683], referred to by Judge Baker in Over v. Lake Erie, etc., supra, as follows: "In speaking of the claim of the wrongdoer to the benefit of insurance money received by the injured party, a recent writer on the law of damages says: There can be no abatement of damages on the principle of partial compensation received for the injury, where it comes from a col-

¹ The reference to "our statutes" by Judge Baker in the case of Over v. Lake Erie R. Co., supra, is to the following Indiana statutes: Burns Anna tated Statutes of Indiana 1894, § 251. "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." Section 252. "An executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another. It shall not be necessary to make an idiot or a lunatic a joint party with his guardian or committee, except as may be required by statute."

of action for a tort invest the assignee with any part of the legal title. The plaintiff Over still retains the entire legal right to the cause of action. As the owner and holder of the entire legal title to the cause of action, and having also the entire beneficial ownership of the unassigned part of it, he can, in this state, as at common law, maintain in his own name an action for the whole amount of the loss. Cunningham v. Railroad Co., 102 Ind. 478, 1 N. E. 800 [52 Am. Rep. 683]. His right of action is at law, because his title is purely legal. The title and interest of the insurance companies are wholly equitable, and extend to but a part of the cause of action. Can Over, whose right of action is at law, by joining the insurance companies, whose right of action is in equity, deprive the railroad company of the right of removal? He could have brought his suit originally in this court against the railroad company, but it would have had to be brought in his name alone. His right of action, being legal, and embracing the entire loss, is separable from the equitable causes of action of the insurance companies. The distinction between actions at law and suits in equity is firmly maintained in the federal system of jurisprudence, and state legislation will not be permitted to alter or abridge this distinction. Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712 [35 L. Ed. 358]; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977 [37 L. Ed. 804]. If the practice in the state courts permits the joinder of parties having the entire legal title with others having only an equitable title or interest in a part of the cause of action, still, in my opinion, such joinder will not defeat the right of the federal court to separate the parties having a legal cause of action from those having an equitable right; and if, when thus separated and arranged, the action at law is removable, the presence of parties having a mere equitable interest will not defeat such right. If the assignee of an equitable interest in a cause of action of a legal nature is a necessary or proper party with the owner of the entire legal title, then, in every case where a cause of action arises, of which the federal court might rightfully have taken cognizance by removal, this right could be defeated by the assignment, to a citizen residing in the state of the defendant's residence of a small interest in the claim or cause of action. Such construction would make the defendant's right of removal, in every case, depend on the will of the owner of the cause of action. I think the motion to remand should be overruled, and it is so ordered."

lateral source, wholly independent of the defendant, and is as to him res inter Nor will proof of money paid to the injured party by an insurer or other third person, by reason of the loss or injury, be admissible to reduce damages in favor of the party by whose fault such injury was done. The payment of such moneys not being procured by the defendant, and they not having been either paid or received to satisfy in whole or in part his liability, he can derive no advantage therefrom in mitigation of damages for which he is liable. As has been said by another, to permit a reduction of damages on such a ground would be to allow the wrongdoer to pay nothing, and take all the benefit of a policy of insurance without paying the premium.'

1 Sutherland, Damages, p. 242. The doctrine here declared was recognized, approved, and acted upon by this court, in Sherlock v. Alling, 44 Ind. 184. In that case, a similar defense was interposed to that pleaded by the appellee in the second, third, and fourth paragraphs of its answer, in the case in hand. In considering this defense the court there said: 'It proposes to use, as a defense to damages resulting from the wrongful act of the defendants, by way of set-off, recoupment, or in mitigation of such damages, pecuniary benefits received by the injured party, to which the defendants had not contributed, and not resulting from, or connected with, the act causing the death -benefits which it is fair to presume would have been realized at a future day, without the aid of their wrongful act.' So, in Ohio, etc., R. Co. v. Dickerson, 59 Ind. 317, it was held by this court that the fact that the salary of a person, injured through the negligence of the defendant, is paid by his employer during the time he is disabled by such injury cannot mitigate the damages such injured party may recover, in an action therefor."

4. To defeat the jurisdiction of this court, the plaintiffs rely upon section 5159, Code Ala. 1907, which is in these words:

"Claims against railroad companies, for injuries to property, may be assigned in writing, and each successive assignee thereof may sue thereon in his own name."

The constitutionality of this section has never directly been passed upon by the Supreme Court of Alabama. That court did not find it necessary to do so in L. & N. R. R. Co. v. Landers, 135 Ala. 509, 33 South. 483, where the constitutionality of the statute was attacked. There it was said:

"The first contention of counsel in argument for appellant is, that the subject-matter of the suit is a chose in action, of which there can be no valid assignment; the insistence being that section 877 of the Code (which is section 5159 of the present Code), authorizing the assignment in writing of claims against railroad companies for injuries to property, and suits thereon in the name of the assignee, is an unjust discrimination against railroad corporations as a class, and violative of section 12, art. 14, of the Constitution of 1875. There is no merit in this contention, since the chose in action here assigned is a claim for damages growing out of the alleged breach of a contract, and the action is in form ex contractu. There can, we think, be no doubt of the assignability of such a claim apart from the statute. The right of the plaintiff to sue in his own name on the claims assigned is not raised in the pleadings, and on the case as presented to the jury was not involved in any of the rulings on the charges."

Here the defendant contends that this statute (section 5159, supra, which is the same as section 877, Code Ala. 1896) is unconstitutional, and insists that, this question not having been passed upon by the court of last resort of the state, it is now the duty of this court to pass upon it. Of course, it is settled that the federal courts will, as a rule, follow the constructions of a state statute given by the highest court of the state. But this rule is not followed in every case, as, for example, it was not followed in Gelpcke v. City of Dubuque, 1 Wall. 175, 205, 17 L. Ed. 520, where Mr. Justice Swayne for the court said:

"* * It is insisted that in cases involving the construction of a state law or Constitution, this court is bound to follow the latest adjudication of the highest court of the state. Leffingwell v. Warren, 2 Black, 599 [17 L. Ed. 261], is relied upon as authority for the proposition. In that case this court said it would follow 'the latest settled adjudications.' Whether the judgment in question can under the circumstances, be deemed to come within that category it is not now necessary to determine. It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur."

But there has been no decision by the Supreme Court of Alabama construing this statute to be constitutional or unconstitutional.

Section 240, Const. Alabama 1901, declares:

"All corporations shall have the right to sue, and shall be subject to be sued, in all courts in like cases as natural persons."

This is the exact language of section 12, art. 14, of the Constitution of 1875. In the case of Smith v. L. & N. R. R. Co., 75 Ala. 449, a statute, the language of which was as follows, was held to be in violation of that provision of the Constitution:

"When the death of any minor child is caused by the wrongful act or omission of any officer or agent of an incorporated company, or private association of persons, the father of such child, or if the father be not living, the mother, may maintain an action against such corporation or private association of persons, * * * and may recover such damages as the jury may assess."

There Chief Justice Stone said:

"Within the last 20 years very important constitutional provisions, federal and state, have been adopted. Article 14 of the amendments to the Constitution of the United States declares (section 1) that 'no state shall * * * deny to any person within its jurisdiction the equal protection of the laws.' Speaking of this provision, Justice Field, of the United States Supreme Court, in County of San Mateo v. South. Pac, R. R. Co. (116 U. S. 138, 6 Sup. Ct. 317, 29 L. Ed. 589) said: 'It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens or charges, than such as are equally imposed upon all others under like circumstances.' 8 Am. & Eng. R. R. Cases, 1-11 (8 Sawyer [C. C.] 238, 13 Fed. 722, 757). And Circuit Justice Sawyer, in the same case (page 33) said: 'In my judgment, the word "person" (in this clause of the Fourteenth Amendment) includes a private corporation.' See note to that case on page This question, however, would seem to be settled by our own state Constitution, art. 14, § 12, which ordains that 'all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons.' 'In like cases as natural persons' must mean that where the cases are alike, the cause of action the same description of contract or tort, there must be no discrimination between corporations and natural persons, in the matter of prosecuting or defending suits. A tort which will support an action for one will support it for the other, and a defense available to one is available to the other. Mayor v. Stonewall Ins. Co., 53 Ala. 570; Green v. State, 73 Ala. 26."

In the case of South & North Railroad Co. v. Morris, 65 Ala. 193, the constitutionality of the statute assailed was in this language:

"Any corporation, person or persons, owning or controlling any railroad in this state, or any complainant against such corporation, person or persons, taking an appeal from a decision rendered by a justice of the peace, in a suit for damages brought under the provisions of section 1711, and failing to sustain such appeal, and to increase or reduce the judgment before the appellate court, shall be liable for a reasonable attorney's fee incurred by reason of such appeal, to be assessed by the court, not to exceed \$20; and the attorney's fee shall be part of the costs" in the case.

And, Mr. Justice Somerville for the court said that:

"After a careful consideration of this question, during which it has been held under protracted advisement by the whole bench, a conclusion has been reached, which clearly persuades us that this particular section of the Code is violative of both the Constitution of the state and that of the United States."

In Birmingham-Tuscaloosa Ry. Co. v. Carpenter (Ala.) 69 South. 626, decided May 20, 1915, Chief Justice Anderson rendered the opinion for the court holding the following provision of the Alabama Automobile Law (Laws 1911, p. 649) unconstitutional:

"34. The contributory negligence of the person operating or driving any motor vehicle in this state shall be imputed to every occupant of said motor vehicle at the time of such negligence in actions brought by such occupant or his personal representatives for the recovery of damages for death or personal injury whether the relation of principal and agent exists between such

person operating or driving such motor vehicle and such occupant or not, provided that the provisions of this section shall not apply to passengers paying fare and riding in a motor vehicle regularly used for public hire."

There it was said that:

"It [this section] is an unwarranted and unjust discrimination between persons of the same class; that is, it discriminates against persons riding in motor vehicles, because it does not reach those riding in any other kind of vehicles under similar terms and conditions. * * * The section denies an equal protection of the law to all persons similarly situated, and is an unwarranted discrimination. Cooley's Const. Limitations, 391; South & North Ala. R. Co. v. Morris, 65 Ala. 193; Smith v. L. & N. R. R. Co., 75 Ala. 449."

The reasoning employed, which is unnecessary to be given here, in the three cases quoted from is unanswerable. It may be the Supreme Court of Alabama will hold, as defendant's counsel insist it will, that the statute (Code Ala. § 5159) is unconstitutional, because it singles out railroad companies from all other companies or persons, and declares that claims against railroad companies for injury to property may be assigned, etc., and that, therefore, it is in conflict with the provisions of the Constitution of Alabama which ordains that all corporations shall have the right to sue, and shall be subject to be sued, in like cases as natural persons. And Judge Stone said, in Smith v. L. & N. R. Co., supra, that:

"In like cases as natural persons' must mean that where the cases are alike, the cause of action the same description of contract or tort, there must be no discrimination between corporations and natural persons, in the matter of prosecuting or defending suits."

Further, that:

"The sum of these provisions is, that no burden can be imposed on one class of persons, natural or artificial, which is not, in like conditions, imposed on all other classes."

Admittedly, if the statute is unconstitutional, then, any assignment that the insured Webb may have made to the insurance company can give the insurance company no right, and therefore, whatever interest they may have in any judgment recovered of the railroad, on account of the tort sued for, must be founded upon the right independent of the statute. But, for a decision of this case, it is not necessary for me to declare the statute obnoxious to any provision of the Constitution of the United States or of the state of Alabama; for, as indicated, neither insurance company is an indispensable party to the action; and that every item of damage set forth in the complaint is recoverable by Webb, and damage for some of the items is recoverable by him and him only.

[4] 5. Section 2490, Code Ala. 1907, is in this language:

"In all cases where suits are brought in the name of the person having the legal right for the use of another, the beneficiary must be considered as the sole party on the record."

This statute can have no application to this case, although plaintiffs insist that it has, and that under it the insurance companies have the right to join in the action. This does not seem to me to be sound.

I do not think that this statute confers upon them any right that

they do not have independent of the statute.

The insurance companies issued the policies to Webb. The suit is not upon the policies, is not ex contractu, but is for the alleged wrongful destruction of Webb's property by the defendants. The only rights the insurance companies have is to be subrogated pro tanto to such share in the judgment recoverable for the loss as may be equal

to the amount paid by them to Webb under the policies.

As before stated, in other language, the suit is for the destruction of certain property owned by Webb solely and insured by the companies, and also to recover damages for certain other individual property and business of Webb, upon which the insurance companies had taken no risk, and in which they had no possible interest. This suit is not like an action brought on an official bond to which the above statute would apply; for instance, a bond in which a probate judge, register in chancery, or other official, is named as the nominal beneficiary, but where the real party or parties to the cause in which the bond was given is or are the real beneficiary or beneficiaries. Nor is it like the case of the payee of a note as plaintiff for the use of the original plaintiff (Cowan v. Campbell, 131 Ala. 211 1); nor is it like that of an assignee of a note for subscriptions to stock where the assignee of a judgment against a corporation may be considered the sole party plaintiff in an action against the stockholders. Lehman Durr Co. v. Clark, 85 Ala. 109, 4 South. 651; Wooldridge v. Holmes, 78 Ala. 568.

[5] 6. But, whatever may be the construction of this Alabama statute by the courts of that state, and regardless of the local application of the Alabama statute, the distinction between law and equity has been preserved in the federal courts. Such courts must be, and are, the judges of their own jurisdiction, and cannot be bound by mere local rulings and practice regulations which may be employed so as to render a cause which is equitable only to be adjudicated at law. Here the insurance companies have an equity in the damages recoverable for the loss to the extent of the insurance which they would be bound by their policies to pay, and which they did pay. As they have no further or other interest in the matter—the other damages properly sued for by Webb—and as they are not indispensable, that is, not necessary, parties to the action now under consideration, the Alabama statute cannot be of such avail as to deprive this court of jurisdiction over the controversy. Over v. Lake Erie, etc., Ry. Co., supra.

That Congress has always sedulously intended to preserve the distinctions between law and equity, which distinctions are plainly recognized in the Constitution of the United States, is evidenced by much federal legislation, and was recently further evidenced by the act of Congress approved March 3, 1915, 38 Stat. 956, c. 90. There the Congress has kept abreast with the advanced thought of the day and passed this law. The paramount idea carried in the act is that courts are established and maintained for the administration of justice, and not to furnish a forum chiefly for the exhibition of the skill of intellectual gladiators—sometimes forgetful of the rights of the parties

litigant to have justice administered. So this act, just referred to, provides that if a party has brought his suit at law, whereas it should have been in equity, or vice versa, the cause may, upon application, be transferred to the proper side of the docket, law or equity, as the case may be, the pleadings properly reformed, and the cause proceeded with. Thus the delay or injustice which the courts were compelled to cause in numerous instances, as in Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451, and many other cases, can be avoided.

[6] 7. The Conformity Act, § 914, Rev. Stat. (Comp. St. 1913, § 1537), cannot be invoked in this case to oust this court of its plain and rightful jurisdiction over this cause. The purpose of this statute was to bring about uniformity in the law of procedure in the federal and state courts in the same locality, taking cognizance of the statutory enactments of many states. The language of the statute is that:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit and district courts are held," etc.

As was said by Mr. Justice Matthews in Erstein v. Rothschild (C. C.) 22 Fed. 61, loc. cit. 64, quoting in part from I. & St. L. R. Co. v. Horst, 93 U. S. 291, 300, 23 L. Ed. 898:

"The conformity is required to be' as near as may be, 'not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provisions in such state statutes which, in their judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice, in their tribunals. While the act of Congress is to a large extent mandatory, it is also to some extent only directory and advisory.' The act of Congress, at any rate, does not require the adoption, with the local statutes, of the local interpretation which may have been put upon them, or which may, from time to time, be enforced. It must be held that the body of the local law thus adopted in general must be construed in the courts of the United States in the light of their own system of jurisprudence, as defined by their own Constitution as tribunals, and of other acts of Congress on the same subject. It can hardly be supposed that it was the intent of this legislation to place the courts of the United States in each state, in reference to their own practice and procedure, upon the footing merely of subordinate state courts, required to look from time to time to the Supreme Court of the state for authoritative rules for their guidance in those details. To do so would be, in many cases, to trench in important particulars, not easy to foresee, upon substantial rights, protected by the peculiar Constitution of the federal judiciary, and which might seriously affect, in cases easily supposed, the proper correlation and independence of the two systems of state and federal judicial tribunals."

Having reached the conclusion that the insurance companies (or either of them) are not indispensable parties to this action, it is the duty of this court to follow what is believed to be warranted by law, reason, and justice. It is plain from the words of the complaint, and all the attendant facts and circumstances which are gathered from

a consideration of the record in the case, that the insurance companies were brought into this suit solely for the purpose of defeating the jurisdiction of this court. Such a purpose cannot be approved. As was said in Kelly v. Chicago & A. Ry. Co. (C. C.) 122 Fed. 286, loc. cit. 292:

"The afterthought of bringing the old Kansas City, etc., Ry. Co. into this controversy is so palpably for the purpose of preventing the removal by the real defendant into this jurisdiction that the rule strictissimi juris should be rigidly applied. As suggested by Mr. Justice Miller in Arapahoe County v. Railway Co., 4 Dil. 277, Fed. Cas. No. 502, courts should be astute not to permit devices to become successful which are used for the very purpose of destroying the right of removal."

And, Mr. Justice Van Devanter, for the court, in C. & O. Ry. Co. v. Cockrell, 232 U. S. 146, loc. cit. 152, 34 Sup. Ct. 278, 280 (58 L. Ed. 544) said:

"A civil case, at law or in equity, presenting a controversy between citizens of different states and involving the requisite jurisdictional amount, is one which may be removed by the defendant, if not a resident of the state in which the case is brought; and this right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." Authorities cited.

In making the temporary order, restraining the plaintiffs from prosecuting their suit in the law and equity court of Marengo county, Ala., until this motion should be determined, Judge Toulmin held tentatively that the removability of the cause was at least debatable, and directed that further action in the state court be stayed until a hearing could be had here. And, now after having heard arguments for and against removal, I entertain no doubt that the cause is removable under the facts shown by the transcript of the record, and, the cause being removable, and all statutory requirements for removal having been complied with, that it has been removed into this court. The defendant's case, according to the record, is such that the statute governing removals has, proprio vigore, operated to that end.

Order will be entered overruling the motion to remand this cause to the state court, and making the temporary restraining order issued by Judge Toulmin permanent.

THE GURNET.

(District Court, D. Maine. July 31, 1916.)

No. 324.

1. MARITIME LIENS \$\ightharpoonup 57\to Lien Given by State Statute\to Enforcement in Admiralty Court\to "Labor or Materials Furnished for Building a Vessel"

Rev. St. Me. c. 93, § 8, provides that whoever furnishes labor or materials for building a vessel shall have a lien on it therefor, which may be enforced within four days after the vessel is launched, or, if furnished under a contract not then completed, within four days after its completion. Intervener was employed by contract to furnish and install the

engine and machinery of a steamer being built, and during performance of the contract was directed by the superintendent of the work for the owner to furnish and install a pinch wheel for the engine and a spring bearing for the shaft; the engine and shaft being secondhand and without such appliances. These parts were not completed when the vessel was put into service, but were installed afterwards, and within four days before the steamer was seized in a suit to enforce liens. Held, that the work done by intervener was such as contemplated by the statute and entitled him to a lien; that the admiralty court, having taken possession of the vessel before the time for enforcing the lien had expired and sold the same, had jurisdiction to entertain and determine all claims against the proceeds, and would enforce intervener's lien, although a different procedure was prescribed by the state statute.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 96; Dec. Dig. ⇐⇒57.]

2. MARITIME LIENS \$\sim 43-\Waiver-Taking of Notes.

Claimant, while performing a contract to furnish work and materials for the building of a vessel, for which on completion he would be entitled to a lien under the state statute, took notes from the owner for a part of his claim. He did not intend to abandon his lien, or understand that it would be affected; but the purpose of the parties was to enable him to raise money temporarily until the owner could arrange for payment. After two or three days, finding he could not use the notes, they were returned. Held, that claimant did not lose his lien, and that it was entitled to priority over a mortgage on the vessel and over the trustee in bankruptcy of the owner.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 82; Dec. Dig. \$\simeq 43.]

In Admiralty. Suit by Randall & McAllister against the steamer Gurnet. In the matter of the claim of Joseph C. Noyes, intervener. Decree for intervener.

Benjamin Thompson, of Portland, Me., for intervener.

William S. Linnell, of Portland, Me., for trustee in bankruptcy of Portland-Bath-Casco Bay Rapid Transit Co.

HALE, District Judge. On September 18, 1914, the steamer Gurnet was seized upon this libel to enforce a maritime lien. On November 12, 1914, she was sold at a marshal's sale by virtue of an interlocutory order of sale, and the proceeds of the sale were paid into the registry of this court. On the day of filing the libel, Joseph C. Noyes intervened, by petition, to enforce a lien for labor and materials furnished for installing the boiler and machinery of the steamer. It is alleged that this lien is a construction lien, and arises under section 8 of chapter 93 of the Revised Statutes of Maine, as follows:

"Sec. 8. Whoever furnishes labor or materials for building a vessel, has a lien on it therefor, which may be enforced by attachment thereof, within four days after it is launched; but if the labor and materials have been so furnished by virtue of a contract not fully completed at the time of the launching of the vessel, the lien may be enforced within four days after such contract has been completed. * * * "

The proofs show that the labor and materials were furnished by the intervener, Noyes, for the installation of a pinch wheel, an appliance for turning the engine over, and a spring bearing.

It is contended on behalf of the trustee in bankruptcy that Noves was to install the engine, not as a contract job, but that he was to be paid a fair value for the material furnished, and for the labor by the day; that the steamer entered into the service for which she was built on July 9, 1914; that the constructive work was completed at that time, and that Noves did not enforce his claim to a lien within four days afterwards, and that, therefore, he has lost his lien; that the appliances furnished were not necessary for the working of the engine, or for the operation of the boat but that the steamer could, and did, operate without them; that inasmuch as the contract was not completed before the vessel went into service, no enforceable lien ever attached to the steamer; that, even though Noves may have had an uncompleted contract during the summer of 1914, during that period he had only an inchoate right to a lien under certain conditions; that such right could not be enforced, under the terms of the statute, until he had completed his contract and established his lien; that, in any event, it could not be enforced at any other time than "within four days after such contract has been completed," as provided by the statute; that, under the statute, when labor and materials are furnished, in accordance with the terms of the contract, nothing but the completion of the contract can create a valid lien, and that, up to the time of the completion of the contract, there exists only an inchoate right to a lien; that such right is given, not by a federal statute, but by a state law; and that neither the federal court nor any other court can enforce a right that does not comply with the terms of the state statute.

[1] 1. It becomes necessary to examine the proofs to see what the contract was between the parties. The steamer Gurnet was owned by the Portland-Bath-Casco Bay Rapid Transit Company, a corporation organized in November, 1913, to carry on a passenger and freight business. Captain Oscar Randall was a director and the president: George W. Brown was the general manager and treasurer. Captain Oscar Randall had followed the sea for more than 30 years as master of sailing vessels and motorboats. He is well known to me as being experienced in maritime matters. Mr. Brown, at the time he went into this business, had no experience in maritime affairs. Captain Randall testifies that while Brown was the general manager, he himself made the contract for the building of the Gurnet, after consulting Brown; that his understanding was that Brown was to consult with him, as a director, in making the contracts and giving directions as to what should be done, and that he himself should have the superintendence of the boats. Captain Randall says that both he and Brown entered into a contract with Mr. Noyes. Brown himself testifies that it was understood that Noves was to furnish everything necessary, with the exception of the feed water heater, boiler, condenser, and pump, and some incidentals, and that Noves was given orders to furnish everything else necessary to install and fix up the boat. He adds:

"I considered that we had entered into an agreement with him [Noyes], and that he was to complete the work unless there was some unusual proceeding; but I had every confidence in Mr. Noyes doing the work right."

It appears that one Ray Marshall was appointed to superintend the work of installing the machinery for the Gurnet. The proofs lead me to believe that, during the process of installation, it was discovered that the engine, a secondhand one, did not have a pinch wheel upon it, or any other appliance for turning it over; that the shaft was also a secondhand one, with heavy couplings; that no spring bearing was connected with it; that on or about June 19, 1914, Marshall, then acting as superintendent of installation in behalf of the vessel, ordered Noyes to prepare a pinch wheel and spring bearing which were necessary for the operation of the steamer and that he determined where the pinch wheel should be located; that, under Marshall's directions, Noyes made measurements for the purpose of determining the size of the pinch wheel, and that the shaft was prepared, before it was put into the steamer, for the reception of the spring bearing; that Noves received orders from the superintendent of construction to make these two parts, with the agreement that they should be installed as soon as the steamer could be hauled up long enough to perform the work to be done; that at the time of the installation of the steamer's machinery Noyes was compelled to put off the work of preparing the parts and construction of the pinch wheel and spring bearing, and, it being necessary that there should be some means of turning over the engine, it was agreed that, while these appliances were being prepared, Noyes was to loan Marshall, for the temporary use of the steamer, a large Stillson wrench; that the installation of the pinch wheel and spring bearing was not completed when the vessel was put into service, July 9, 1914, but it was understood that Noyes should do the work on the pinch wheel and spring bearing when it was convenient for him; that the pinch wheel was duly installed and the spring bearing delivered on board the steamer, under the contract, on September 15, 1914, within four days before these proceedings were commenced.

Without further reciting testimony, after a full examination of the proofs, I am satisfied that the contract was one relating to the construction of the vessel; that within the meaning of the state statute, the labor and materials were furnished for "building a vessel"; that the pinch wheel and spring bearing were necessary parts of the steamer, and were furnished upon the order of the owner of the steamer, by its superintendent of construction, under one continuing contract; and the fact that some time intervened between the time the steamer was put in operation and the time when the pinch wheel and spring bearing were furnished does not affect the validity or priority of the lien.

The jurisdiction of the court over the lien is fixed by the fact that the steamer was seized and sold under admiralty proceedings; the court thereby acquiring jurisdiction over the remnants of the sale in the registry. It has long been well settled in the admiralty courts, that, where proceeds are rightfully in the possession and custody of the admiralty, it is an inherent incident to the jurisdiction of the court to entertain supplemental suits by the parties in interest to ascertain to whom the proceeds rightfully belong; and, although the state statutes prescribing liens prescribe also the forms of proceedings, still the federal courts proceed to give relief in admiralty, sometimes by sum-

mary proceedings of a character entirely different from those provided by the state statute. Andrews v. Wall, 3 How. 568, 573, 11 L. Ed. 729; The Lottawanna, 21 Wall. 558, 582, 22 L. Ed. 654; Schuchardt v. Babbage, 19 How. 239, 241, 15 L. Ed. 625; The Atlantic City (C. C.) 220 Fed. 281; Berwind-White Coal Mining Co. v. Metropolitan S. S. Co. (C. C.) 166 Fed. 782.

Under the practice of maritime courts I can have no doubt that

this court has the right to distribute this fund.

Under the proofs, I think the lien established is of the positive character I have above indicated; but, even if the testimony disclosed only an inchoate lien, it would still be the duty of the court to give effect to such lien, and to provide means for enforcing it. In the Metropolitan Steamship Case (C. C.) 166 Fed. 782, 785, to which I have referred, Judge Putnam says:

"If, at the time the bills before us were filed, there was resting on those steamers, or either of them, an inchoate lien of any character, it is the duty of this court to give it fruition."

Under the practice of the admiralty courts, whatever right Noyes had in the steamer at the time possession was taken under the process issued by this court in this proceeding, it is the duty of the court to protect and enforce such right, and "to give such remedy as the equity

of the case might advise."

[2] 2. The proofs show that, on July 28, 1914, the manager of the Portland-Bath-Casco Bay Rapid Transit Company gave Noves four notes, two for \$400 each, and two for \$300 each; that one, at least, of these notes was on four months' time, and would mature on or about November 27, 1914. The notes were returned after two or three There is contradictory testimony touching the matter of the taking and returning of the notes. The learned proctor for the trustee urges with clearness and force that, in taking the notes, Noves extended credit to the owners of the steamer for four months as to a part of the indebtedness, and that it is apparent that Noves, at the time he took the notes and at the time he so extended credit, knew that his contract would be completed before the expiration of the term of credit: that, by the law of Maine and of Massachusetts, the acceptance of notes by a creditor is presumed to be in payment of the debt (Wilkins v. Reed, 6 Me. 220, 19 Am. Dec. 211; Spitz v. Morse, 104 Me. 447, 72 Atl. 178, and cases cited); that by the law of the federal courts if a creditor extended credit beyond a period when, by the terms of the statute, he must enforce his lien, then his lien is lost, because, by subsequent contract, he has entered into an agreement inconsistent with the enforcement of his lien. The learned proctor cites the leading federal case, Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co., 137 Fed. 26, 71 C. C. A. 1, where the Circuit Court of Appeals for the Eighth Circuit held that the acceptance for a debt, secured by a lien, of a promissory note which does not mature until after the time fixed by the statute for the commencement of an action to enforce the lien destroys the lien, for the reason that the acceptance of the note extends the time of payment of the debt until the note matures; and the learned proctor for the trustee urges that, whatever contract Noyes had made, it would have been completed long before the expiration of the term of credit he extended to the owner of the steamer by taking the notes; and the learned proctor denies that Noyes ever returned the notes under such circumstances as to make a mutual rescission of the contract, and that any repudiation of the contract by Mr. Noyes could not affect the contract previously made, for either he would still be liable under that contract or liable for damages for repudiation; that the lien was absolutely destroyed by Noyes' intent to extend credit for the period of four months, and, the lien being destroyed, it could never be restored

or reinstated by any subsequent act.

It is necessary here to carefully examine the proofs in relation to the receipt of the notes. Noves testifies that, on July 28th, Brown, the manager of the company owning the steamer, gave him the four notes in question, and one of the notes, at least, was on four months' time; that he took the notes to the Canal Bank, and he thinks they were placed to his credit, but he does not think he drew against them. As a result of conference with his counsel, Noyes obtained the notes from the bank within two or three days. He went to Brown's office again, and handed him the four notes, and stated that he could not use them, as they were not acceptable to the bank, so he returned them to Brown. Noves says that Brown made no objection to the return of the notes, and did not give question to Noves' right to do so, and that the notes have been in Brown's possession, so far as he knows, ever since that time, and were in the possession of the trustee in bankruptcy at the time of the hearing. The notes did not cover his account in full, and, when he returned them, Brown did not return his Noyes testifies clearly that "his object in taking the notes was simply to help him out until the steamboat company could raise money"; that he thought, at the time of taking the notes, he had a maritime lien, but he did not know the difference between a construction lien and a maritime lien; that in taking the notes he did not intend to waive or discharge his lien, and he did not understand that the giving or taking of notes would affect his lien, but the bank asked him to look into the question of lien; and he then consulted his counsel; that soon after he returned the notes he asked Brown for money, Captain Randall being present, and told Brown that he had been informed by his counsel that his lien would continue four days after the completion of his work, and that things would have to be settled up; that both Brown and Randall stated that they did not want to do anything to hurt him; that he had done the work in a satisfactory way and should have his pay; that, a few days after he returned the notes, he told them that he had not completed his work, and should want to take action within four days after he had completed it; that they asked him to hold off on the work for a few days, to see if they could not make some arrangement to raise the money. In his testimony Captain Randall does not contradict Noves on any material matter. Brown's evidence is contradictory to Captain Randall's in many important particulars; it is not necessary to discuss that testimony, or that of other witnesses, in detail. On all the proofs, I am satisfied

that the taking of the notes by Noyes was on condition that they would be accepted by the bank; that the notes were given, and received only as a temporary expedient, with a view to giving the company owning the steamer an opportunity to negotiate loans with which to meet its obligations, and, at the same time, to assist Noyes in raising money; that the notes did not cover the full amount of the account, and were not, in fact, given in settlement of the account; and that, in giving and taking the notes, both Captain Randall and Mr. Noyes understood that Noyes retained his lien on the steamer, and that there was no intention, on the part of either, that the taking of the notes should operate to waive the lien existing at that time.

In The Helen M. Pierce, Fed. Cas. No. 6,332, Judge Fox, in this district, refers to Carter v. The Byzantium, Fed. Cas. No. 2,473, in which, in speaking of the rule of Maine and Massachusetts courts,

Judge Clifford says:

"It is merely a presumption of fact, and may be controlled by circumstances indicating a contrary intention."

In The Alabama (C. C.) 22 Fed. 449, it was held that, by the principles of the maritime law, a lien is not lost by the acceptance of notes, unless the claimant can show that the lienholder agreed to receive the notes in lieu of the original claim. In The L. B. X (D. C.) 93 Fed. 233, 239, in commenting upon a case where it is claimed that taking a note had waived a lien in the admiralty court, District Judge Philips said:

"The law gave the lien absolutely, and therefore it devolved upon the claimant to show affirmatively that this lien was waived as a part of the contract.

* * * The notes being unpaid, he may return them, and enforce his lien.'"—citing The Kimball, 3 Wall. 37, 18 L. Ed. 50.

In Robins Dry Dock & Repair Co. v. Chesbrough, 216 Fed. 121, 125, 132 C. C. A. 365, 369, in speaking for the Court of Appeals for this Circuit, Judge Putnam said:

"It is settled, however, by sound reason, and by long practice and acquiescence, that any debt to which a lien or a special ground of relief is attached is not discharged, so far as the lien or special ground of relief is concerned, by a renewal, or any number of renewals, unless there is something of a peculiar nature which showed that what was done was intended to absolutely merge the original debt. * * * Independently of the question of the effect of taking a promissory note, which in Massachusetts and Maine is regarded as a discharge of the original debt prima facie, while in New York it is not regarded as such a discharge, the rule is universally applicable, for example, that the taking of a new obligation does not necessarily discharge the original debt without an especial intention on the part of the parties that it should do so."

See Meyer v. Tupper, 1 Black, 522, 525, 17 L. Ed. 180; Ramsey v. Allegre, 12 Wheat. 611, 6 L. Ed. 746; The Winnebago, 141 Fed. 945, 946, 73 C. C. A. 295; The Pioneer (D. C.) 53 Fed. 279; Moore v. Newbury, Fed. Cas. No. 9,772; The Sarah J. Weed, Fed. Cas. No. 12,350; Page v. Hubbard, Fed. Cas. No. 10,663; Hudson v. Bradley, Fed. Cas. No. 6,833; The Napoleon, Fed. Cas. No. 10,011. The Eclipse, Fed. Cas. No. 4,268.

In the case at bar the proofs lead me to believe that the notes were not taken with the intention that Noyes should abandon his lien. They lead me to distinctly the opposite conclusion, namely: that, at the time of taking the notes, Noyes supposed he had a lien, and did not intend to waive or discharge it and did not understand that the giving or taking of notes would affect his lien. The return of the notes followed in a few days, under circumstances tending to substantiate the contention of Noyes. In view of all the testimony, and of the decisions of the federal courts I am constrained to find that Noyes' lien was not lost by the action of the parties in reference to the notes. As bearing upon his intention, it is clear that Noyes would never have taken the notes if he had been fully advised of the financial condition of the company, and of Brown and Randall. It is obviously true of him, as it was of the claimant in The Helen M. Pierce, Fed. Cas. No. 6,332, of whom Judge Fox said:

"In my opinion, Coombs did not intend to release and discharge his security by thus accepting Maddocks' note; and it is certain he would never have done it, if fully advised of Maddocks' condition."

There is no necessity of reviewing in detail the testimony touching the claims of the mortgage. Under the proofs, and under the decisions of the federal courts, it is clear that the construction lien of Noyes takes priority over the mortgage, as it does over the trustee in bankruptcy. American Trust Co. v. Fletcher Co., 173 Fed. 471, 479, 97 C. C. A. 477; The Kiersage, Fed. Cas. No. 7,762; The St. Joseph, Fed. Cas. No. 12,229; The Guiding Star (D. C.) 9 Fed. 521, 524.

I find, then, that the work done by the intervener, Noyes, was done as a part of the work growing out of the construction of the steamer Gurnet; that the pinch wheel and spring bearing were furnished on the order given by the superintendent of construction of the steamship company, soon after the work of installation began; that the fact that some time intervened between the steamer's being put in operation and the time the pinch wheel was installed and the spring bearing delivered on board the steamer does not affect the validity or priority of the lien; that the intervener's construction lien was not rendered invalid by the taking of the notes; that the notes were not received with any intent of discharging the lien; that the intervener's lien takes priority over mortgages and also the rights of the trustee in bank-ruptcy.

There must, then, be a decree for the intervener, Joseph C. Noyes, for the sum of \$1,597.26, with interest to March 1, 1916, with costs, and that the claim constituted a lien upon the steamer Gurnet at the time she was seized by the marshal, by virtue of the process of this court, issued in this case, and that such lien is entitled to priority over the rights of the trustee in bankruptcy and over the mortgage. Let

such a decree be drawn and presented.

BROWN DRUG CO. et al. v. UNITED STATES et al. (District Court, N. D. Iowa, W. D. October 2, 1916.)

No. 46.

1. COURTS \$\infty\$101__Interstate Commission__Rates__injunction__Jurisdiction of Court.

In a suit against the Interstate Commerce Commission and carriers to prevent enforcement of new rates, where there is an application for a temporary injunction, and the District Judge calls in two other judges, one of them being a Circuit Judge, to dispose of such application, the court as constituted is without jurisdiction to dispose of the case on the merits.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 344–350, 629; Dec. Dig. ⇐ 101.]

2. COMMERCE -96-Interstate Commission-Temporary Injunctions-Right to.

Where new rates permitted by the Interstate Commerce Commission would work injury and possibly discrimination against towns in South Dakota, while the previous existing rates worked injury and possibly had for several years discriminated against a town in Iowa, a temporary injunction pending a suit against enforcement of the rates, will not be granted, the court being unable to measure the respective injuries, and the order of the Interstate Commerce Commission being presumptively valid.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 146; Dec. Dig. \$\sim 96.]

Reed, District Judge, dissenting.

Action by the Brown Drug Company and others against the United States of America, the Interstate Commerce Commission, the American Express Company, and others, seeking to enjoin the putting into effect of certain express rates in South Dakota. On order to show cause why temporary injunction should not issue against defendants. Injunction denied.

Thomas H. Null, of Huron, S. D., and Edward E. Wagner, of Sioux Falls, S. D., for plaintiffs.

Blackburn Esterline, Sp. Asst. Atty. Gen., for the United States. Charles W. Needham, of Washington, D. C., for Interstate Commerce Commission.

SMITH, Circuit Judge. In this case the government and the Interstate Commerce Commission have entered a special appearance and plea to the jurisdiction to hear the application for a temporary writ of injunction. The Sixty-First Congress (Act March 3, 1911, c. 231, § 207, 36 Stat. 1146, 1148 [Comp. St. 1913, § 993]) provided that:

"The Commerce Court shall have the jurisdiction possessed by Circuit Courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds: * * Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

This vested general jurisdiction in this class of cases in the Commerce Court. It was further provided (page 1149, § 996):

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"The jurisdiction of the Commerce Court shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought."

I shall ask my Associates upon the bench to express their views in this case, and therefore in what I say I am expressing my own views.

In my judgment all that is necessary to invoke the jurisdiction of the Court of Commerce under this old law is the filing of this petition. The word "invoke" is defined by Webster's New International Dictionary as:

"To call on for aid or protection; to invite earnestly or solemnly, as in prayer; to solicit or demand by invocation, as to invoke the Supreme Being, or to invoke His aid; to appeal to, or cite, as authority or for support."

The Standard Dictionary defines it in the fifth heading, referring to the law, "To call for by judicial process; as, to invoke papers into court." The Century Dictionary defines it in law as, "To call for judicially; as to invoke deposition or evidence," and it gives the synonyms for the word "invoke" used other than as a law term as "to implore, supplicate, adjure, solicit, beseech." This substantially explains the meaning of the word "invoke" as used in the statute. It then provided that in place of serving a subpcena upon the government, as it might have done, the service upon the government should be by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice.

This same law provided by section 208 of the act, page 1149 (Comp. St. 1913, § 997), for temporary injunctions to restrain orders of the Interstate Commerce Commission, but provided that no such temporary injunction should be issued by the Commerce Court otherwise than upon notice. This refers not to the notice mentioned in the succeeding section; the latter notice being the one required to obtain final jurisdiction to try the case. There is no provision in section 208 that temporary injunctions may not issue without the notice required to obtain final jurisdiction to proceed in the main case. This was amended by the Sixty-Third Congress. Act Oct. 22, 1913, c. 32, 38 Stat. 208, 219, 220 (Comp. St. 1913, § 998). This new act provides:

"When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit."

Personally I am distinctly of the opinion, even if the other statute should be so construed that the power to grant a temporary injunction or to hear an application for a temporary injunction is withheld until after notice has been given in the main case, this statute distinctly provides that upon 5 days' notice it might be heard, and this had nothing whatever to do with whether jurisdiction had been acquired to try the main case or not.

I have read the unpublished opinions in the Ninth circuit that are furnished in manuscript form, but I cannot find anything that bears

upon this case. In those cases there was no notice under the statute. My Associates do not fully agree with me in this respect, and as this case must be disposed of upon other grounds, we decline to pass upon the question of jurisdiction raised by the government and the Interstate Commerce Commission, and pass to other matters in connection with the case.

[1] A motion is made by the express companies to dismiss this case. This motion in my judgment could not be heard before the three judges now sitting. The three judges are convened to hear the application for a temporary writ of injunction, not to determine whether the case should be dismissed upon its merits. If the motion had been filed before the application had been made, there would be no pretense that

these three judges should sit to hear that question.

The motion to dismiss is one the majority of this court think must be submitted to the District Judge alone and be determined by him. That motion is not entirely free from difficulty. It is alleged in the bill that no legal evidence was taken before the Interstate Commerce Commission which would confer jurisdiction on it in this matter. Some of the judges are inclined to the opinion that it stated a legal conclusion; some that it stated an ultimate fact to be determined by the District Court. Whether he will determine it to-day or not is no affair of this court. When we come to the question as to whether the temporary injunction shall be granted or not a majority are agreed it cannot be done.

[2] The decision in the so-called Shreveport Case, the Houston & Texas Railway v. United States, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341, and the same case when tried by the Commerce Court and found and reported in 205 Fed. 391 (in the lower court Hon. John E. Carland, now by assignment one of the judges of this circuit, was one of the judges), held that if intrastate rates were of such a character as to interfere with the free movement of interstate commerce, Congress had the power under the Constitution to take over the fixing of said rates to that extent, and had conferred that power on the Interstate Commerce Commission, and the Interstate Commerce Commission in this case, in practically the identical language used in the Shreveport Case, determined that the rates from these points in South Dakota were of such a character as to constitute a discrimination against Sioux City, and thereby interfered with the freedom of interstate commerce, and were subject therefore to be regulated by the Interstate Commerce Commission.

The majority have agreed that we cannot grant the temporary injunction as an emergency relief. Such injunctions are ordinarily granted before proofs are complete, and in determining whether to grant them or not, the court must consider the damages which would be sustained by the defendants if a writ of injunction did issue before proof, and the damages to be incurred by the complainants if it did not issue. As Sioux City has, according to the findings of the Interstate Commerce Commission, been suffering from this discrimination against it for about 2 years and 7 months, we cannot find that within the 30 or 60 days between this and the final hearing the South Dakota towns

will suffer more damage from the failure to grant this injunction than Sioux City would suffer from the granting of it. We are therefore inclined to the opinion that the temporary injunction should not be granted in this case. The presumption is that the Interstate Commerce Commission's determination was correct and valid. We cannot assume that that controversy would be determined in favor of the complainants against the Interstate Commerce Commission, and thus grant this injunction when the damages to Sioux City from the granting of the injunction would be substantially equal to the damages to the South Dakota towns by refusing it. We are therefore of the opinion that the application for a temporary writ of injunction must be denied. This makes it wholly unnecessary to pass upon the question of jurisdiction, and the motion to dismiss is for decision by the District Judge.

I now suggest that Judges REED and WADE express their views so far as desired.

WADE, District Judge. So far as at present advised, I am of the opinion that if the proof were present of the actual service of this petition upon the Interstate Commerce Commission and the Department of Justice, even though less than 5 days before the hearing, we would have jurisdiction, although that is not a finding by which I would be held to be bound upon further investigation.

As I read this statute, I am rather inclined to think that the requirement of the service of the petition by filing in the Department of Justice and in the office of the Interstate Commerce Commission is mandatory, in order to acquire jurisdiction of the United States and the Interstate Commerce Commission; but in the view which I have of what should be the result in this case, it is unnecessary to pass upon the question here.

The cause of action set forth in this application involves, it may be said, three elements: One, that the Interstate Commerce Commission had no jurisdiction to make the order; another, that it had no evidence before it upon which to base the order; and another, that even if it had jurisdiction, the express companies could not fix rates without conferring with the railway commissioners of South Dakota.

In the view which I hold as to the other question in the case, which has been explained by Judge SMITH, it is not necessary for me to pass upon these questions. Of course I feel that no one can read the Shreveport Case and not be compelled to feel that it is the duty, at least of this court, to follow that case in holding that the Interstate Commerce Commission has the power to do what they did in the case at bar.

I realize that the rule of that case must result in a new field of controversy between the nation and the states, but I feel that in time these relations between the nation and the states will be so adjusted that there will be no more conflict than is absolutely necessary; but I do believe, inasmuch as the law does not fix the manner in which the rates shall be adjusted under an order of this kind, but simply authorizes the Interstate Commerce Commission to announce that there is a dis-

crimination—and, as held in the Shreveport Case, that the Commission has the right to rectify that discrimination—that the spirit of comity between the nation and the state should require that the express companies should, in the exercise of the rights granted by the Interstate Commerce Commission, present their situation to the railway commission of the state, in order that the rate which they propose to put in force shall be a matter of public information, and that in order that the state commission may have a chance to adjust general rates in the state in such a way as to meet the situation as well as possible.

Upon the hearing here, it is disclosed that some steps were taken in this direction; but there is not sufficient in the record to justify me in saying that they have not taken the steps that would be required; the facts upon this matter not being fully disclosed. But again, it is

not necessary to determine this question.

A temporary injunction is an extraordinary remedy. The modern tendency is to restrict it to cases where it is absolutely necessary, and where it can be granted without doing great injustice to any one. Now we have here, in this case, two conflicting interests, the interests of the merchants of South Dakota, and the interests of the merchants of Sioux City. Whichever way this case is decided, damage must result to some one; it may be to a greater or less degree, but somebody has to sustain damages. The condition of which Sioux City complains has existed now something more than 2 years. That the merchants of Sioux City are entitled to relief has been absolutely adjudicated by the Interstate Commerce Commission. If a temporary injunction should issue as prayed, the condition, so far as it affects and damages the merchants of Sioux City, must continue. It would be impossible to prescribe a plan which would enable them to recover the damage they would suffer, in case, upon final hearing, the temporary injunction should be dissolved, because their damage arises out of a loss of business or trade in such a way that it would be practically impossible to establish damages. On the other hand, if the injunction is denied the merchants of South Dakota must suffer, but they suffer simply because they pay a higher rate to the express company than they should pay if they are right in this proceeding, and they have a cause of action to recover the excess charges.

It is therefore a question as to whether the merchants of South Dakota must suffer by our order, or the merchants of Sioux City must suffer. I realize that there may be a difference in the amount of damage which one group may suffer, compared with what the other may suffer. I do not hold that the amount is necessarily the same, but it is of the same character; it grows out of the same cause upon one side or the other. This court cannot act without imposing damages on somebody; it cannot refuse an injunction without injuring South Dakota; it cannot grant a temporary injunction without saying to Sioux City:

"You will have to continue to carry this burden which the Interstate Commerce Commission has decided you have been compelled illegally to carry since February, 1914, and you must continue to carry this burden without any possible chance of recovering damages which you may suffer."

This being the situation, I personally do not feel that it justifies action by a court of equity at this stage. I do not believe that a court should grant a temporary injunction unless there is irreparable injury to the complainants, and unless it can be granted without imposing irreparable injury upon some one else; and, it being impossible to grant a temporary injunction without imposing damages upon the merchants of Sioux City, as aforesaid, I do not believe that the court at this time should exercise its extraordinary power to restrain the defendants from proceeding under the order of the Interstate Commerce Commission.

For this reason, and without passing upon the other questions presented, I hold that the application for a temporary injunction should be denied.

REED, District Judge (dissenting). I am unable to agree with the opinions that have just been announced.

At the outset I may say that there seem to be some statements in the Shreveport opinion and other cases bearing upon the questions here that are not easily reconciled; but that is not my reason for

disagreeing with the majority.

We are here to determine whether or not an interlocutory injunction should issue, practically against the defendant express companies, and for this reason the case is not now for hearing upon the merits. The majority of the court is of opinion that the three judges cannot now determine the merits, and with this I agree; but they go farther and say, as I understand them, that because the Interstate Commerce Commission and the Attorney General of the United States have not been served with the notice of this hearing for the required time (which is true so far as we now know), we cannot therefore determine the question of the jurisdiction of this proceeding as against them; that, I think, depends upon the statute providing for this court as now organized. The act of Congress, abolishing the Commerce Court and transferring its jurisdiction, so far as not repealed, upon the District Courts of the United States, was passed October 22, 1913, c. 32, 38 Stat. 219, 220 (Comp. St. 1913, § 998) which provides that:

"No interlocutory injunction suspending or restraining the * * operation or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued * * * by any District Court of the United States, or by any judge thereof, or by any Circuit Judge acting as District Judge, unless the application for the same shall be presented to a Circuit [Judge] or District Judge, and shall be heard and determined by three judges, of whom at least one shall be a Circuit Judge, and unless a majority of said three judges shall concur in granting such application."

That is the authority for calling together this court of three judges, and the act further provides that:

"Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other parties as may be defendants."

It is said by the majority that this court as now constituted may not determine the question of the jurisdiction to hear this application, be-

cause all it can do rightly is to determine whether or not the application shall be granted by this court. But what is it that this court as now constituted is to determine? Let the statute itself answer:

"When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges."

The Interstate Commerce Commission and the Special Assistant to the Attorney General of the United States appear before us specially to object to the jurisdiction of this court to proceed with this hearing, because the notice required by law to be served upon them has not been given. In this I think they are right. What is to be done? Before this court can proceed against the Interstate Commerce Commission, and the government itself, it must give the required notice; that has not been done; but that only means that the court shall not proceed to determine the application until the required notice has been given to the Commission and the Attorney General, and amounts only to this: That the hearing of this application should be postponed until those parties have been served the required time before the hearing can proceed. But the majority say that we are not authorized to consider the question of the jurisdiction of the court. The statute requires that when an application for a temporary injunction is made the judge shall immediately call to his assistance to hear and determine the application two other judges. In my judgment it is the duty of this court as now constituted, when one or more of the parties to a proceeding of this nature comes before it and says that it is without jurisdiction of the proceedings, that the court should determine whether or not the court has jurisdiction of the proceedings. It cannot rightly avoid determining it by declining to rule upon the motion so presented, and determine the question upon some other ground.

In my opinion the majority of the court is in error in disposing of this hearing before the Interstate Commerce Commission and the government itself have been given the required notice, and in now declin-

ing to determine its jurisdiction as to them.

The majority also say that the question of determining this case upon its merits devolves upon the District Court. That may be true; and the express companies appear and present what is in effect a demurrer to the petition for want of equity. But the merits of the case are not now for hearing, and when the case comes on for final hearing that will then be determined by the District Court.

As to the question of a temporary injunction, I agree with the majority that the relative damages that may be sustained by one or the other of the parties may, and ordinarily should, be considered. But if any damage is likely to result to Sioux City, or any other party, the injunction should not be denied upon that ground, but should be granted, if the plaintiff is otherwise entitled thereto, upon the plaintiff giving proper security to indemnify the party against whom it shall issue against such damages as the granting of the injunction may cause. The plaintiffs are commercial clubs and jobbers in five of the largest cities and towns in South Dakota that will be seriously injured if the proposed increase of rates by the express companies is put into effect.

I cannot agree that this court as now constituted may not determine the question of the jurisdiction to grant a temporary injunction at the proper time.

It is apparent upon the face of the petition that jobbers in these five towns will be discriminated against if the proposed rates shall go into effect, and will suffer damages—how much I do not know. But whatever they may be, the plaintiffs may be required to give proper security that will indemnify those who will be damaged by the granting of the writ. If I was to now determine the question of the merits of the demurrers of the express companies to the petition, I might be inclined, as now advised, to overrule it; but that question, as before stated, is not now for determination.

I am constrained to dissent from the holding of the majority, denying the application for the preliminary injunction at this time.

THE LUCY H.

(District Court, N. D. Florida. May 16, 1916.)

1. NEUTRALITY LAWS &=3.—CONSTRUCTION OF STATUTE—ARMING VESSELS AGAINST FRIENDLY POWERS—"COLONY, DISTRICT OR PEOPLE."

By Cr. Code, § 11 (Act March 4, 1909, c. 321, 35 Stat. 1000 [Comp. St. 1913, § 10175]), which makes it a criminal offense to fit out and arm, within the jurisdiction of the United States, any vessel "with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace," Congress designed to secure the neutrality of the United States, not only in wars between other nations recognized, and between contending parties recognized, as belligerents, but also by the words "colony, district or people," which were added by amendment in 1818 (Act April 20, 1818, c. 88, § 3, 3 Stat. 447), between warring factions contending for exclusive dominion, although there has been no political recognition of either as sovereign or of a state of belligerency.

[Ed. Note.—For other cases, see Neutrality Laws, Cent. Dig. §§ 3–8; Dec. Dig. €=3.

For other definitions, see Words and Phrases, Colony.]

2. Neutrality Laws &=3—Construction of Statute—Arming Vessels against Friendly Powers—"Prince"—"State."

Within Act April 5, 1794, c. 50, § 3, 1 Stat. 383, prohibiting fitting out

Within Act April 5, 1794, c. 50, § 3, 1 Stat. 383, prohibiting fitting out and arming of vessels "with intent to be employed in the service of any foreign prince or state to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state, with whom the United States are at peace," the words "prince or state" meant a sovereign or a political community entitled to admission into the family of nations; and, as such, political recognition was essential, and the words did not include an insurrectionary body or an unrecognized force of belligerents contending for the sovereignty of any given territory.

[Ed. Note.—For other cases, see Neutrality Laws, Cent. Dig. §§ 3–8; Dec. Dig. €=3.

For other definitions, see Words and Phrases, First and Second Series, State.]

3. Words and Phrases-"State"-"Nation."

A "state" or "nation" denotes a political community organized under a distinct government recognized and confirmed by its citizens and subjects as a supreme power.

[For other definitions, see Words and Phrases, First and Second Series, Nation; State.]

4. WORDS AND PHRASES-"PRINCE."

A "prince," in the general acceptation of the term, when applied in the law of nations, signifies a sovereign, a king, emperor or ruler; one to whom power is delegated or in whom it is vested.

In Admiralty. Libel of information and seizure maritime by the United States against the American schooner Lucy H. for violation of neutrality laws. On exceptions to libel. Overruled.

On September 14, 1915, the American schooner Lucy H. then in the port of Pensacola, Fla., in command of one H. B. Snell, master, took on board, besides a crew of 9 men and 15 Mexicans, a cargo of 162 rifles and 25,000 rounds of ammunition. Whereupon the vessel proceeded to Key West, Fla., arriving there about the last of the month. Here two more cases of rifles and a quantity of stores were added to the cargo. On the night of Tuesday, October 19, 1915, the vessel sailed from Key West in an unauthorized manner, and proceeded toward Tuxpam on the east coast of Mexico. The Mexicans taken on board at Pensacola remained with the vessel throughout the voyage. They were not shipped as crew nor listed as passengers. Near Tuxpam the Lucy H. discharged 2 of her crew, who went ashore with 2 of the Mexicans in one of the ship's boats and did not return. The schooner then beat up and down the Mexican coast two or three days, during which time, while off a settlement, another Mexican was sent ashore. Finally the Lucy H. dropped anchor, and the remainder of the Mexicans and all of the cargo were sent ashore, after which the schooner sailed for Pensacola, arriving on November 11, 1915, where she was seized upon a libel of information which charged substantially in alternative articles, under section 11 of the Penal Code, that: "The said schooner Lucy H., on the 14th day of September A. D. 1915, within the navigable waters of the United States and within the jurisdiction of this court, was then and there unlawfully furnished, fitted out and supplied * * * and armed with a military expedition of 15 armed men, more or less, with intent to be employed in the service of the Villaistas, certain insurgents in the country called Mexico, with whom the United States were and are at peace, with intent to cruise and commit hostilities against the subjects, citizens and property of * * * "—First, the people of Mexico; second, Gen. Carranza, a foreign prince; third, the colony of Mexico; fourth, the district of Mexico; fifth, the republic of Mexico; sixth, the de facto government and the forces of Gen. Carranza; with whom the United States then were and now are at peace, etc.

John L. Neeley, U. S. Atty., of Tallahassee, Fla., and Phillip D. Beall, Asst. U. S. Atty., of Pensacola, Fla., for libelant.

John P. Stokes and Scott M. Loftin, both of Pensacola, Fla., for respondent.

SHEPPARD, District Judge (after stating the facts as above). The American schooner Lucy H. was seized by the United States on a libel of information with 36 articles, charging a violation of the Neutrality Act as finally amended April 20, 1818 and embodied in section 11 of the Penal Code of 1910 (Comp. St. 1913, § 10175), the pertinent provisions of which read:

"Whoever, within the territory * * * of the United States fits out and arms * * * any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, dis-

trict, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace * * * and every such vessel, * * * her tackle * * * materials * * * stores * * shall be forfeited."

The sufficiency of the libel in law is challenged by several exceptions, the sixth and seventh of which test the substance of the case as made by the libel, and submits for judicial determination the concrete question whether the acts charged in the libel as delictum come within the inhibition of the statute. These exceptions maintain substantially that to violate the statute the vessel must be fitted out "with intent * * * [to] be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace," and who are at the time enjoying independent political recognition.

First. It is contended that the whole import of the libel is that the vessel was to be employed in the service of named bandits, whom it is impossible to bring within the first prohibitive classes described in the Neutrality Act, viz., "any foreign prince or state, or of any

colony, district or people."

Second. It is contended by the claimant that, according to the articles of the libel, the vessel was not fitted out to cruise against the "subjects, citizens or property of any foreign prince or state, or of any colony, district or people with whom the United States are at peace," but against another faction of brigands, not emulating the dignity of a "foreign prince or state, or * * * colony, district or people," or any designated class entitled to the protection extended by Congress to recognized foreign nations or governments "at peace" with the United States.

The exceptions therefore raise both the questions of political recognition of the foreign party or authority employing the expedition, as well as the intention of Congress in amending the statute by adding to the section as it originally read, in both branches, the words

"or of any colony, district or people."

[1-4] For an intelligent comprehension of the effect of the amendment, a brief review of the pertinent cases construing the act before and since the amendment may be useful. Many of the cases cited, compared, and discussed by counsel in their exhaustive arguments (The Carondelet [D. C.] 37 Fed. 801; The Conserva [D. C.] 38 Fed. 431; The Florida, 4 Ben. 452, Fed. Cas. No. 4,887; The Itata, 56 Fed. 505, 5 C. C. A. 608) were cases adjudged before the comprehensive decision of The Three Friends, 166 U. S. 54, 17 Sup. Ct. 495, 41 L. Ed. 897, and are interesting more in that they emphasize the marked reluctance of courts to depart from established precedent than to illuminate the subject under discussion.

The inferior federal courts, having occasion to construe the law with the amendment, have followed with unrelenting tenacity Gelston v. Hoyt, 3 Wheat. 246, 4 L. Ed. 381, which, according to the history

of the particular legislation, rendered necessary the present enlarged provision of the act to meet situations wherein the previous or original act because of its restricted scope was deficient. Gelston v. Hoyt, supra, was an action of trespass against the collector and surveyor of the port of New York for seizing an American ship under orders of the President, dated July 10, 1810, for a violation of the act of 1794, § 3 (1 Stat. 383, c. 50), which provided for cases in which the vessel was fitted out and armed—

"with the intent to be employed in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state, with whom the United States are at peace."

The defendants in the case pleaded that the seizure was justified under the statute, and that they were not responsible for the spoliation of the cargo and the damages suffered by the ship. Construing this statute, the court said (page 323 of 3 Wheat., 4 L. Ed. 381, supra):

"But the other point which has been stated * * involves the construction of the act of 1794 (chapter 50, § 3). * * No evidence was offered to prove that either of these governments was recognized by the government of the United States, or of France, as a foreign prince or state; and, if the court was bound to admit the evidence, as it stood, without this additional proof, it must have been upon the ground that it was bound to take judicial notice of the relations of the country with foreign states, and to decide affirmatively that Petion and Christophe were foreign princes within the purview of the statute. No doctrine is better established than that it belongs exclusively to governments to recognize new states, in the revolutions which occur in the world; and until such recognition, either by our own government or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered."

Recognizing the effect of this decision, Congress in amending the act sought to extend its scope and include other broadly defined persons, groups, or classes in the service of whom hostile expeditions might be employed other than princes or states, as well as against whom hostilities might be committed.

The Supreme Court in the case of The Three Friends, supra, had under review sharply the point whether the act of fitting out an expedition "to be employed in the service of any foreign prince or state, or of any colony, district or people" was meant, as held by the lower court, to refer to a "body politic" which had been recognized by our government at least as "a belligerent."

The Supreme Court, in considering the application of the first branch of the section which designates in whose service the expedition was to be employed, broadly held that the word "people," taken in connection with the words "colony" and "district," covered any insurgent or insurrectionary body of people acting together, undertaking, and conducting hostilities, although its belligerency had not been recognized, and in reversing, the lower district court said:

"Of course a political community whose independence has been recognized is a 'state' under the act; and, if a body embarked in a revolutionary political movement, whose independence has not been recognized, but whose belligerency has been recognized, is also embraced by that term, then the words 'colony, district or people,' instead of being limited to a political community

which has been recognized as a belligerent, must necessarily be held applicable to a body of insurgents associated together in a common political enterprise and carrying on hostilities against the parent country, in the effort to achieve independence, although recognition of belligerency has not been accorded."

The remaining question for decision is whether or not Congress, by the addition of the phrase "or of any colony, district or people" to the words "any foreign prince or state" in the second branch of the section, sought to provide protection for an unrecognized foreign faction laying claims to sovereignty. By reference to standard dictionaries, as well as authorities on international law, it will be found very well settled that a "state or nation" denotes a political community organized under a distinct government recognized and conformed to by its citizens and subjects as the supreme power. A "prince," in the general acceptation of the term according to authorities when applied in the law of nations, signifies a sovereign, a king, emperor, or ruler; one to whom power is delegated or vested. Necessarily, when the statute of 1794 described the contending factions, parties, or belligerents as "any foreign prince or state * * * against * * * another foreign prince or state," it described a sovereign or a political community entitled to admission into the family of nations; and, as such, political recognition was essential to the operation of the statute as it read. It did not then describe or cover in either branch of the section an insurrectionary body or an unrecognized force of belligerents contending for the sovereignty of any given territory. By the adjudged cases, chiefly Gelston v. Hoyt, supra, this defect in the act was disclosed to Congress and culminated in the re-enactment of April 20, 1818, now under consideration. In The Three Friends, supra, page 56 of 166 U.S., page 499 of 17 Sup. Ct. [41 L. Ed. 897], alluding to the amendments in the first branch of the section, the court say:

"At all events, Congress imposed no limitations on the words 'colony, district or people,' by requiring political recognition."

Further on in its opinion the court referred to the case of The Salvador, L. R. 3 P. C. 218, and regarded the observations therein as "entirely apposite," and, as before noted, held that the amendment covered any "insurgent or insurrectionary body of people * * * undertaking and conducting hostilities." In passing, the court called attention to the use of the same words, "colony, district or people," in the succeeding part of the section, and stated that as thus used they were employed in another connection, and "were affected by obviously different considerations." While this was a direct reference to the "succeeding part of the section," in the light of the opinion it cannot be held to possess the dignity of a construction, for the question as to its scope was not before the court, not necessary to the decision, and hence could not have been authoritatively decided there. In the view of this court such statement is in no wise controlling in the case at bar, for it clearly falls within the rule laid down by Chief Justice Marshall in the case of Brooks v. Marbury, 24 U. S. (11 Wheat.) 78, 6 L. Ed. 423, viz.:

"General expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the

case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." Cited among other cases is Schaap v. United States, 210 Fed. 856, 127 C. C. A. 415, text.

It may be true that for a political community to be entitled to political recognition under the law of nations, it should have the attributes of sovereignty. In that event the provisions of the statute "any foreign prince or state" would necessarily embrace such a community. If recognition followed, that recognition would take place in the orderly way prescribed by rules governing such matters in national intercourse. There would be the necessary representative, the formal demand, and the formal action of the political department of the recognizing power.

Interpreting one section of the Neutrality Act after the amendments of 1818, the Supreme Court, in the case of Wiborg v. United States, 163 U. S. 647, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289, text, observed:

"It [the Neutrality Act] was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency."

Congress undertook to preserve the neutrality of the United States, not only in wars between states and nations recognized, but also in insurrections and political revolts in foreign countries where such contests produce a situation in which both factions are striving for exclusive dominion. If the United States is to preserve neutrality toward other nations and peoples as Congress designed, its ports cannot be used as a base of operations for military expeditions or enterprises which may not only go in furtherance of or in assisting an insurrectionary force, but which in its very nature, in the absence of strife, might incite revolt. Manifestly, therefore, Congress, in the addition of the words "colony, district or people," to the second branch of this section sought to provide for a situation which, and to describe a body of persons whom, it was impracticable to recognize politically.

There is no apparent reason for restricting the interpretation of the amendment to the first branch of the section, as stated in The Three Friends, supra, and there certainly is nothing in the opinion to warrant the view that the words "foreign prince or state, or of any colony, district or people," as used in the second branch of the section, against whose "subjects, citizens or property" hostilities were intended, should receive a more strict application. Indeed, such a construction would fail utterly to compass what President Madison moved Congress to do by his earnest appeal for "more efficient laws to prevent violations of the neutrality of the United States as a nation at peace," by permitting belligerent parties to arm and equip vessels within the waters of the United States for military purposes.

From what is said it follows that the construction placed on the first branch of the particular section of the Neutrality Act is equally applicable to the second branch of the section, and consequently political recognition of the objects of the hostilities is not required as a condition precedent to a violation of the act, and the exceptions numbered 6 and 7 will be overruled.

HANSEN et al. v. UNIFORM SEAMLESS WIRE CO. (District Court, D. Rhode Island. September 9, 1916.)

No. 1585.

COMPORATIONS \$\igstructure{\infty} 308(5)\$—Contracts with Owner of Controlling Stock—Validity.

On the organization of a corporation, all of its common stock, except 3 shares, of a par value of \$30, were issued to petitioner in payment for certain formulæ and inventions, and he became president and a director. The corporation also entered into a contract by which it employed him as general manager for 10 years at a weekly salary of \$100. During the ensuing 6 years preferred stock was sold, but purchasers were not informed of the contract, nor was the stipulated salary paid petitioner, although he drew smaller sums from time to time for services. Statements were also issued, for purposes of selling stock and as a basis for credit, none of which showed any indebtedness to petitioner for past salary. Held, that the contract was one in form only, and not enforceable as against other stockholders or creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1339, 1340; Dec. Dig. ⇔308(5).]

In Bankruptcy. Petition in involuntary bankruptcy by Charles E. Hansen and others against the Uniform Seamless Wire Company. Petition dismissed.

Peter C. Cannon, of Providence, R. I., for petitioning creditors. J. Jerome Hahn, of Providence, R. I., for defendant.

BROWN, District Judge. This is an involuntary petition in bank-ruptcy.

The principal question is whether the claim of Joseph T. Boland to be a creditor is established by the evidence. Boland's claim is set forth as follows:

- (1) Joseph T. Bolaud, services as general manager of said Uniform Seamless Wire Company under a certain contract dated May 20, 1909, between said Joseph T. Boland and said Uniform Seamless Wire Company. Balance due......\$24,855
- (2) Also for the reasonable value of work and labor performed by said

 Joseph T. Boland for the said Uniform Seamless Wire Company
 as general manager of said Uniform Seamless Wire Company
 from May 20, 1909, to March 4, 1916. Amount as above.....\$24,855

By the records of the board of directors of the Uniform Seamless Wire Company, a Maine corporation having its principal place of business at Providence, R. I., it appears that on October 27, 1908, it was voted that the corporation purchase of Boland, for the sum of \$99,970, payable wholly and only by 9,997 shares of common capital stock, certain rules and formulæ relating to the manufacture of seamless gold plated wire, etc., and also all formulæ, inventions, and processes, etc., patented or unpatented, which, during the period of 10 years next ensuing, he might have, possess, make, and acquire, relating to metallurgy, metallic plating, etc.

The record of that meeting recites the execution by Boland of a deed drawn by counsel of the corporation, its delivery to the treas-

urer, and the issue and delivery to Boland of a certificate for 9,997 shares of the common stock. This was all except 3 shares of the capital stock. It was also voted that the corporation make a contract with Wheaton Seabury, Incorporated, to pay a commission of 10 per cent. on all moneys and funds paid to the corporation for stock, common or preferred, sold by Wheaton Seabury, Incorporated. So far as this related to common stock, it was inconsistent with the issue of that stock to Boland, though it indicates that Boland and the corporation were regarded as practically the same in interest.

On February 1, 1909, Boland was elected a director and president in place of Wheaton Seabury, resigned, and also general manager, at a salary of \$100 per week, payable weekly, to serve until the next annual meeting, or until some other person was elected and qualified

in his stead.

At a meeting of May 14, 1909, it was voted that a contract be made for the term of 10 years from that date, with Boland, to serve as general manager at a salary of \$100 per week, payable weekly. This contract was executed May 20, 1909, and is the basis of Boland's claim.

The records show that at this time the corporation was in the first stages of promotion. No moneys had been paid in, and for what he conveyed to the corporation Boland received all of its common stock except 3 shares, of the par value of \$10 each.

The record of July 16, 1909, shows the resignation of Wheaton Sea-

bury as treasurer, and a vote to execute to him a general release.

The record of July 30, 1909, shows the election of Elijah Astle as director, treasurer, and secretary. There is no record of any directors' meeting between July 30, 1909, and January 10, 1912. At the latter date it was voted to pay a dividend of 7 per cent. to all holders of preferred stock to December 30, 1911.

The condition of the business for the year ending December 31, 1911, is shown by a report on audit of accounts by Suffern & Sons, certified Public Accountants (Defendant's Exhibit J), which is an important piece of evidence in this case. It shows for the preceding year a total of \$2,468.27 for general expenses and salaries, and the schedule of liabilities shows no indebtedness to Boland for past salary.

The contract at the time of its execution was rather a matter of form than of substance, for Boland was in effect merely contracting with himself, since, except for 3 directors' shares, of a par value of \$10 each, he owned all the stock in the corporation. As was said of a somewhat similar transaction in Smith v. Bowker-Torrey Co. (D. C.) 207 Fed. 967:

"Looking to the substance of the matter, the agreement between the corporation, all of whose stock was held by the copartners, and the copartners, is primarily a matter of form."

It is claimed that in order to secure the success of the corporation it was essential to secure the services of Boland for a period of 10 years; but the parties to the transaction other than Boland, and the promoter, who was to sell stock for a commission of 10 per cent., had,

so far as appears, no substantial interest in the matter. In effect Boland, having certain formulæ and certain knowledge respecting the manufacture of seamless filled wire, adopted the plan of forming a corporation to which he would convey his formulæ and his inventions, taking all the common stock except 3 shares, and while the owner of practically all the stock, and before marketing any stock, making a contract for 10 years' service. So long as he continued as practically the sole stockholder, it would make little difference whether he received his compensation in the form of salary or of dividends.

A contract for Boland's services for 10 years at a fixed salary of \$100 a week might be a valuable asset of the corporation, or a burden, as its affairs might develop. In fixing the amount which the corporation was to pay for services as a general manager and the term of service, however, the value of the services and the term were not fixed between two parties acting in separate and opposing interests, but were fixed arbitrarily. Furthermore, Boland at this time was a director and president of the company.

Under these circumstances purchasers of stock were entitled to be informed of the fact that the company was under obligation to pay Boland the sum of \$100 per week for the period of 10 years. It appears, however, that stock was sold to a considerable amount without disclosure to the purchasers of the existence of the contract with Boland.

As the corporation was without funds, and without means of obtaining funds other than the sale of preferred stock, or borrowing, it was from the outset unable to comply with the agreement to pay Boland \$100 per week, and its failure to do so gave Boland the liberty of choosing whether he would or would not be bound for the period of 10 years. It was all a one-sided arrangement, lacking in its formation the essential elements of a contract, though it was such in form, and might become such in substance, if subsequently assented to. I find, however, no evidence of subsequent assent to or ratification or recognition of the contract by any person having any substantial interest in the corporation.

I find as a matter of fact, upon the evidence, that the purchasers of the stock did not become informed of the existence of this contract until some time in the spring of 1915. Boland testified that after Elijah Astle had purchased stock, for which he paid, and had been elected treasurer, some time in the latter part of July, 1909, Astle, in looking over the papers of the corporation, found the contract, and said, "This will never do;" and that Boland replied, "Oh, yes; that contract is very good;" and took it and put it into his private drawer in the safe. Boland's own testimony indicates that he did not disclose the existence of the contract to Astle before Astle purchased stock.

Astle, however, denies ever having seen the contract at this time, or that he learned of it before the spring of 1915; and, having regard to the fact that the testimony of Boland is on many points in direct contradiction to that of a number of apparently disinterested wit-

nesses, I find as a fact that Astle and other stockholders were not informed of the existence of this contract before the spring of 1915.

In March or April, 1913, there was some conversation between Boland and Elijah Astle in relation to the amount of salaries, and an informal arrangement was made between them to take preferred stock of the company in satisfaction for salaries, for the years 1909, 1910, and 1911; but this evidence falls short of proof that Astle had knowledge of this contract, or that it was the basis of that arrangement. It shows nothing more than that both Boland and Astle considered that their past services entitled them to compensation from the corporation.

It is significant that the rate of salary for Boland was not \$5,200,

according to the terms of the contract, but \$3,000, per annum.

This plan of taking preferred stock for past salary was not consummated, and the preferred stock, though issued, was returned to the corporation; Boland testifying that he "didn't think it was right to take it, under the conditions."

Upon the whole evidence I find that there was no assent by any party in interest to the contract made by Boland at the organization of the corporation. I find, also, that when Astle and others became purchasers of stock and interested in the business, the affairs were conducted in a somewhat informal way; that from July 30, 1909, when Astle became treasurer, to January 10, 1912, there is no record of any meeting of directors, and that withdrawals for compensation for services were adjusted by Boland and Astle with reference to the ability of the business to pay; that the arrangement for compensating themselves for back salary was not made upon the basis of the terms of an existing contract, nor as a recognition of an existing contract, and for Boland was upon a basis of \$3,000, instead of \$5,200, a year; and that even this was abandoned on account of the fact that the condition of the business would not warrant it.

The conduct of Boland in his dealings with other stockholders, and in respect to the sale of stock, is entirely inconsistent with the existence of a large claim for salary, and shows that if, at the outset, he planned to collect that amount according to the terms of the contract, he abandoned this plan at a time when it was for his interest to do so in order to secure funds for the company, of which he was always the principal stockholder in interest.

In December, 1911, an audit was prepared and used as a means of inducing investment in the stock. No liability to Boland for past salary appears. Although Boland disclaims a knowledge of other than the mechanical business, the whole testimony shows that he was fully cognizant of the affairs of the company, and that the bookkeepers gave him due information by monthly trial balances. The preponderance of evidence is strongly against Boland on this matter.

Various statements were prepared as a basis of credit at bank, and in these bank statements the item of wage and salary accounts is itemized; but they include no claim of Boland for unpaid salary. Tax returns proper for filing with the state government and the federal government are shown to have been brought to Boland's attention and

none of these returns contains the debt on salary account. It appears that at directors' meetings no claim was advanced by Boland. At certain meetings dividends were declared upon preferred stock. Had Boland's claim been an obligation of the company, it is contended that there would have been no profits with which to pay the dividends. Furthermore, statements were made to creditors as to the standing of the company, which included no claim of Boland for back salary.

The petitioners contend that, if the corporation is not insolvent by virtue of a debt owed under an express contract, it is insolvent by virtue of a debt due upon quantum meruit. I am of the opinion, however, that this case cannot be reopened to admit evidence as to the

value of services rendered.

Boland, from time to time by arrangement with the treasurer, received certain sums; and there is no evidence, other than the contract of May 20, 1909, of any express or implied contract of the corporation to pay him any larger sums. Boland, a controlling stockholder, was interested in maintaining the credit of the corporation; and his acceptance of pay from time to time by arrangement with the treasurer must be held conclusive against any claim for a larger amount on

quantum meruit.

I am of the opinion that the claim must be disallowed, for the reason that the so-called contract was not a contract in substance, but merely a paper representing a project of Boland, a contract only in form, which was never assented to at any time by any person representing the corporation independently, and for the further reason that Boland upon the evidence must be held both to have abandoned all claims for salary at the contract rate and, by his failure for about six years to assert such claim, and by his knowledge that no indebtedness for the claim was stated as a liability to be fully estopped as against all other stockholders and all creditors from asserting this claim against the corporation as a creditor petitioning the corporation into bankruptcy.

The record of the receivership proceedings in the state court shows that the petition alleged inability to pay debts as they became due in the ordinary course of business, and not that the liabilities exceeded the assets, or insolvency as that term is defined in the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544). It therefore is essential for the petitioners to establish the fact of insolvency by proof other than

the record of the state court.

The claim of Boland being disallowed, there is a failure to prove insolvency, and the claims of other creditors are insufficient in amount to meet the requirements of the Bankruptcy Act.

The petition is denied.

YOUNGKEN et al. v. DAVID et al.

(District Court, E. D. Oklahoma. June 17, 1916.)

No. 2175.

1. Indians \$\infty 15(2)\to Lands\to Alienation by Heirs.

Act April 26, 1906, c. 1876, § 22, 34 Stat. 145, provides as follows: "The adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe * * * may sell and convey the lands inherited from such decedent. * * * All conveyances made * * * by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior." Held, that such provision applies only to lands which had been or should thereafter be selected by or patented to the decedent during his or her lifetime, and does not apply to land selected by an administrator under section 20 of the Cherokee Agreement July 1, 1902, 32 Stat. 716, and on behalf of an Indian who died without having received his allotment, and that such lands are alienable by the heirs without restriction under prior legislation.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 39; Dec. Dig.

□5(2).]

2. Indians \$=15(1)-Lands-Alienation by Heirs.

Act April 26, 1906, c. 1876, § 19, 34 Stat. 144, which provides that no full-blood Indian of any of the Five Tribes shall have power to alienate "any of the lands allotted to him" for a period of 25 years, applies only to lands allotted to an Indian in his own right as his share of the tribal lands, and does not apply to land allotted to him as heir on behalf of a deceased member.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 37, 38; Dec. Dig. ६ 15(1).]

In Equity. Suit by J. H. Youngken and others against Nellie David and others. Decree for complainants.

L. J. Roach, of Muskogee, Okl., for complainants.

D. H. Linebaugh, U. S. Atty., of Muskogee, Okl., Paul Pinson, Special Asst. U. S. Atty., of Atoka, Okl., and James C. Denton and Frank Lee, both of Muskogee, Okl., for defendants.

CAMPBELL, District Judge. The statement of facts involved in this case and the chief contentions of the parties as set forth in the brief of counsel for plaintiffs will be adopted, from which it appears that

"Stephen David, an enrolled Cherokee full blood, died intestate September 30, 1903, without having selected an allotment. He left surviving a widow, five adult daughters, and a minor grandson, the son of a deceased daughter. The widow, Nellie David, and one daughter, Nancy Ghormley, were enrolled as of three-quarter blood, while the four other daughters and the grandson were enrolled as full-blood Cherokees.

"An administrator was appointed, who, on August 2, 1905, selected a portion of the allotment to which the heirs of Stephen David were entitled, under section 20 of the Cherokee Agreement, providing that: 'If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his

proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter 49 of Mansfield's Digest of the Statutes of Arkansas: Provided, that the allotment thus to be made shall be selected by a duly appointed administrator or executor.'

"For some reason the administrator did not select the balance of the allotment until May 28, 1907. This latter portion of the allotment is the land now in controversy. On November 5, 1907, the widow and the five adult heirs executed a warranty deed, conveying this land to John D. Scott and Horace M. Adams. A consideration of \$200 was paid to each grantor. This deed was never presented for approval, or approved, either by the Secretary of the Interior or by a county court, the grantees deeming approval unnecessary.

"In December, 1907, the legal guardian of the minor grandson presented a petition to the county court of Cherokee county, reciting this conveyance by the adult heirs; that Scott and Adams had offered to pay the minor \$200 for his interest; that a deed had been executed by the guardian to Scott and Adams; and asking that this deed be approved by the court. It was so approved on December 30, 1907. On March 31, 1909, Adams conveyed his interest in the land to Scott, and on January 28, 1915, Scott conveyed to the plaintiff J. H. Youngken. Scott died on March 4, 1915, and the plaintiff Youngken is the administrator of his estate. On October 9, 1909, almost two years subsequent to the deed to Scott and Adams, the widow and the five adult daughters and the minor grandson, by his legal guardian, executed an oil and gas lease on the land to F. W. Galer. This lease was in departmental form, and was approved by the Secretary of the Interior on January 10, 1910. On April 18, 1910, it was assigned by Galer to the defendants Knight & Gillcoat. Knight & Gillcoat have developed the land, and produced considerable quantities of oil. From August 1, 1910, until March, 1912, the one-eighth royalty due the owner of the land was paid to the Indian agent. In March, 1912, the agent advised the Prairie Oil & Gas Company, which was purchasing the oil, that a question had arisen concerning the right of the department to supervise the lease, and that until that question was settled the Prairie Company might retain the royalties. All royalties accruing since March, 1912, are in the hands of the Prairie Company, and the land is producing oil at the present time.

"The plaintiff contends that the land in controversy, being allotted under section 20 of the Cherokee Agreement, on behalf of the heirs of an enrolled citizen who died before receiving his allotment, was at all times unrestricted as to alienation by the heirs; that the conveyance by the adult heirs required no departmental or other approval; that the conveyance of the interest of the minor has been properly approved by a county court; and that the deeds from the adult heirs, and the minor, by his guardian, in November and December of 1907, conveyed good title to the plaintiff's grantors; that the department has never had, and has not now, any right to supervise the land or the royalties arising therefrom; that the title of the plaintiff, J. H. Youngken, should be quieted as against the widow and other heirs, all of whom are made defendants; that the plaintiff, J. H. Youngken, personally is entitled to recover the royalties which have accrued since he purchased the land; and that Youngken, as administrator of the estate of John D. Scott, deceased, is entitled to recover for the estate the royalties which accrued while the land was owned by Scott.

"The answers of the several Indian defendants and of the superintendent allege that the land was restricted for the reason that it was not selected by the administrator of Stephen David, deceased, until after April 26, 1906. It is insisted that sections 19 and 22 of the act of that date, or one of such sections, imposed restrictions upon alienation, or subjected any conveyance by the heirs to approval by the Secretary of the Interior."

It will be noted that the portion of the allotment involved in this case was not selected by Stephen David's administrator until after the act of April 26, 1906 (34 Stat. L. 137), became effective. Had it been selected before the passage of that act, there would be no question

of the right of these heirs to alienate it without restrictions, at least up to the time of the passage of the act referred to. Section 20, Cherokee Treaty (32 Stat. L. 716); Mullen v. United States, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834; Skelton v. Dill, 235 U. S. 206, 35 Sup. Ct. 60, 59 L. Ed. 198; Adkins v. Arnold, 235 U. S. 417, 35 Sup. Ct. 118, 59 L. Ed. 294; Mallory-Bushyhead Case (affirmed by Circuit Court of Appeals, 237 Fed. 526, 150 C. C. A. 408), decided by this court without written opinion.

This land was selected and the conveyances relied upon by the plaintiffs were made before the passage of Act May 27, 1908, c. 199, 35 Stat. 312, so that the question is confined to a consideration of the applicable portions, if any, of the act of April 26, 1906. Counsel for defendants contends, however, that as to the interest in this land of those of the aforementioned heirs of Stephen David who are full-blood Indians it is made inalienable except with the approval of the Secretary of the Interior by section 22 of the act of April 26, 1906, reading as follows:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

[1, 2] It is contended that this section applies, not only to a case where the selection of the deceased Indian's allotment had been made or a patent had issued to him during his lifetime, but also to a case like the one at bar, where he had died prior to such selection or issuance of patent, and where such selection is made by administrator or executor, as provided in section 20 of the Cherokee treaty above quoted. A careful consideration of section 22 of the act of April 26, 1906, in the light of controlling decisions, convinces that it will not bear the construction contended for by counsel for defendants. The very language of the section confines its effect to allotments of deceased Indians which had been, or shall be, selected by or for or patented to such Indians prior to their death. The lands affected in each case are those "inherited from such decedent." The purpose of the section is to apply its provisions to such lands in the hands of heirs of Indians already deceased at the time of its passage or who shall thereafter die. Hence the language, "his or her share of the land of the tribe to which he or she belongs or belonged." The manifest object of this section is to relieve the lands referred to from existing restrictions upon alienation. Allotments selected by or for or patented to living Indians of the several tribes affected by this legislation as their allottable share of the lands of any such tribe were, at the time of the passage of the act in question, restricted as to alienation either by such allottee or his heirs, by virtue of the several prior acts of Congress relating to such tribes respectively. The effect of this act was to relieve the heirs from such restrictions except as to minors and full bloods, as to whom there was a qualified removal of such restrictions. On the other hand, by existing legislation relating to these several tribes the lands selected by or for or patented to heirs of deceased Indians dying prior to such selection or patent, being lands to which such deceased Indians would be entitled if living, were taken and held by such heirs free from all restrictions. Hence as to such lands there was no necessity of legislation removing restrictions.

Counsel for defendants cites as authority the case of Sampson v. Staples, decided by the Oklahoma Supreme Court, 155 Pac. 213. In this case it appears that Louisiana Sampson was a Mississippi Choctaw who died in 1903. It is stated that after her death, and prior to April 26, 1906, "Allotment designations were made for said allottee covering the land in controversy." Allotment certificates were issued therefor in 1907 and patents in 1909. Conveyances were thereafter made by the full-blood heirs without either the approval of the Secretary of the Interior or of the county court. It is held that under section 22 of the act of April 26, 1906, these conveyances were invalid, citing as authority: Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738, United States v. Western Investment Co., 226 Fed. 726, 141 C. C. A. 482, and Brader v. James (Okl.) 154 Pac. 560. But the lands involved in each of the cases cited were selected and allotted to Indians in their lifetime who afterwards died, and the question involved in each case was the right of the heirs of such deceased Indians to alienate without the approval of the Secretary of the Interior or the county court. So that they are not really authority for the holding in Sampson v. Staples, and, for reasons heretofore given, I cannot agree with the conclusion reached in that case.

By section 19 of the act of April 26, 1906, it is provided:

"That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribes shall have power to alienate, sell, dispose of, or incumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of congress."

Under the provisions of section 20 of the Cherokee Agreement above quoted the land in controversy passed directly from the tribe to the heirs of Stephen David by operation of law, although it may have been nominally allotted and patented in the name of Stephen David, as provided by that section, for at the time of such allotment he was dead. Hence it might be contended that this was an allotment to the heirs, and that as to such of them as are full bloods section 19 applies as to "lands allotted to them." Such contention, however, would not be sound, for the reason that when section 19 is considered, as it must be, in connection with all preceding legislation passed by Congress relating to the allotment of the lands of the Five Civilized Tribes, it is apparent that this section must be confined in its effect to the lands which a member of the tribe receives as his allottable

share of the lands of the tribe by virtue of his membership therein. and not to the lands he receives by virtue of a provision whereby as an heir of another member of the tribe dving before receiving his allottable share of the tribal lands such lands passed to him as such heir. While in such case such lands may be, in a general sense, allotted to him, they are not allotted to him in the sense of that term as applied to the aliquot part of the land which every living member receives as his allotment or division of the lands of the tribe. distinction is made manifest by the United States Supreme Court in Skelton v. Dill, supra. This case involved the question whether the full-blood heirs of a Creek ancestor, entitled to an allotment of land in that tribe, but dving before receiving the same, could alienate the lands allotted to them as heirs of such ancestor without the approval of the Secretary of the Interior. They took such lands by virtue of section 28 of the Original Creek Agreement (31 Stat. L. 861), which provided that in such case such lands should "descend" to the heirs and be "allotted" and distributed to them. By section 16 of the Supplemental Creek Agreement (32 Stat. L. 500) it was provided that "lands allotted to citizens" should be subject to certain restrictions upon alienation, but the court held that these restrictions applied only to allotments made to living citizens in their own right, and did not apply to allotments made on behalf of deceased members. reason is perceived why any different signification should be given to the term "allotted" in section 19 of the act of April 26, 1906, than is given by the Supreme Court to the same term in section 16 of the Supplemental Creek Agreement. To construe either section 19 or 22 of the act of April 26, 1906, as applying to lands held by fullblood Indians by virtue of being heirs of tribal members dying before receiving such lands in allotment would be to impute to Congress the intention to reimpose restrictions upon such lands as had gone into the hands of such heirs prior to the passage of the act, for, as we have seen, up to that time such lands were unrestricted. But this, it is held, is not within the power of Congress to do. Bartlett v. United States, 203 Fed. 410.

It is true that in Shulthis v. McDougal (C. C.) 162 Fed. 331, decided in 1908, this court gave to section 22 of the act of April 26, 1906, the construction now contended for by defendant's counsel, which was apparently approved by the Circuit Court of Appeals in the same case on appeal. 170 Fed. 529, 95 C. C. A. 615. But a reconsideration of the section in the light of controlling decisions of the Supreme Court and Circuit Court of Appeals since the decisions in Shulthis v. McDougal were rendered forces the conclusion that the construction placed upon the section in that case was wrong.

It follows that the conveyances from the heirs of Stephen David, under which the plaintiffs claim, were valid so far as concerns the right of such heirs to alienate the lands in controversy free from restrictions. Decree may therefore enter for the plaintiffs.

235 F.-40

HARRIS v. BELL et al.

(District Court, E. D. Oklahoma. June 20, 1916.)

No. 2015.

INDIANS 5-15(1)-LANDS-ALIENATION BY HEIRS-DESCENT.

Land allotted by the Commission to the Five Civilized Tribes in the name of a deceased Creek child who was placed on the rolls pursuant to Act March 3, 1905, c. 1479, 33 Stat. 1048, but died before allotment, whether the title passes under the Original and Supplemental Creek Agreements or by virtue of Act April 26, 1906, c. 1876, § 5, 34 Stat. 138, or Act June 25, 1910, c. 431, § 32, 36 Stat. 863, descends to the heirs of the deceased child according to Mansf. Dig. Ark. §§ 2522–2545, free from any restrictions upon alienation.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 37, 38; Dec. Dig. ⊗ 15(1).]

In Equity. Suit by Annie Harris against Harry H. Bell and others. Decree for defendants.

J. R. League, of Tulsa, Okl., and Merwine & Newhouse, of Okmul-

gee, Okl., for complainant,

Gibson & Thurman, of Muskogee, Okl., F. F. Lamb, of Okmulgee, Okl., Ramsey & Thomas, of Muskogee, Okl., R. C. Martin and H. M. Kirkpatrick, both of Idabel, Okl., John S. Kirkpatrick, of Kansas City, Mo., Belford & Hiatt, of Okmulgee, Okl., and W. C. Franklin, of Muskogee, Okl., for defendants.

CAMPBELL, District Judge. The controlling facts in this case are set forth in an agreed statement of facts filed at the trial, to which reference is made without repeating them here. All the parties plaintiff and defendant agree that the title to the land in controversy was, by virtue of the arbitrary allotment and patenting of this land by the Commission to the Five Civilized Tribes in the name of Freeland Francis after his death, vested in his heirs. The chief questions raised between them are as to whether the Arkansas law or Oklahoma law determines who are the heirs and what, if any, restrictions upon alienation attached to this land in the hands of the heirs. It will therefore be assumed for the purpose of this case that title vested in the heirs of Freeland Francis. For reasons stated in an opinion recently rendered and filed in this court in No. 2175 Equity, Youngken et al. v. David et al., 235 Fed. 621, it is held that the restrictions imposed by sections 19 and 22 of the act of April 26, 1906 (34 Stat. L. 137), do not apply to the land in controversy in this case; the land not having been selected by or for or allotted to Freeland Francis during his lifetime. Freeland Francis was enrolled, and the allotment was made in his name pursuant to the following provision found in the Indian Appropriation Act of March 3, 1905 (chapter 1479, 33 Stat. **L.** 1071):

"That the Commission to the Five Civilized Tribes is authorized for sixty days after the date of the approval of this act to receive and consider applications for enrollments of children born subsequent to May twenty-five,

nineteen hundred and one, and prior to March fourth, nineteen hundred and five, and living on said latter date, to citizens of the Creek Tribe of Indians whose enrollment has been approved by the Secretary of the Interior prior to the date of the approval of this act; and to enroll and make allotments to such children."

By section 28 of the Original Creek Agreement (chapter 676, 31 Stat. L. 870) it was provided that all citizens having certain qualifications therein stated should be placed upon the tribal rolls. Then follows this provision:

"All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

"The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other prop-

erty of the tribe shall be made, and to no other persons."

By section 7 of the Supplemental Creek Agreement (chapter 1323, 32 Stat. L. 501) it was provided:

"All children born to those citizens who are entitled to enrollment as provided by the act of Congress approved March 1, 1901 (31 Stat. L. 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

Thus the legislation stood so far as relating to the enrollment and allotment of "new-born" Creek children until the passage of the Indian Appropriation Act of March 3, 1905, the applicable portion of which is quoted above. It will be noted that by this provision the Commission is "authorized" for 60 days to receive and consider applications for enrollment of children born subsequent to May 25, 1901, and prior to March 4, 1905, and living on the latter date, and further authorized to enroll and make allotments to such children. By reference to the section of the Supplemental Agreement above quoted it is seen that it only provided for the enrollment of children born up to May 25, 1901. This provision of the act of 1905 extends the time to March 4, 1905, so that children born up to that time may be enrolled and allotted. In this respect it is clearly passed with reference to this prior legislation, and is an amendment or modification of the Supplemental Agreement in this regard. Having been authorized to receive and consider such applications for enrollment, the Commission must look to the original and supplemental agreements for directions controlling the enrollment and allotment of such children. In case such child should receive its allotment during its lifetime, such allotment would be subject to the restrictions upon alienation provided by section 16 of the Supplemental Agreement, and would descend to his heirs in case of his death pending such restrictions subject to the

same. No provision is found in the act of 1905 as to the vesting of the lands and moneys in the heirs in case such child should die before allotment. If, however, the purpose of this act was merely to modify or amend the existing legislation or agreements so as to extend the benefits of enrollment and allotment to children born up to March 4, 1905, then its effect would be to substitute in section 7 of the Supplemental Agreement May 25, 1901, for July 1, 1900, and March 4, 1905, for May 25, 1901, leaving effective that portion of said section providing that, if any such child should thereafter die, before receiving his allotment of lands and moneys to which he would be entitled if living, the same should descend to his heirs according to chapter 49 of Mansfield's Digest of the Statutes of Arkansas. no reason is perceived why Congress should have made any different provision regarding the allotments for children born prior to May 25, 1901, and those born subsequent to that date, the above suggested construction would seem reasonable. If that construction is accepted, then the heirs and their interests must be determined by the Arkansas law, and the land was not subject to restriction. Skelton v. Dill, 235 U. S. 206, 35 Sup. Ct. 60, 59 L. Ed. 198; Washington v. Miller, 235 U. S. 422, 35 Sup. Ct. 119, 59 L. Ed. 295; Priddy v. Thompson, 204 Fed. 955, 123 C. C. A. 277.

But if, as contended by some of the parties, the heirs in this case acquired the title by virtue of section 5 of the act of April 26, 1906 (chapter 1876, 34 Stat. 138), or section 32 of the act of June 25, 1910 (chapter 431, 36 Stat. L. 855), or both, the heirs and their respective interests must still be determined by the Arkansas law. Section 5 provides:

"That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect."

Section 32 of the act of June 25, 1910, provides:

"Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in pursuance of any tribal agreement or act of Congress, to a person who had died, or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life."

In each of these last-mentioned acts it is provided that the title to the land shall inure to and vest in the heirs of the deceased allottee as if the patent or deed had issued to him during his lifetime. If the patent to the land in controversy had issued to Freeland Francis during his lifetime, it would have descended to his heirs on June 22, 1905, the date of his death. At that date the general law of descent and distribution in force in Indian Territory, as well as that specially in force in the Creek Nation as provided by the Supplemental Agreement

above quoted, was chapter 49 of Mansfield's Digest of the Statutes of Arkansas. If the title is to vest as if the patent had issued to Freeland Francis during his lifetime, then the controlling date is the date of his death June 22, 1905, and not December 4, 1907, the date the allotment was actually made.

But, even though the heirs in this case must find the justification of their claim of title in section 5 of the act of April 26, 1906, or section 32 of the act of April 25, 1910, or both, still the land came to them free from any restrictions upon alienation, because the restrictions, provided by section 16 of the Supplemental Agreement only attached to allotments made to living citizens in their own right. Skelton v. Dill, supra. Applying the Arkansas law, it follows that one-half of this land vested by the allotment and patent to Freeland Francis after his death in the plaintiff Annie Harris, his mother, and one-half in the heirs of his father, William Francis. Section 2531, Mansfield's Digest; Shulthis v. McDougal, 170 Fed. 529, 95 C. C. A. 615; McDougal v. McKay, 237 U. S. 372, 35 Sup. Ct. 605, 59 L. Ed. 1001. The heirs of William Francis are Mack Francis, Amos Francis, and Elizabeth Francis, each of whom took one-third of the one-half passing to the heirs of William Francis, or one-sixth of the whole.

It follows that the deed from the plaintiff to Laura L. McGinnis dated January 15, 1908, conveyed all of plaintiff's interest in the land in controversy. The defendant Harry Bell therefore took no interest in the land by virtue of plaintiff's subsequent deed to him.

The deed of W. J. Cook, as guardian of Amos Francis and Elizabeth Francis, to Lightsey and Taylor, made upon order of the county court of Okmulgee county, and approved and confirmed by that court, conveyed to said Lightsey and Taylor all the interest of said minors in said land. The subsequent oil and gas lease of said minors to the Hoppy Toad Oil & Gas Company therefore conveyed no interest in said land to that company.

Counsel for Lamb and Brady states in his brief that these defendants claim no interest in the title as disclosed by the record. The record fails to show service upon A. B. Miller, so that his interest, if any, in the land involved cannot be affected by the decree. As against the other defendants claiming under Mack Francis, his deed of April 9, 1910, to Maude Mitchell conveyed to her his one-sixth interest in the land. At her death intestate on September 17, 1911, her interest passed in equal parts to her husband, J. Orlando Mitchell, and her daughter, Gertrude Womack. The interest thus inherited by J. Orlando Mitchell has passed by series of mesne conveyances to the defendant Gill.

It follows that decree must enter against the plaintiff and in favor of the several defendants found to have an interest in the property. If counsel can agree upon form of decree, the same may be prepared and presented for signing and entry. If counsel do not so agree before Monday, July 10th next, the court will on that date, at 10 o'clock a. m., at Muskogee, hear counsel and determine the form of decree to be entered herein.

ENGLISH v. SUPREME CONCLAVE, IMPROVED ORDER OF HEPTASOPHS, et al.

(District Court, D. New Jersey. September 6, 1916.)

1. REMOVAL OF CAUSES &== 15-CAUSES REMOVABLE-"SUIT BROUGHT."

Where a complainant has filed a bill for an injunction in a state court, and obtained a temporary restraining order and an order to show cause, which were served, although no subpæna has issued, a "suit" has been brought within the removal statute (Judicial Code [Act March 3, 1911, c. 231] § 28, 36 Stat. 1094 [Comp. St. 1913, § 1010]).

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 25; Dec. Dig. ६ 15.]

2. REMOVAL OF CAUSES 6-60-SEPARABLE CONTROVERSY.

A suit by a member of a fraternal order having a Supreme Conclave, which is incorporated under the laws of another state as a fraternal benefit association, and which issues certificates of insurance on the lives of members, and also having unincorporated local conclaves with which the members affiliate, to enjoin the Supreme Conclave from carrying into effect certain amendments to its by-laws, is removable by the corporation defendant, notwithstanding the joinder of the local conclave as a defendant and a prayer for an injunction to restrain it from in the future increasing the dues of members, which are entirely separate from the insurance assessments made by the Supreme Conclave; the only controversy under the issues tendered being between complainant and the foreign corporation.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 114; Dec. Dig. ⊕=60.]

In Equity. Suit by Nicholas C. J. English against the Supreme Conclave, Improved Order of Heptasophs, and another. On motion by complainant to remand to state court. Denied.

McCarter & English, of Newark, N. J., for complainant. Olin Bryan, of Philadelphia, Pa., and W. Holt Apgar, of Trenton, N. J., for defendants.

RELLSTAB, District Judge. Nicholas C. J. English, a citizen and resident of New Jersey, on December 31, 1915, filed his bill in the Court of Chancery of that state against the Supreme Conclave, Improved Order of Heptasophs, a corporation incorporated and organized under the laws of the state of Maryland, hereafter called the Supreme Conclave, and the Garfield Conclave, No. 241, Improved Order of Heptasophs, unincorporated, located at Elizabeth, N. J., hereafter called the local conclave. The bill seeks to permanently enjoin the defendant from doing certain things hereinafter particularly mentioned. On the same day that court made an order requiring the defendant to show cause on January 11, 1916, why an injunction should not issue as prayed in the bill, with an ad interim stay covering the matters sought to be permanently enjoined. On the latter day the Supreme Conclave had the said cause removed into this court. No subp. ad. resp. has been issued in said cause.

The plaintiff moves to remand the cause to the state court upon the following grounds:

"First. Because said cause was not pending, so as to be removable under the statutes of the United States concerning the removal of causes. "Second. Because the controversy involved in the above cause is not between citizens of different states, but involves a controversy wherein citizens of the state of New Jersey are upon both sides."

[1] As to the first ground: If the cause should be remanded for this reason, nothing would prevent another removal as soon as subpoena should be issued. Section 28 of the Judicial Code, 36 Stat. 1087, provides (so far as pertinent):

"Any suit * * * which may hereafter be brought, in any state court, may be removed into the District Court of the United States."

The plaintiff contends that a suit is not brought in the state Chancery Court until subpœna issues. I think the plaintiff is estopped from raising this point. It would seem to be consonant with the true principles governing the administration of justice that one who brings another into a court of equity upon the allegation that a wrong, irremediable at law, has been done him, and succeeds in placing the alleged wrongdoer under judicial restraint, should be prevented from saying that no "suit" had been brought against him.

But, passing the estoppel: The plaintiff relies upon Hermann v. Mexican Petroleum Corp. (N. J. Ch.) 96 Atl. 492. In that case Vice Chan-

cellor Backes held that:

"Before the issuing of process, a cause is not 'pending' in chancery, so as to make it the subject of removal into the law courts, under the Transfer of Causes Act (P. L. 1912, p. 417)."

On the hearing of the rule to show cause in that case the preliminary injunction was denied, and the bill dismissed. With the denial of such injunction the ad interim restraint ceased, and there was nothing calling for an answer from the defendant, as no subpœna had been issued. In such a situation, confronted with the alternative of transferring the cause to the law court or dismissing the bill, the learned Vice Chancellor held that, at that time, there was no suit "pending," as contemplated by the state Transfer of Causes Act (Laws N. J. 1912, c. 233, as amended by Laws N. J. 1915, c. 13), and dismissed the bill.

In the instant case the removal proceedings brought into the court, not only the filed bill, but the rule and ad interim restraint referred to. As the cause stood in the state court, and stands here, the defendants were and are required to make answer to the rule directed against them, and they continue under the restraint imposed upon them in such proceedings. Surely in every sense, except a technical one, such

proceeding was and is a suit pending.

The words of a statute regulative of a constitutional right are not to be given a narrower meaning than they bear, or the context demands. The particular words "suit brought" should be so construed as to give them the full effect intended by the federal statute; i. e., the right of a defendant possessing the requisite qualification to remove into the federal court a proceeding instituted against him in a state court. Whatever the form of proceeding to bring a defendant into court, a suit is brought when such defendant is subjected to judicial orders.

While the filing of a bill in the state Court of Chancery may not be the commencement of a suit, so as to bring it within the meaning of "pending" in a state statute, authorizing the transfer of a cause from one state court to another, the filing of an injunction bill in a state court, followed by an ad interim stay, pending the hearing of a rule to show cause why a preliminary injunction should not issue in said cause, is a suit within the meaning of the Federal Statute in question.

[2] As to the second ground: This calls for determining whether,

as between the Supreme Conclave, the defendant removing the suit, and the plaintiff, in the language of said section 28, there is "a controversy which is wholly between citizens of different states, and which can be fully determined as between them." The case as made by the bill, summarized, is as follows: Plaintiff is a resident of Elizabeth, N. J., and a member of the defendant, the local conclave, located at said Elizabeth, which is one of a number of local conclaves affiliated with the Supreme Conclave, the other defendant. The latter is a corporation of Maryland and a fraternal benefit association engaged in a species of life insurance. The contract of insurance between the member and the organization is evidenced by a benefit certificate and the by-laws. The local conclave is the medium through which plaintiff obtained membership in the Supreme Conclave, and in addition it provides for sick benefits for its members under the terms of its by-laws. Plaintiff holds a benefit certificate of the Supreme Conclave which reads as follows:

"Improved Order of Heptasophs, Contributors."

"No. 36351.

Benefit Certificate.

\$5,000

"This certificate is issued to Bro. Nicholas C. J. English, a member of Garfield Conclave, No. 241, Improved Order of Heptasophs, located at Elizabeth, N. J., upon evidence received from said conclave that said brother is a fifthrate contributor to the benefit fund of this order, and upon condition that the statement made by said brother in his application for membership in said conclave and that statement certified by him to the medical examiner, both of which are filed in the Supreme Secretary's office, be made a part of this contract, and upon condition that the said brother hereafter complies with the laws, rules, and regulations now governing said conclave and benefit fund, or that may in the future be enacted by the Supreme Conclave to govern said conclave and fund, these conditions being complied with, the Supreme Conclave of the Improved Order of Heptasophs hereby promises and binds itself to pay out of its benefit fund to wife, Ella J. English, within 60 days from receipt of satisfactory proof of death the sum of five thousand dollars, in accordance with and under the provisions of the laws governing said fund, upon satisfactory evidence of the death of said brother and upon the surrender of this certificate: Provided that said brother is in good standing in this order at the time of his death, and provided, also, that this certificate shall not have been surrendered by said brother and another certificate issued at his request in accordance with the laws of this order.

"In testimony whereof the Supreme Conclave of the Improved Order of Heptasophs has herewith affixed its seal and caused this certificate to be signed by its Supreme Archon, and attested and recorded by its Supreme Secretary, at Baltimore, Maryland, this 2d day of April, A. D. 1896.

"I hereby accept this certificate on the conditions therein named.

"Nicholas C. J. English, Holder of Certificate.

"Witness: P. A. Banker.

"Andrew Altman, Archon.

"V. M. Hall, Secretary.

"M. G. Cohen, Supreme Archon.

"Saml. H. Tattersall, Supreme Secretary.

"Garfield Conclave No. 241."

Plaintiff is still in good standing in said Supreme and local conclaves. By section 2, article 3, of the by-laws of the local conclave he was to pay it dues of 50 cents per month. About September 1, 1913, said sum was increased to 62 cents a month. Plaintiff has always paid said dues, which the local conclave levies, and in addition to them the Supreme Conclave levies, an assessment in the nature of a premium upon the life insurance agreed to be paid by said benefit certificate. By the by-laws of said Supreme Conclave said assessment is levied monthly, and must be paid monthly, or the benefit certificate is forfeited. At the time plaintiff received his certificate the assessment, exclusive of the local dues, was \$7.70 per month. Said assessment was increased, respectively, to \$12.45 and \$17.40; the last continuing to and including December, 1915. Plaintiff has paid the assessments so levied, as well as said local dues. At a special session of the Supreme Conclave held at Harrisburg, Pa., in October, 1915, material changes were made in the by-laws, rules, and regulations of the said Supreme Conclave, affecting plaintiff's vested rights in said benefit certificate with reference to either the amount to be paid thereunder and out of its benefit fund upon the death of plaintiff, or the amount of the monthly assessments to be levied against him as a condition for his continuance in said conclave and of receiving the benefit of his certificate or both. Said by-laws as amended are unreasonable, confiscatory, and illegal. By said amendment the members of said Supreme Conclave have been arbitrarily divided into classes A and B, a division which did not exist theretofore. Class B includes members who joined the Supreme Conclave prior to January 1, 1914, of which plaintiff is one. Class A includes members who have joined since that date and those who may hereafter join. Separate treasuries exist for the disbursement of the benefit fund to care for the members of those classes respectively. No moneys received from new members will take care of the members of class B; the funds to pay the death benefit certificates of this class will have to be made up from increased assessments levied on such members. By the new by-laws, rules, and regulations an option is given to the members of class B to remain in that class by paying such further assessments as may be levied to pay maturing death benefit certificates, or to become members of class A, in which event they will be required to accept one of four conditions, designated options: As applied to plaintiff, who is 73 years of age, in. addition to his paying the dues and per capita tax of the local conclave, he would be required to pay a monthly assessment of \$50.05, under option 1, to receive \$5,000, the full amount of his benefit certificate; \$15.60 under option 2, to receive \$2,589.80, less 4 per cent. interest from date of exercising said option to date of death, instead of the sum called for in his said certificate; \$17.40 under option 3, to receive \$1,338.65, instead of the sum called for in his said certificate; \$29.75, under option 4, to receive \$2,972.05, instead of the sum called for therein. To remain in class B, plaintiff is certain to be subjected to increased assessments, as the fund available for the payment of the benefit certificates is inadequate to meet such certificates as they mature; and as a result of said amended by-laws, rules, and regulations the plaintiff will be subjected either to a reduction of the sum to be paid under his benefit certificate at death, or to heavy increases in monthly assessments.

Besides the usual prayer for subpoena, answer, and general relief, the bill prays that the defendants may be enjoined from suspending plaintiff from membership in either conclave, and from forfeiting his benefit certificate on account of his failure to pay such assessments in the Supreme Conclave as may be levied in excess of the sum of \$17.40 per month, or to pay such dues of the local conclave in excess of 62 cents per month; that the Supreme Conclave may be enjoined from assessing against plaintiff a greater assessment than \$17.40 per month, and the local conclave be enjoined from assessing against him dues in excess of 62 cents per month, and that the defendants be further enjoined from putting into operation the proposed division of the members of each of said conclaves in accordance with the said new by-laws, rules, and regulations.

From this recital it appears that the plaintiff holds a membership in both the Supreme and local conclaves, and that upon payment of assessments to be levied by the Supreme Conclave and compliance with the by-laws, rules, and regulations of said conclave there will be paid at his death a specified sum as insurance, and that upon the payment of certain monthly dues levied by said local conclave he will receive benefits in case of sickness.

The alleged grievance is that the Supreme Conclave has illegally changed the contract of insurance between him and said conclave, and that unless it be restrained from putting its proposed change into force the plaintiff will be irremediably injured. There is no allegation that the local conclave has trespassed on the rights of the plaintiff. It is made a party, not because it is necessary to the determination of the controversy between the plaintiff and the Supreme Conclave in relation to such changes in by-laws, etc., but because, if the latter carries out the scheme of its new by-laws, and enforces the proposed classification of its membership, and he refuses to comply therewith and pay his assessments on the new basis, his membership in both conclaves will cease.

No present controversy, therefore, exists between the plaintiff and the local conclave. At the most, a controversy may arise when the Supreme Conclave ends the relation between it and the plaintiff. Such a controversy is at best but potential, and if it materializes will begin only when the controversy between the plaintiff and the Supreme Conclave is ended. The fact that the local conclave is the local agent for the collection of the proposed illegal assessments against the plaintiff does not alter the character of the controversy between him and the Supreme Conclave, nor make the former a necessary party for the determination of its controversy. The grievance, as shown, is not against any action of the local conclave, and a decree enjoining the Supreme Conclave from imposing or collecting said assessments will be binding upon any of its agents, including said local conclave. Hatch v. Chicago, R. I. & P. R. Co. et al., Fed. Cas. No. 6,204, 11 Fed.

Cas. 799, 803; Geer v. Mathieson Alkali Works, 190 U. S. 428, 433, 23 Sup. Ct. 807, 47 L. Ed. 1122.

The existing grievances, therefore, raise but one controversy, and that is wholly between the plaintiff and the Supreme Conclave, and is one which can be fully determined between them without the presence of the local conclave. That its determination also concludes or precludes another is no reason why it should not be treated as a separable one, and be subject to removal into the federal court. Regis v. United Drug Co. (C. C.) 180 Fed. 201, is not, as contended, opposed to this view. In that case the corporate defendant, who was joined with its president the resident defendant, was denied the right of removal, for the reason that the bill charged that the president in his individual capacity had committed the tort complained of jointly with the corporate defendant. In the instant case, as noted, there is no joint wrongdoing alleged or claimed.

The motion to remand is denied.

In re EVANS et al.

(District Court, W. D. Pennsylvania. July 20, 1916.)

No. 8007.

1. Pledges =19-Collateral-Rights of Parties.

Where two members of a firm executed a note, pledging collateral for that obligation or any other of their obligations, the collateral could not be used in discharging a note signed by all three members of the firm, and on their bankruptcy any surplus after payment of the note should be paid to the trustee in bankruptcy.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 58-63; Dec. Dig. € 19.]

2. Pledges = 19—Collateral—Liability.

Where collateral is pledged to secure a firm obligation, such collateral cannot be used in paying a note signed by the members of the firm as their joint individual obligation, and in case of bankruptcy, the holder of the collateral, holding a joint obligation of the members of the firm, must deliver to the trustee in bankruptcy any surplus.

3. Partnership = 173-Partnership Obligations-Intention.

Whether a note is a partnership obligation or the individual obligation of those partners signing it depends on the intention of the parties.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 304, 305; Dec. Dig. \$\sime_173.]

4. PARTNERSHIP \$\simes 217(3)\$—OBLIGATIONS—EVIDENCE—SUFFICIENCY.

Where on bankruptcy of a firm and the members thereof a creditor who held firm notes and also notes signed by the members as individuals contended that a note by the members individually was a partnership obligation, and so collateral pledged for payment of partnership obligations might be used in paying such note, held, under the evidence, that the note was a firm note.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 425; Dec. Dig. € 217(3).]

5. EVIDENCE 5396-PAROL EVIDENCE RULE-ADMISSIBILITY.

Where a bank which received collateral prepared the written pledge, it cannot, after bankruptcy of the pledgors, vary the instrument by indefinite parol testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1754, 1755; Dec. Dig. ©=396.]

In Bankruptcy. In the matter of the bankruptcy of John Kuhn Evans, James Evans, and Alan Stotler Evans, individually and partners doing business as Evans Bros. On questions certified on the report of the referee. Referee's report confirmed.

McKee, Mitchell & Alter, of Pittsburgh, Pa., for Columbia Nat. Bank.

Sterrett & Acheson, of Pittsburgh, Pa., for receiver.

THOMSON, District Judge. The referee has certified for our opinion whether, under the facts and circumstances set forth in the report and supplemental report and opinion of the referee, a certain claim of the Columbia National Bank, amounting to \$1,649.08, should be allowed against the bankruptcy estate of Evans Bros.

The material facts of the case are these: The partnership of Evans Bros. consisted of three brothers, John K. Evans, James Evans, and Alan S. Evans. At the time of the bankruptcy of the Evanses, both as individuals and partners, the Columbia National Bank held two overdue partnership obligations signed "Evans Bros.," each note be-

ing secured by certain collateral.

The bank also held three other notes: First. A collateral note, dated October 22, 1915, at four months, for \$15,000, signed by James Evans and Alan S. Evans, pledging 100 shares of National Bank of McKeesport stock "as collateral security for the payment of this and all other liabilities of the undersigned to the holder hereof, now or hereafter due, and now or hereafter existing." Second. A promissory note signed by John K. Evans, James Evans, and Alan S. Evans. dated September 10, 1915, at 90 days, for \$4,500. This note was unsecured. Third. A demand note of \$600, signed by John K. Evans. The two notes of Evans Bros. were paid off by a conversion of a part of their collateral, and there was left as a residue from said collateral a bond of the Canonsburg & Washington Railway Company for \$1,000 and the sum of \$56.10 in cash. On April 13, 1916, the collateral attached to the \$15,000 note was sold for a price netting \$17,366.50. The bank, it appears, attempted, first, to pay out of this fund the \$4,500 note, and then to apply the residue in payment pro tanto of the \$15,000 note, leaving a balance against the estate of Evans Bros. in this case, and its position is that it is entitled to receive the bonds of the railway company and the small amount of cash as security for the balance claimed in its proof of debt. Upon the petition of the receiver, an order of court was made, directing the bank to turn over this bond and small cash balance to the receiver, subject to any credit that the bank might have against the same. It is the position of the bank that the securities deposited with the \$15,000 note are collateral also for the \$4,500 note, and that the bank was justified in crediting enough

of the proceeds of sale of this collateral to the discharge of the latter note, that the balance due the bank is evidenced by the \$15,000 note, and that the latter, under the circumstances of the case, is a partner-ship obligation.

- [1] What is the result if the \$15,000, note is what it purports to be, an individually joint obligation of James and Alan S. Evans? Can the collateral pledged for the payment of this joint obligation be used in the payment of the \$4,500 note given by the three parties? This question must be answered in the negative, under the authority of Torrance v. Third National Bank of Pittsburgh, 210 Fed. 806, 127 C. C. A. 356. The court there, in a carefully considered opinion, held that the residue of property hypothecated by two joint obligors could not be applied in payment of an individual liability of either of the joint obligors, although the collateral note was both joint and several in form. It is true that in that case the collateral pledged was joint, while in this case the stock was owned by the pledgors individually, 50 shares each. But this fact does not change the result. The application which can be made of the collateral must depend on the terms of the collateral pledge. The parties owning the securities might have made any application of them which they mutually saw proper to make, without regard to the question of ownership as between themselves. But the note in question created a joint liability and no other, and the pledge of the stock was "for the payment of this and all other liabilities of the undersigned." The Torrance Case has distinctly ruled that the "other liabilities of the undersigned" are of the same character as the joint liability; in other words, that the securities were pledged only for the joint liability of the two makers.
- [2] Under the terms of the pledge in this case, therefore, the collateral could not be applied to the payment of the \$4,500 note. Is the case in any manner changed, if in fact the \$15,000 note was a partnership obligation? Manifestly not. If a partnership obligation, the bank could not apply, much less first apply, the collateral to the individual note of the three parties. It would have to be applied to the payment of the note for which it was pledged, and, being in excess of the note, that note would be paid in full; and, as this instrument is the only one by virtue of which the bank could ever assert any right or claim to the residuary collateral to the Evans Bros. notes (the \$1,000 bond and \$56.10 in cash), that claim of the bank must fail.
- [3, 4] I agree with the referee that the evidence is not sufficient to show that the note was in fact a partnership obligation. In this case there was no uncertainty as to the form of executing paper when the firm wished to create a partnership obligation. In such case, the notes were signed "Evans Bros." It does not appear that any other method of signing was ever used by the firm. The bank was fully aware of this, as it held at that time several partnership notes signed "Evans Bros." It also held the joint note of the three parties composing the firm, which is conceded to have been an individual obligation. It must be assumed, prima facie, that in taking the \$15,000 note, the bank was dealing with individuals. The note was neither signed in the firm name, nor did all the members of the firm join in it. There is

no evidence, either on the part of the bank or on the part of the firm or its members, that the bank in fact was dealing with the firm. The only evidence on that subject at all is that the proceeds went into the account of "Evans Bros. Special," and a little later passed into the account of Evans Bros. in another bank. This is not sufficient to make the note a partnership obligation. The question is, Was the contract with the partnership; that is, did the parties making it intend it as a partnership transaction? Alexander v. McGinn, 3 Watts (Pa.) 220. If not, the fact that the money went into the partnership funds can make no difference. But in either event, whether it be treated as an individual or a partnership transaction, the collateral pledged for

its payment could not be applied to satisfy the \$4,500 note.

[5] I also agree with the conclusion of the referee that the testimony of Mr. Hammond and Mr. Jennings is not sufficient to establish a contract that the McKeesport National Bank stock should be held to secure, or was to be held to secure, both of these obligations. The rather vague statements, testified to as being made by the Evanses, really amount to no more than a mistaken assumption on their part, and the bank's officers, as to what their legal rights in the matter were. For this mistake the bank is to blame. If it was to have a prior claim on the property of Evans upon its unsecured notes, it was incumbent on the bank to secure that right in accordance with the methods governing such matters. The pledge of a hundred shares of stock with the bank was in writing, and the terms of the pledge distinctly set forth. At this late day the bank, a creditor of the bankrupt estate, should not be permitted to vary the terms of that written contract by evidence so vague and unsatisfactory.

I agree with the legal conclusion of the referee as to the application of the proceeds derived from the sale of the collateral and the distribution of the balance in the hands of the bank. The report of the referee

is therefore affirmed.

FREDERICK V. METROPOLITAN LIFE INS. CO. OF NEW YORK. (District Court, W. D. Pennsylvania. July 12, 1916.)

No. 1 November Term. 1915.

BANKRUPTCY 5396(3)-PROPERTY PASSING TO TRUSTEE-LIFE INSURANCE. Under Act Pa. April 15, 1868 (P. L. 103), providing that all policies of insurance on the life of any person taken out for the benefit of, or assigned to, a wife or dependent relative, shall be property of the beneficiary, and not subject to the debts of such person, and Bankr. Act July 1, 1898, c. 541, § 6a, 30 Stat. 548 (Comp. St. 1913, § 9590), which provides that the act shall not affect the allowance of exemptions under state laws, insurance on the life of a bankrupt made payable to his wife, although the designation of the beneficiary is revocable by him, is for the benefit of the wife and exempt where no revocation has been made, and no interest therein passes to his trustee under section 70a (section 9654). [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 667; Dec. Dig. \$\infty\$396(3).]

Action by Elliott Frederick, trustee in bankruptcy of the estate of John E. Schmidt, against the Metropolitan Life Insurance Company of New York. Trial to court, and judgment for defendant.

Alpern & Seder and L. C. Barton, all of Pittsburgh, Pa., for plaintiff.

Jennings & Jennings, of Pittsburgh, Pa., for defendant.

THOMSON, District Judge. This action is brought by a trustee in bankruptcy to recover the amount of a policy of insurance on the life of the bankrupt. By stipulation filed, the parties waived a trial by jury, submitting the case to the adjudication of the court,

Findings of Fact.

- (1) An involuntary petition in bankruptcy was filed on December 19, 1912, against John E. Schmidt, and on January 8, 1913, he was duly adjudged a bankrupt, and Elliott Frederick, the plaintiff herein, was elected trustee of the estate and duly qualified and acted as such trustee.
- (2) At the date of the filing of the petition and adjudication, the bankrupt was the owner of a certain policy of life insurance in the Metropolitan Life Insurance Company, issued on July 10, 1909, in the sum of \$5,000, being an ordinary life policy, payable on the death of the insured to Anna M. Schmidt, wife of the insured, beneficiary, with the right of revocation.

(3) On April 4, 1913, John E. Schmidt died, leaving his said wife surviving, and due proof of his death was made and delivered to the defendant company and by it accepted.

(4) At the time of the filing of the petition and adjudication, the said policy had a cash surrender value of \$524.04, but the same was not included in the schedules of the bankrupt.

(5) The said policy contained the following provision:

"Change of beneficiary.-When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable designation, the insured, if there be no existing assignment of the

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policy made as herein provided, may while the policy is in force designate a new beneficiary with or without reserving right of revocation, by filing written notice thereof at the home office of the company accompanied by the policy for suitable indorsement thereon. Such change shall take effect upon the indorsement of the same on the policy by the company. If any beneficiary shall die before the insured, the interest of such beneficiary shall vest in the insured."

The right of revocation was duly reserved by the terms of the policy.

(6) The insured did not exercise, or attempt to exercise during his lifetime, either before or after the adjudication in bankruptcy, the right of revocation by designating a new beneficiary, in the manner provided by the policy or otherwise, and on April 22, 1913, the defendant company paid to Anna M. Schmidt, the beneficiary named in the policy, the amount of the policy in full.

(7) The petition in bankruptcy was filed on December 12, 1912, the adjudication was had on January 8, 1913, and the bankrupt died on

April 4, 1913.

This is an ordinary life policy, taken out by the insured at the age of 54. The policy provides that:

The company, "in consideration of the annual premium of \$212.41, and with the payment of a like amount on each tenth day of July hereafter, until the death of the insured, promises to pay at the home office of the company in the city of New York, upon receipt at said home office of due proof of the death of John E. Schmidt, of Rochester, county of Beaver, state of Pennsylvania, herein called the insured, five thousand dollars, less any indebtedness hereon to the company and any unpaid portion of premium for the then current policy year upon the surrender of this policy properly receipted, to Anna M. Schmidt, wife of the insured, beneficiary, with right of revocation."

It will be noted that thus far there is no condition by which the policy is payable in any case to the insured, to his estate, or to his executors, administrators, or assigns; the payment being unconditionally to the wife, with right of revocation. Then follows the clause above quoted, authorizing a change of beneficiary. The method of effecting this change is therein pointed out, namely:

"By filing written notice thereof at the home office of the company, accompanied by the policy for suitable indorsement thereon. Such change shall take effect upon the indorsement of the same on the policy by the company."

Then follows the provision:

"If any beneficiary shall die before the insured, the interest of such beneficiary shall vest in the insured."

There is a later clause that:

"No assignment of this policy shall be binding upon the company unless it be filed with the company at its home office."

Looking, then, at the policy with its conditions, these propositions may be stated:

First. The interest of the wife in the policy, during the life of the insured, is not a permanent or vested interest, but inchoate and expectant. Hopkins v. Northwestern Life Assur. Co., 99 Fed. 199, 40 C. C. A. 1.

Second. This interest or expectancy of the wife can be defeated only by her death before the insured, or by the latter exercising his right to change the beneficiary. If neither of these conditions occur, on the death of the insured the wife's interest becomes vested and absolute

Third. The conditions under which a change in beneficiary must be effected are for the protection of the insurer, and must be strictly followed unless waived by the company. Stephenson v. Stephenson, 64 Iowa, 534, 21 N. W. 19; Appeal of Vollman, 92 Pa. 50.

In this case there is no pretense that any change of beneficiary was made or attempted. On the death of the insured, and proper proofs of death made, the company paid the policy in good faith to the party designated in its contract as sole beneficiary therein, without notice of any character as to any adverse claim thereto. And now, after payment, the trustee in bankruptcy of the insured brings this action to compel the company to pay the policy again. There never was any contract relation between the insurance company and the creditors of the insured. Its contract was to pay the wife \$5.000 on the death of the insured. Two conditions were attached to the contract: That the insured might change the beneficiary in the manner prescribed: and, if the beneficiary died before the the insured, the interest of the beneficiary should vest in the insured. Neither of these conditions happened, and therefore, under the terms of the policy, the defendant company never became indebted to the insured, to his estate, to his personal representatives, or to his creditors.

But notwithstanding this, it is claimed that there was a surrender value to the policy: that this surrender value at least was an asset of the bankrupt's estate which passed to his trustee under section 70a of the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. 1913, § 9654]); that the company had presumptive notice of the bankruptcy of Schmidt; and that under the provisions of said section of the bankruptcy act, inasmuch as the bankrupt did not elect to pay or secure to the trustee the cash surrender value of the policy within 30 days after the same was ascertained, the trustee is entitled to the whole amount of the policy. If this be true, it is certainly a novel legal situation. There has apparently been much conflict of authority in the federal courts as to the rights of creditors and other claimants to the proceeds of life insurance policies where the insured became bankrupt, arising under sections 6 and 70a of the act of Congress. I will not stop to consider these cases in particular. The conflict is often more apparent than real. This is due to the differing terms of the policies, the widely different facts of the several cases, the difference in the provisions of the acts of assembly of the several states where the cases have arisen. relating to exemptions, and the fact that many of the decisions were rendered before any authoritative deliverance of the Supreme Court on the subject. But the case of Holden v. Stratton, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018, furnishes a rock on which we can stand. That decision has settled definitely and finally these propositions:

(a) That section 6 of the Bankruptcy Act, which provides as follows:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition"

—is couched in unlimited terms and is accompanied with no qualification whatever.

- (b) That it has always been the policy of Congress, both in general legislation and in bankrupt cases, to recognize and give effect to state exemption laws, and that section 6 adopts for the purposes of bankruptcy proceedings the exemptions allowed by the laws of the several states.
- (c) That section 70a, and the proviso found therein relating to insurance policies, imposes no limitation whatever upon the terms of section 6. That this section does not deal with exemptions, but solely with the nature and character of the property the title to which passes to the trustee in bankruptcy, and that all exempt property is excluded from its provisions.

This decision set at rest much of the conflict which theretofore existed in the courts with reference to these sections. For instance, Steel v. Buel, 104 Fed. 968, 44 C. C. A. 287, held that the proviso to section 70a does not qualify the exemptions accorded by section 6, while the Circuit Court of Appeals for the Ninth Circuit, in Re Scheld, 104 Fed. 870, 44 C. C. A. 233, 52 L. R. A. 188, took the opposite position. These are an illustration of the conflicting views taken by the courts. Holden v. Stratton has cleared the case of fractions. Section 6 recognizing and intending to give effect to the exemption laws of the state, and section 70a having no application to exempt property, we have only one question remaining: Is the policy in question exempt under the laws of Pennsylvania? If so, that is the end of the plaintiff's case.

There are two acts in Pennsylvania relating to this subject. The Act of April 15, 1868 (P. L. 103), is as follows:

"All policies of life insurance or annuities upon the life of any person which may hereafter mature, and which have been or shall be taken out for the benefit of, or bona fide assigned to the wife or children or any relative dependent upon such person, shall be vested in such wife or children or other relative, full and clear from all claims of the creditors of such person."

The Act of May 1st, 1876 (P. L. 53), provides:

"A policy of insurance issued by any company incorporated under this act, on the life of any person expressed to be for the benefit of any married woman, whether procured by herself, her husband, or any other person, shall inure to her separate use and benefit, and that of her children, independently of her husband or his creditors, or the person effecting the same, or * * * with intent to defraud his creditors, an amount equal to the premium so paid with interest thereon shall inure to their benefit."

Looking at the act of 1868, is there anything in this case, is there a single fact, which should compel the court to hold that this policy was not taken out for the benefit of the wife? If it was taken out for her benefit, there is no foundation for plaintiff's claim. The best evi-

dence that it was so taken out by the decedent is the fact that she was made the sole beneficiary in the policy, and that he died without defeating or attempting to defeat his wife's interest in the policy. But it is assumed that the whole case is changed by the reservation of the right of the assured to change the beneficiary. This clause has the legal effect of changing the interest of the beneficiary from a vested to an inchoate or expectant interest. But I cannot see why, from that fact, the court should find the policy was not taken out for the benefit of the wife. An insurer knows that time may bring a very material change in conditions. The marital relation itself is unfortunately subject to many vicissitudes, such as death, divorce, or separation. In the lapse of a few years the dependent may become independent, and those now strong may demand our aid and assistance. To reserve the right to change one's mind, if circumstances demand it, is in harmony with the whole course of human action. It is only the part of wisdom to take into consideration the ever-changing conditions of men. Persons frequently revoke their wills, add codicils, and change devisees, to meet conditions as they arise; and it is only natural that a husband who takes out a life policy for the benefit of his wife should reserve to himself the power to change the beneficiary if unexpected conditions should arise which make it necessary or advisable. We should remember that exemptions in favor of the wife, children, or other dependents, are favorites of the law. The Supreme Court, in Holden v. Stratton, quotes approvingly from the opinion of Circuit Judge Caldwell, as follows:

"From the organization of the federal courts under the Judiciary Act of 1789, the law has been that creditors suing in these courts could not subject to execution property of their debtor exempt to him by the law of the state." (Citing Lamaster v. Keeler, 123 U. S. 376, 8 Sup. Ct. 197, 31 L. Ed. 238, and other cases.) "The same rule has obtained under the bankrupt acts, which have sometimes increased the exemption, notably so under the act of 1867, * * * but have never lessened or diminished them. An intention on the part of Congress to violate or abolish this wise and uniform rule observed from the creation of our federal system should be made to appear by clear and unmistakable language. It will not be presumed from a doubtful or ambiguous provision fairly susceptible of any other construction."

In support of the proposition that the right to change the beneficiary passes the property in the policy to the trustee, counsel have cited numerous cases. In Re Herr (D. C.) 182 Fed. 716, the policy was payable to the bankrupt, and only contingently to the wife. In Re Dolan (D. C.) 182 Fed. 949, the policy was a 20-year endowment, payable to the insured, or, in the event of her death during the endowment period, to her executors, administrators, or assigns. It was held by the District Court that the policy was property which could have been transferred prior to the filing of a petition under section 70a, and therefore passed to the trustee. The Pennsylvania exemption acts do not appear to have been involved in the decision and were not referred to. In Re Jamison Bros. Co. (D. C.) 222 Fed. 92, Judge Dickinson, while laying down certain principles for the guidance of the referee, did not undertake to pass upon the effect of the Pennsylvania statutes of exemptions on the case before him.

The Supreme Court of Pennsylvania has recognized and enforced the act of 1868 in numerous cases, where there was a conflict between the beneficiary and creditors of the insured. Anderson's Estate, 85 Pa. 202; McCutcheon's Appeal, 99 Pa. 133; Schad's Appeal, 88 Pa. 111; and Sebring v. Brickley, 7 Pa. Super. Ct. 198.

As this was a life policy, payable under its terms only in the event of death, there was no property in the insured which could have been levied upon or sold under judicial process. The insured could not have willed the proceeds to another, as at the instant of his death it would have passed to the beneficiary. Vollman's Appeal, 92 Pa. 50. The plaintiff, in view of Holden v. Stratton, must base his right to

The plaintiff, in view of Holden v. Stratton, must base his right to recover on the assumption that the policy is not exempt; in other words, that it was not taken out for the benefit of the wife. And then, proceeding on that assumption, he claims under the proviso to section 70a that the trustee was first entitled to the cash surrender value, and afterwards, by reason of the failure of the assured to pay or secure this amount, to the whole amount of the policy.

Turning to the proviso, we find:

"That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

I fail to find in the policy any provision for a cash surrender value payable to the insured, his estate, or personal representatives; but, if the policy can be so construed, how can the policy itself, which is payable to the wife, ever become assets of her husband's estate, and pass to his trustee, unless the beneficiary is changed, and no one has power to change the beneficiary except the insured himself. Under the decisions in Burlingham v. Crouse, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148, Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154, and Andrews v. Partridge, 228 U. S. 479, 33 Sup. Ct. 570, 57 L. Ed. 929, respectively, the interest of the estate could not possibly extend beyond the surrender value of the policy. But, as I view the policy, it was taken out for the benefit of the wife, is therefore exempt under the Pennsylvania statute, was an inchoate or expectant interest, which existed during the life of the insured, and ripened at his death into an absolute vested interest, entitling her to the whole of the policy. The conclusion herein reached is in harmony with the opinion of the Circuit Court of Appeals of the Second Circuit, in Burlingham v. Crouse, 181 Fed. 479, 104 C. C. A. 227, and In re Hammel & Company, 221 Fed. 56, 137 C. C. A. 80. Also, In re Booss (D. C.) 154 Fed. 494.

Judgment is therefore entered in favor of the defendant.

WABASH R. CO. v. WEST SIDE BELT R. CO.

KEOKUK TRUST CO. v. WEST SIDE BELT R. CO. et al.

(District Court, W. D. Pennsylvania. June 27, 1916.)

Courts \$\infty\$269—Jurisdiction—Attachment.

Judicial Code, § 57 (Act March 3, 1911, c. 231, 36 Stat. 1102 [Comp. St. 1913, § 1039]), declares that when in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien, etc., on title to real or personal property within the district where such suit is brought, one or more of the defendants shall not be an inhabitant of or found within the district, or shall not voluntarily appear, it shall be lawful for such absent defendant to be ordered to appear and plead, and, in event of failure, for the court to proceed to adjudicate the property rights. A railroad company which had leased some of its cars to a Pennsylvania corporation was adjudged an insolvent after having executed a refunding and extensions mortgage to secure an issue of bonds. Default having been made in payment of the bonds after appointment of the receiver, the mortgage was foreclosed and the property of the railroad company bought in by another corporation, which was not a citizen of Pennsylvania. Complainant, a holder of a number of the bonds, though not a citizen of Pennsylvania, attempted, by suit in a Pennsylvania district, against the lessee and the railroad company and the purchaser, to secure an accounting and to enforce application of the amount due on the lease to payment of its bonds. Held, that the section contemplates the enforcement of a lien on some tangible property, and not the mere enforcement of a chose in action. Therefore complainant, particularly as its rights under the bonds were not adjudicated, could not maintain the suit against the railroad company or its receiver; the Pennsylvania court not having jurisdiction. [Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. **€**==269.1

In Equity. Suit by the Wabash Railroad Company against the West Side Belt Railroad Company, in which the Keokuk Trust Company filed a bill against the West Side Belt Railroad Company, the Wabash Railroad Company, and others. On motion to set aside warning order and quash service of writ. Motion granted, and bill of the Keokuk Trust Company dismissed.

See, also, 197 Fed. 442.

J. L. Minnis, of St. Louis, Mo., and Watson B. Adair, of Pittsburgh, Pa., for Wabash R. Co.

Patterson, Crawford, Miller & Arensberg, of Pittsburgh, Pa., for West Side Belt R. Co.

Felix T. Hughes, of Keokuk, Iowa, for Keokuk Trust Co.

THOMSON, District Judge. In the case of the Wabash Railroad Company (hereafter called the "Wabash Company") against the West Side Belt Railroad Company (hereafter called the "West Side Belt"), the Keokuk Trust Company (hereafter called the "Trust Company"), a corporation and citizen of Iowa, has filed this bill against the West Side Belt and its receiver, citizens of Pennsylvania, the Wabash Company, a consolidated corporation, and citizen of the states of Illinois,

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Indiana, Michigan, Missouri, and Ohio, and the Wabash Railway Company (hereafter called the "Railway Company"), a corporation and citizen of the state of Indiana. It appears from the bill that on October 1, 1905, the West Side Belt leased from the Wabash Company 899 cars for a period of ten years, for a monthly rental of \$8,792.84, taking possession of the cars and using and enjoying them until June 23, 1908, when it became insolvent, and, at the instance of the Wabash Company and other creditors, was placed in the hands of receivers. Horace F. Baker remains at this time the sole receiver of that company. The receivers took possession of the cars, adopted the lease for the period of their receivership, and continued the use of the cars, and are indebted to the Wabash Company, on account of the rental, in a large amount. The Wabash Company, on the 1st of July, 1906, executed a refunding and extensions mortgage to secure an issue of bonds, and afterwards, in 1911, that company was, on a general creditors' bill in the federal court at St. Louis, adjudged insolvent, and receivers were appointed for its property. By auxiliary proceedings, the receivers took possession of all the railroad property and effects in the different states of which that consolidated company was a citizen, and the jurisdiction of said receivers was by the federal courts in said states extended and covered all the property of the company in those states. In January, 1912, by bill of complaint of the Equitable Trust Company of New York, trustee in the mortgage, filed in the federal court at St. Louis, said mortgage was foreclosed, default having been made in the payment of the bonds, and at the foreclosure sale the Railway Company purchased all the railroads and property previously owned by the Wabash Company in said several states.

The complainant owns 20 of the bonds of the Wabash Railroad Company, secured by the refunding and extensions mortgage, which are past due. It prays an accounting as to so much of said bonds and interest as shall be found due complainant, for a decree in this court in favor of the complainant against the Wabash Company for the amount due on its said bonds, and directing said receiver to pay over to complainant so much as shall satisfy said claim and costs. On the filing of the bill, complainant filed an ex parte petition for a warning order against the Wabash Company and the Railway Company. The court entered the order without notice or hearing, and the Wabash Company and the Railway Company were served with copies thereof at their respective offices in St. Louis. Said companies have entered limited appearances for the purpose of moving to set aside the warning order and to quash the service thereof, on the ground of want of jurisdiction of the court. The bill is founded on section 57 of the Judicial Code, which provides as follows:

"When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, an-

swer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be," etc.

The suit, under this section, is in the nature of a proceeding in rem. The order must be served on the person or persons in possession or charge of the property, and, if not practicable to serve the order personally on the absent defendant, such order shall be published in such manner as the court shall direct, and, if the defendant does not appear, the court may—

"proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served; * * * but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceeding shall be taken shall be within another district," etc.

The foregoing provisions show that it is a proceeding against property within the jurisdiction of the court.

Neither the Keokuk Trust Company, plaintiff, the Wabash Company, the debtor, nor the Railway Company, the purchaser of its property, are citizens of Pennsylvania. Unless, therefore, jurisdiction is obtained under the foregoing section of the Code, it does not exist.

Under the section in question, to maintain the bill it must appear that it is one "to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought."

It is clear that this bill is not to remove any incumbrance or lien or cloud upon the title to any property, real or personal, and, if maintained, it must be to enforce a legal or equitable lien upon or claim to personal property within the district. The property in question is a chose in action, a debt owing by the West Side Belt, a citizen of this district, to the Wabash Company, a nonresident defendant. The proceeding is therefore an attempt to establish what might be called an attachment lien, or equitable charge upon the moneys in the hands of the West Side Belt Company to answer the debt of an absent defendant.

It was the opinion of the court in Shainwald's Assignment v. Lewis (D. C.) 5 Fed. 510, that section 738 of the Revised Statutes (now section 57 of the Code)—

"was only intended to reach those suits in equity in which it was sought to enforce some pre-existing lien or claim, legal or equitable, upon or to some specific property, real or personal, and not cases in which it is sought to reach and appropriate the general property of a defendant to the payment of his debts. By the words 'legal or equitable lien or claim against real or personal property.' Congress intended to reach every case in which there should be any sort of charge upon a specific piece of property, capable of being enforced by a court of equity."

The case of Dormitzer v. Illinois & St. Louis Bridge Company (C. C.) 6 Fed. 217, was, as stated by the court, "a creditors' bill to en-

force a sort of equitable garnishment" in the Circuit Court in Massachusetts; the defendant being a resident of Missouri. The court held that Congress had not intrusted the Circuit Courts with power to proceed by attachment of property against an absent defendant, and that the lien or title referred to in the act of 1875 "means a lien or title existing anterior to the suit, and not one caused by the institution of the suit itself."

To the same effect is Jones v. Gould, 149 Fed. 153, 80 C. C. A. 1. Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, was a case by a simple creditor to enforce his debt against the property of the defendant under a Mississippi statute which provided that a creditor should be entitled to a lien on his debtor's property from the time he filed the bill to enforce his debt. The plaintiff contended that the statute created new equitable rights in the creditor, which the federal courts would enforce; but the court held otherwise. With reference to the circumstances under which federal courts of equity will interfere to aid the enforcement of a remedy at law, the court, at page 113 of 140 U. S., at page 715 of 11 Sup. Ct., 35 L. Ed. 358, says:

"There must be an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment; or, to speak with greater accuracy, there must be, in addition to such acknowledged or established debt, an interest in the property or a lien thereon created by contract or by some distinct legal proceeding (citing a number of cases). * * * It is the existence, before the suit in equity is instituted, of a lien upon or interest in the property, created by contract or by contribution to its value by labor or material, or by judicial proceedings had, which distinguishes cases for the enforcement of such lien or interest from the case at bar."

The principles laid down in Scott v. Neely were again recognized in the case of Cates v. Allen, 149 U. S. 451, 458, 13 Sup. Ct. 883, 885 (37 L. Ed. 804). This, also, was a suit in equity by a creditor, who sought to enforce the Mississippi statute creating a lien from the time of filing the bill. The court denied the relief, saying:

"The mere fact that a party is a creditor is not enough. He must be a creditor with a specific right or equity in the property; and this is the foundation of the jurisdiction in chancery, because jurisdiction on account of the alleged fraud of the debtor does not attach as against the immediate parties to the impugned transfer, except in aid of the legal right."

The plaintiff's claim has not been adjudicated nor reduced to judgment. But it is the position of the plaintiff that the Wabash Company is insolvent, all its property and effects in the other states being in the hands of receivers and that which plaintiff seeks is in the hands of a receiver in this state; that in such case it is not necessary for a common creditor to reduce his claim to judgment, and that clearly his bonds need not be reduced to judgment; that, this fund being in the hands of the court through its receiver, creditors must intervene in the West Side Belt receivership and set up their equities; that the fund in question is a trust fund; and that since this court has jurisdiction of the subject-matter and the parties in the case, it can determine every question, legal and equitable, and determine even

legal rights that otherwise would not be within the range of its authority. Counsel cites Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672. In this case it is held that a court of equity may allow the claims of a simple creditor against his debtor's assets, which is being administered by said court for the benefit of creditors.

While this court is administering the insolvent estate of the West Side Belt Company, the plaintiff is not a creditor of that corporation. Being of opinion that the plaintiff has no such legal or equitable lien upon or claim to any property in this district as can be enforced by a bill in equity under section 57 of the Judicial Code, defendants' motion to dismiss for want of jurisdiction is sustained.

JONES et al. v. BANKERS' TRUST CO.

(District Court, D. New Mexico. April 15, 1916.)

No. 442.

1. Corporations \$\sim 80(2)\$—Agents—Misrepresentations.

Unless there is some binding agreement that a corporation will not be responsible for fraudulent misrepresentation of its agents made in selling corporate stock, the corporation, regardless of secret limitations of its agents' power, is liable for their misrepresentations; for it can act only through its agents, and, by accepting the fruits of the agency, is precluded from denying the agents' authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 246, 247; Dec. Dig. ⇐⇒80(2).]

2. Corporations \$\sim 80(1)\$—Stock Subscriptions—Contracts.

A provision, in a contract of subscription to the stock of a corporation, that no statement or representation by the agent taking the subscription should in any way operate to cancel or annul the contract unless reduced to writing and incorporated in the contract, is valid and binding, and, in a suit to annul the subscription on account of fraudulent representations is a good defense, the representation not being included in the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 244; Dec. Dig. &==80(1).]

In Equity. Suit by L. R. Jones and others against the Bankers' Trust Company, a corporation. On motion to strike a portion of defendant's answer. Motion denied.

Powell & Neblett, of Silver City, N. M., for plaintiffs.

Barnes & Nicholas, of Socorro, N. M., Towne Young and Etheridge, McCormick & Bromberg, all of Dallas, Tex., and James Royall, of Silver City, N. M., for defendant.

POPE, District Judge. This is a suit to annul a subscription for stock in the defendant corporation on the ground of fraudulent representations by its agents in procuring the stock. The defendant's answer sets up in defense the agreement to purchase signed by the subscriber:

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

No. 1095

Amount \$23,000.00

This is to certify that I hereby purchase 2,000 shares of the capital stock of the Bankers' Trust Company, for which I agree to pay twenty-three thousand and no/100 dollars.

I further agree that no statement, representation or agreement of warranty made to me by the person taking this contract shall in any way operate to cancel or annul this contract unless the same be reduced to writing and filled in on the following line:

A copy of the certificate of said stock is shown on the back hereof, and forms and constitutes a part of this contract as fully as if incorporated in the body hereof.

The further consideration is that I will extend to Bankers' Trust Company the option to purchase above described stock should my stock be for sale.

Dated this 12th day of May, A. D. 1914. Address Lordsburg, N. M.

[Signed] R. L. Jones. J. T. Jones.

Witnessed by —, Salesman.

The question here presented is whether the second paragraph contained in the instrument just quoted constitutes a good defense as against any representations, fraudulent or otherwise, made by the agent and not inserted in the contract. In other words, is the subscriber precluded from annulment of his contract by a provision thereof to the effect that no representation made by the agent shall accomplish an annulment unless such representation be inserted in the contract?

[1] It is clear that, independent of this provision, fraudulent representations by the agent selling the stock would avail against the company whatever the secret limitations of power existing between the company and its agent might be. 1 Cook on Corporations (7th Ed.) § 141; 2 Pomeroy's Eq. Jurisprudence, § 909; Garrison v. Technic Works, 55 N. J. Eq. 708, 37 Atl. 741, 744; Southern Ins. Co. v. Milligan, 154 Ky. 216, 157 S. W. 37.

The foregoing is true because the corporation can act only through its agents, and the acts of the agents in and about its business are the acts of the principal. Likewise the company is bound by such representations, because these are within the apparent scope of the authority of the agent selling, and because the company by accepting the fruits of the agency will not be heard to deny the authority of the agents in the use of means to secure such fruits.

[2] The case thus far proceeds upon well-known principles of law, which, indeed, are not questioned by the company. The precise point here is whether a provision precluding for purposes of annulment any representations except as embodied in the contract constitutes such a limitation on the power of the agent as, being known to the subscriber, relieves the company for any fraudulent representations of such agent not so embodied. Attorneys for the subscriber urge that such a provision is in effect to place the subscriber in a bag and to sew him up therein. On the other hand, for the company it is said that such a provision is a perfectly proper means by which a company may be informed as to what their agents have represented, and may thus give

the company the option of rejecting an offer of purchase based upon such misrepresentation, thus dealing with the matter at the start instead of later. It is said for the company that such a provision constitutes a limitation upon the power of the agent, known to the sub-

scriber as well as to the company, and thus binding upon all.

Many of the authorities cited by the subscriber on this point do not in my judgment reach it. Thus, Southern Ins. Co. v. Milligan, 154 Ky. 216, 157 S. W. 37, was a case where, it is true, the contract provided that "no conditions or agreements other than those printed or written herein shall be binding on the company." But outside of the mere mention of this in the statement of facts the case does not refer to the matter at all. The provision was not urged as a defense against the claim of misrepresentation, and the court does not refer to, or rule upon, its efficacy to that end.

Gypsum Co. v. Shields, 106 S. W. 734, a case in one of the Texas Courts of Civil Appeals, and thus not in a court of last resort, dealt with a contract containing the following:

"It is agreed that this written order and printed terms hereon constitute the entire contract, * * * and there are no verbal statements or agreements varying the terms."

It was held in that case that evidence of fraudulent representations by which the purchaser was induced to sign the writing, and not tending to vary the terms thereof, was admissible in defense. This is manifestly not authority, since it dealt with a situation entirely unlike the present one. The contract dealt with in the Shields Case was practically an embodiment of the principle that all antecedent oral agreements are merged into the written instrument, and cannot be received to vary the terms thereof. The representations sought to be proved in that case did not vary the terms, but were simply inducements to sign. They were thus not excluded by the terms of the contract. The Shields Case went to the Supreme Court of Texas (101 Tex. 473, 108 S. W. 1165); but that court affirmed the decision purely upon the question of fact as to whether the proof of fraud was sufficient to sustain the verdict, and without in the slightest degree considering the question here involved. That the Supreme Court did not rule upon this in the Shields Case is expressly recognized in Commonwealth Co. v. Bomar (Tex. Civ. App.) 169 S. W. 1060, 1063, a case much relied on by the subscriber, and to be now considered.

Commonwealth Co. v. Bomar, just cited, was likewise a decision by the Court of Civil Appeals. In that case the contract contained the following stipulation:

"No conditions, representations or agreements other than those printed herein, shall be binding on the Commonwealth Organization Company or the Commonwealth Bonding & Casualty Insurance Company."

The bonding company contended that because of this provision evidence as to representations by the company's agent was not admissible. The Court of Civil Appeals held, however, against this view, basing its decision upon the Shields Case, supra, which, as we have seen, is not at all in point.

In Commonwealth Co. v. Cator, 175 S. W. 1074, 1077, a decision also by the Court of Civil Appeals of Texas, the point here made was involved, and the court dismissed it with the following comment:

"Though the subscription contract stipulates that no conditions, representations, or agreements, other than those printed therein, shall be binding, still evidence of the alleged representations by McDonald was admissible to show fraud in the inception of the contract. The effect of this evidence was not to vary or contradict the terms of the written instrument. United States Gypsum Co. v. Shields (Tex. Civ. App.) 106 S. W. 724; Id., 101 Tex. 473, 108 S. W. 1165."

The cases cited, however, in the foregoing quotation, are, as we have seen, not authoritative. Further, the assignment made in the Cator Case to the effect that the evidence tended to vary or contradict the terms of the written instrument was, as the court held, clearly untenable, since the representations did not contradict the terms of the instrument, but simply constituted inducements to its execution. The question raised here as to the binding effect of the contract against representations not embodied therein was not raised in the Cator Case, and that case is therefore not authority here.

The same Court of Civil Appeals considered this question in Commonwealth Co. v. Barrington, 180 S. W. 936, 938, where it is said:

"It is urged that the representations made before the contract in question was executed were inadmissible because it varied the terms of the contract. The contract has a clause: 'No conditions, representations or agreements other than those printed herein shall be binding * * * on the Commonwealth Bonding & Accident Insurance Company.'

"It is insisted by appellant that appellee should not have been permitted

to prove any other agreement or promise than those contained in the contract itself for the reason that the recitals in the contract that there were 'no conditions, representations or agreements other than these' contained therein. We were first inclined to believe the proposition presented by appellant to be sound, but under the authority of U. S. Gypsum Co. v. Shields (Tex. Civ. App.) 106 S. W. 725, and affirmed by the Supreme Court, 101 Tex. 473, 108 S. W. 1165, in which a like provision was contained in an order, in which it was held such provision did not preclude proof of fraudulent representations inducing the contract, and that such proof did not vary the terms of the contract. This case induces us to conclude otherwise. We might note, however, that the grounds set up to avoid the contract in that case were

facts outside the contract and did not purport to be part of the promise or agreement, but were only representations that certain contractors would use the material being sold in the construction of government buildings; and it further appears that the cement ordered by the dealer was for the purpose of sale, and in that particular that case is distinguishable from this."

It will be noted from the foregoing quotation that this decision results only from a mistaken view of the Shields Case as authority, and that, had the proposition been an original one in the Barrington Case, the decision of the court would have been otherwise.

Two New York cases are likewise in point for the subscriber. Thus in Smith v. Hildenbrand, 15 Misc. Rep. 129, 36 N. Y. Supp. 485, it was held by a court of common pleas that such a provision as the present one does not relieve the principal from liability for the fraudulent representations of the agent. This case does not seem to have been taken to the higher court.

In Universal Fashion Co. v. Skinner, 64 Hun, 293, 19 N. Y. Supp. 62, there was a similar ruling by the Supreme Court of New York, Judge O'Brien, who wrote the opinion for the court, dissented.

No other authorities are cited for the subscribers, so that their case rests upon decisions not entirely harmonious, and from inter-

mediate courts of Texas and New York.

The cases cited for the company are more numerous and much more to the point. Thus in Colonial Corporation v. Bragdon, 219 Mass. 170, 106 N. E. 633, the contract contained the following clause:

"No agent of this company has authority * * * to make any reference, representation or agreement not contained in this contract, and none not contained herein shall be binding upon the seller, or in any wise affect the validity of this contract or form any part thereof, but all statements made have been merged and set forth herein."

The court said:

"The contract was executed in duplicate, and each party retained an original. The defendant testified that he read over the contract before he signed it and knew of its terms and conditions." He was allowed to introduce evidence tending to show, and the jury found, that he was induced to sign the contract by reason of false material representations knowingly made by authorized agents of the plaintiff to the effect that the lots were part of a tract cut up and laid out in streets; that there were several substantial buildings upon other parts of the tract; the land was in every way ready and suitable for immediate building and occupancy; and that the lots were within 20 minutes' walk from the railroad station.

"The question is whether these facts and findings constitute a defense to an action on this contract. The representations plainly were fraudulent in their nature and, apart from the paragraph of the contract quoted at length, would invalidate any agreement made in reliance upon them. But the parties chose, after all the preliminary statements and negotiations were ended, to put the contract in writing. It is not contended that the defendant was induced to sign that contract through any misrepresentation as to its contents or meaning. On the contrary, his own evidence was that before signing he read it through and understood its terms. One of those terms, to which he himself assented, was that no agent of the plaintiff had any authority to make any representations not contained in the contract. Further stipulations, to which he likewise assented, were, in substance, that every representation to which he would undertake to hold the seller was written in the contract and every statement upon which he relied was set out in it. He intentionally and intelligently, without any trick, mistake, duress, covin, or fraud as to its contents, signed this written contract, which was plain in its phraseology. In the light of the evidence and findings of the jury, it was a most unwise agreement for him to make. But he made it freely, when he knew what he was about. It is a fundamental principle of law that contracts in writing voluntarily executed with full knowledge of their contents by rational beings acting on their own judgment must be enforced.

"The defendant relies on the proposition that fraud vitiates every contract; but there is a distinction between a fraud which is antecedent to a contract, and fraud which enters into the making of the contract. The present case belongs to the former class. It constitutes no defense to this contract. Nor does it afford ground for an independent action. Cannon v. Burrell, 193 Mass. 534, 79 N. E. 780; McCoy v. Metropolitan Life Ins.

Co., 133 Mass. 82.

"This seems a hard case. But contracts freely made by intelligent persons cannot be abrogated simply because they are unwise."

International Co. v. Martin, 221 Mass. 1, 108 N. E. 469, from the same court, and decided only in 1915, is to the same effect.

An earlier case, Cannon v. Burrell, 193 Mass. 534, 79 N. E. 780, decided by the same court, presents the matter with a like conclusion, but upon a different course of reasoning:

"By agreeing that 'separate and verbal or written agreement with salesmen are not binding upon' the plaintiffs, and that the sale was 'made under inducements and representations herein expressed and no others,' the defendant agreed with the plaintiffs that in making the contract he would deal with the plaintiffs' salesman on that basis and no other; that is to say, on the basis that the salesman had no authority to change the terms of the written contract by any 'inducements,' 'representations,' or 'separate or written agreements.' Such an agreement is binding."

In Equitable Co. v. Biggers, 121 Ga. 381, 49 S. E. 271, the Supreme Court of Georgia had under consideration a contract very similar to the present one. The court said:

"We think it clear, in view of the explicit stipulations of the contract of sale, and the entire absence of any averment in the plea that the defendant was misled or deceived as to the contents of the contract, or in any manner prevented from ascertaining the same, he was estopped from setting up as a defense that he was induced to execute the contract by reasons of the fraudulent representations of the plaintiff's agent as to the quality of the goods purchased and guaranty of profits for room in the store. 'This sale is made under inducements and representations herein expressed, and no others,' is the plain and unambiguous language of the contract. The right to claim failure of consideration was expressly waived unless the defendant should exhaust the terms of warranty and exchange as specified in the contract, and there was not even an intimation in the plea that defendant had complied, or made any effort to comply, with such terms. The plea merely sought to set up that certain representations (presumably oral) made by plaintiff's agent to defendant, contemporaneously with the execution of the contract, and which induced defendant to enter into the same, were false and fraudulent, and this, too, in the face of the explicit agreement on the part of the defendant that the contract was made under the inducements and representations expressed therein, and no others. The plea was, for the reasons given, if for no others, without merit, and the court erred in refusing to strike it.'

In Arthur E. Guth Piano Co. v. Adams, 114 Me. 390, 96 Atl. 722, decided in 1916, the Supreme Court of Maine said, in dealing with a contention similar to that here made:

"The plaintiff contends that the evidence was inadmissible, because it tended to vary, add to, and modify the written agreement. It is unnecessary to consider the question thus raised, for upon the contract is a certificate, signed by the defendant, 'that the Arthur E. Guth Plano Company are not to be holden to me for any agreements made with their salesmen other than those specified within this lease.' This certificate was an agreement that the written lease contained all the agreements, terms, and conditions of the contract. It was notice to the defendant that selling agents had no authority to vary, add to, or modify the terms of the lease as written. If, notwithstanding this, the defendant relied upon representations of the agent, outside the written instrument, he did so at his peril. The agent may be liable for his false representation, but the principal is not made liable for them. The evidence was properly excluded."

In McKindly v. Dunham, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740, the Supreme Court of Wisconsin had occasion to deal with a contract containing the words "agent not authorized to collect." The court said:

"To this extent (i. e., of taking orders) they authorized him and trusted him; but they might not have been willing to trust him further with a large and dangerous power of receiving payments."

The following cases likewise uphold such an agreement as is here pleaded as constituting a defense to the claim of misrepresentation: Bruner v. Kansas Co., 7 Ind. T. 506, 104 S. W. 817; Advance Thresher Co. v. Roger, 123 La. 1067, 49 South. 709; Anderson Electric Co. v. Cleburne Co. (Tex. Civ. App.) 44 S. W. 929; National Trust Co. v. Thomas, 28 Tex. Civ. App. 379, 67 S. W. 454; Bybee v. Embree Co. (Tex. Civ. App.) 135 S. W. 203.

While Insurance Co. v. Mowry, 96 U. S. 544, 24 L. Ed. 674, was decided upon different principles, yet in that case the court mentions as germane to the decision a provision in the policy to the effect:

"That no agent of the company, except the president, and secretary, could waive such forfeiture, or alter that or any other condition of the policy."

The weight of the authority is thus to the effect that such conditions, when embodied in a contract such as this, are binding upon the subscriber. The cases proceed upon the ground, first, that the absent principal, the company, is entitled to protect itself against the improper acts of its representatives by requiring any acts relied upon against such representatives to be narrated in the contract. This provision is not unreasonable, for it protects the company upon the one hand, and, being known to the subscriber on the other, puts the latter upon notice of the limitations of the authority of the agent. The cases further proceed upon the ground that such an agreement fairly made by a subscriber is as binding upon him as any other provision of the contract. Having read it and understood it, the time for him to speak is then, and not afterwards. As was said in Colonial Corporation v. Bragdon, supra, "contracts freely made by intelligent persons cannot be abrogated simply because they are unwise."

I am of the opinion that the answer, so far as it pleads this contract, states a defense against the bill. The motion to strike must,

accordingly, be denied.

In re VORCK,

(District Court, D. Montana. August 22, 1916.) No. 1464.

BANKBUPTCY \$\igsim 165(1)\$—Preferences—Dividends Paid by Assignee for Creditors.

An assignment for the benefit of creditors, although avoided by bank-ruptcy proceedings within four months, is not void, and dividends paid by the assignee in the meantime in good faith do not constitute preferences which creditors receiving them must surrender before proving their claims, although creditors who did not participate in the dividends are entitled to have their claims equalized with those who did before further distribution is made, and if necessary for that purpose a portion of the dividend paid may be recovered by the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. \$\infty\$165(1).]

In Bankruptcy. In the matter of Charles H. Vorck, bankrupt. On review of order of referee disallowing claim. Reversed.

James A. Walsh and E. C. Day, both of Helena, Mont., for appealing creditor.

Wight & Pew, of Helena, Mont., for objecting creditor.

BOURQUIN, District Judge. Vorck assigned for the equal benefit of his creditors, and within four months thereafter petitioned and was adjudicated bankrupt. In the meantime the assignee paid dividends of 35 per cent. to all creditors known to him. The claim of a creditor so receiving dividends was objected to by a creditor unknown to the assignee, and the referee sustained the objection, in that the assignment was void and the dividends were a preference, and disallowed the claim.

No actual fraud, no intent to hinder, delay, or defraud creditors, no greater percentage to be received by the creditor claimant than by any other creditor of the same class, and obviously no reasonable cause for such creditor claimant to believe by the assignment and div-

idends a preference would be effected, appear.

Assignments for benefit of creditors are lawful though acts of bankruptcy, and are not void, but for rather indefinite reasons are held voidable, provided bankruptcy proceedings are initiated within four months from the assignments. Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165. If so avoided, the assignee's powers are at an end, but his past administration in good faith is lawful and beyond impeachment, save to the extent impeachable if bankruptcy had not intervened.

In the instant case the dividends received by the creditor claimant do not come within the Bankruptcy Act's definition of preferences. Act July 1, 1898, c. 541, § 60, 30 Stat. 562 (Comp. St. 1913, § 9644). They are not preferences, and so are not within the act disallowing claims unless preferences are surrendered. Undoubtedly, if because of creditors' neglect to present claims the assignee paid other creditors excessive dividends, the excess is money paid by mistake and can be recovered by the trustee. Bankruptcy proceedings being in equity, this may be directly accomplished by the trustee first paying the neglectful creditors dividends in like proportion to those paid other creditors by the assignee. If the assets do not admit, though it seems they will, the trustee may proceed against those excessively paid in so far as necessary to make up the deficiency. See Page v. Rogers, 211 U. S. 581, 29 Sup. Ct. 159, 53 L. Ed. 332.

The referee's order is set aside, and the claim of the petitioner for

review will be allowed.

KELLOGG TOASTED CORN FLAKE CO. v. QUAKER OATS CO.

(Circuit Court of Appeals, Sixth Circuit. October 3, 1916.)

No. 2807.

1. Trade-Marks and Trade-Names ⇐⇒3(4)—Descriptive Terms—"Toast."

The expression "Toasted Corn Flakes," as applied to thin flakes of white corn browned by the heat, is a descriptive term not the subject of a trade-mark, for the word "toast" means to brown by the heat, which as to the flakes was accomplished by large ovens, and, though the word "flake" has other equivalents, the phrase used accurately describes the product.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 7; Dec. Dig. \$\sim 3(4).]

2. TRADE-MARKS AND TRADE-NAMES \$\igsigle 3(3)\$—\$Subjects of Trade-Marks.

A descriptive term which does not indicate the origin of an article is not the subject of a technical trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 6; Dec. Dig. $\Leftrightarrow 3(3)$.

3. Trade-Marks and Trade-Names = 73(1)—Descriptive Terms—Second-ARY MEANING.

A manufacturer or trader who has so used descriptive words with respect to his goods as to establish in the public mind a secondary meaning in the term as denoting his goods is entitled to protection when another attempts to dispose of his goods under such name, so as to pass them off as the goods of the first appropriator.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. \$\infty 73(1).]

4. Trade-Marks and Trade-Names = 78-Unfair Competition-Right of

Where a manufacturer establishes in a descriptive word a secondary meaning as indicating his goods, he is entitled as against another only to such protection as will prevent such other from using that term to pass off his goods as those of the original appropriator.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 88; Dec. Dig. €=78.]

5. Trade-Marks and Trade-Names \$\sim 93(1)\$—Unfair Competition—Pre-SUMPTIONS.

While in the case of a technical trade-mark use by others is presumed to be with wrongful intent and will be enjoined, the rule is otherwise as to a descriptive word which it is claimed has acquired a secondary meaning as a trade-mark, and in such case the person asserting the secondary meaning has the burden of proving that his competitor's use of the term is unfair.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 104½; Dec. Dig. © 93(1).]

6. Trade-Marks and Trade-Names \$\sim 93(3)\$—Unfair Competition—Second-ARY MEANING OF TERM-EVIDENCE.

Where complainant claimed that the expression "Toasted Corn Flakes" had an acquired secondary meaning as indicating its product, evidence that persons engaged by complainant to call for such product at retail stores in the majority of instances received complainant's product is of little weight in establishing the secondary meaning of the term.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 106; Dec. Dig. € 93(3).]

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 235 F.—42

7. Trade-Marks and Trade-Names \$\iff 93(3)\$—Unfair Competition—Secondary Trade-Mark.

In a suit by complainant to enjoin another company from selling corn products under the name of "Toasted Corn Flakes," evidence *held* insufficient to show that the descriptive phrase "Toasted Corn Flakes" had generally acquired a secondary meaning indicating complainant's product so as to become a trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 106; Dec. Dig. & 93(3).]

8. TRADE-MARKS AND TRADE-NAMES 4-73(1)—UNFAIR COMPETITION.

Where complainant had not even established a secondary trade-mark in the phrase "Toasted Corn Flakes," although to some of the trade the expression was shown to indicate complainant's product, defendant, which sold its own product under the same name, is not guilty of unfair competition, where the dress of the two packages was so unlike that defendant's product could not be mistaken for that of complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. & 73(1).]

9. Thade-Marks and Trade-Names 55—Unfair Competition—What Constitutes.

Though defendant sold its product under the descriptive name previously adopted by complainant, yet where there was no fraud on the public, defendant's goods not being palmed off as those of complainant, there was no unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 86; Dec. Dig. ♦ 75.]

10. Trade-Marks and Trade-Names \$==93(3)—Unfair Competition—Advertising,

That complainant spent large sums in advertising its product and defendant's sales of its product under the same name increased, though it spent little in advertising, is no ground for a finding of unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 106; Dec. Dig. ⇔93(3).]

11. Trade-Marks and Trade-Names \$\sim 93(3)\to Unfair Competition\to What Constitutes.

That complainant had previously manufactured a similar product under a different name and the identical product under a different name, both of which ventures were abandoned, does not establish defendant's unfairness in subsequently disposing of its cereal under the name "Toasted Corn Flakes," which was first used by complainant, to describe its own cereal of identical nature.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 106; Dec. Dig. \$23(3).]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Bill by the Kellogg Toasted Corn Flake Company against the Quaker Oats Company. From a decree of dismissal, complainant appeals. Affirmed.

G. T. Buckingham, of Chicago, Ill., for appellant.

Frank F. Reed and Edward S. Rogers, both of Chicago, Ill., for appellee.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SATER, District Judge.

WARRINGTON, Circuit Judge. The appellant, Kellogg Toasted Corn Flake Company, a Michigan corporation, brought suit against

appellee, the Quaker Oats Company, a New Jersey corporation, called defendant herein, to enjoin defendant from selling a food product, made from white corn, in cartons bearing the words "Toasted Corn Flakes," from using cartons containing such a food product and bearing such words, and from selling the product in the particular cartons which defendant is using. The case was heard finally upon the original bill, filed September 17, 1910, and certain amendments thereto, filed August 3, 1912, and answer and proofs, and the bill as amended was in terms dismissed for want of equity. The case is pending here on appeal allowed in the court below, June 29, 1915. The grounds of dismissal are sufficiently shown by two of the assignments of error:

"(4) In finding and holding that the words 'Toasted Corn Flakes,' as applied to the articles in controversy, are a descriptive term and not susceptible of

exclusive appropriation."

"(9) In finding and holding that the evidence in this case shows no effort on the part of defendant to obtain the business of complainant, except only the use of the name 'Toasted Corn Flakes,' and that such name is, in fact, under the evidence so distinguished that there is no probability of confusion or deception arising."

It is contended for appellant (1) that the words "Toasted Corn Flakes," as applied to appellant's food product, constitute a technical, though unregistered, trade-mark; and (2) that assuming, though not admitting, that the words were not susceptible of original and exclusive appropriation as a valid technical trade-mark, appellant has, nevertheless, by long prior and exclusive use of the words, "in connection with its novel invented article, caused the words in the public mind to acquire a secondary meaning, designating" its "particular product"; and that defendant has intentionally and unfairly invaded appellant's right,

and so is guilty of unfair competition.

[1] The subjects of these issues, the products of the respective parties, are substantially alike and are made in substantially the same way. The basic ingredient of each is white corn grits—that is, as appellant's counsel say, "corn with the jacket and germ removed"—which are steamed in closed vessels, called cookers, and flavored, dried and rolled into flakes (each grit being reduced to a flake), and then subjected to the heat of an oven. Appellant claims, and has presented some testimony to show, that this process produces "baked," not "toasted," corn flakes: and thus that "toasted" is a fanciful rather than a descriptive The ovens, therefore, involve an important feature of the process. The ovens are large, though indifferently described. It is fairly to be gathered from the evidence that they are each approximately 30 feet long, 25 feet high and 9 feet wide; that each is equipped inside with a series of metal belts, called shelves, about 25 feet in length and 3 feet in width, which are disposed one above another and operated slowly by power, and, presumably, alternately in opposite directions, so as to conduct the flakes (which are fed into the oven upon the top shelf) along each shelf, the flakes falling successively within the control of an apron from the end of one shelf to that of another until they reach and pass over the lower one, where they are discharged from the oven and carried to a point outside and placed and sealed in cartons. The heat maintained in the ovens averages about 450 degrees,

Fahrenheit, and is generated at the bottoms of the ovens—in the appellant's by a furnace, and in the defendant's by gas. The flakes passing through appellant's oven are not exposed directly to the fire of the furnace, but when the flakes carried through defendant's oven reach the bottom belt they are to some extent exposed to the gas flames, since defendant's shelves are made of perforated metal. The time consumed in carrying flakes from the entrance to the exit of defendant's oven is about 20 minutes, and it is to be inferred, though it is not distinctly shown, that practically the same time is used in appellant's oven. The products of both parties are through this treatment more or less browned.

It cannot be doubted that the effect of this process is to toast the corn flakes. In the first place, in our view of the evidence, it is not open to appellant to claim that, as applied to its product, the word "toasted," when considered either alone or in combination with the words "corn flakes," is a fanciful or arbitrary word. The appellant and its predecessors have manufactured this product in this way and have described the product by these words ever since 1898. It will serve to clarify the subject by alluding to the different companies which have been organized by the Kelloggs, and to some advertising matter which has been given widespread circulation in placing the product upon the market. The first two companies so organized were named, respectively, the Battle Creek Sanitarium Company and the Sanitas Nut Food Company, and were owned and controlled by Dr. Kellogg and his brother, W. K. Kellogg; the first-named company being organized in 1897, and the latter in 1899, though this one would seem to have been a partnership association until 1903, when it was incorporated. The Sanitarium Company manufactured cereal products and also acted as selling agent for the Sanitas Company, selling for the latter, among other products, "Toasted Corn Flakes." This plan was continued until 1906, and in March of that year Dr. Kellogg sold the exclusive right to make and sell "Toasted Corn Flakes" to the Battle Creek Toasted Corn Flake Company, which was organized in February of that year; and in July, 1907, this sale was confirmed by the Sanitas Company. The Sanitas Company, however, continued to make other cereal products until at least 1912. The name of the Battle Creek Toasted Corn Flake Company was changed in May, 1907, to that of Toasted Corn Flake Company, and in May, 1909, the name was again changed to that of appellant, and, notwithstanding these changes in corporate name, W. K. Kellogg appears to have been the president of the company throughout, and to have signed the original The features of advertising matter put out by these companies, including appellant, which for present purposes sufficiently illustrate the understanding of these companies and the persons controlling them that the process resulted in toasting the corn flakes, may be seen in the following:

"They are so nourishing and easily digested; so scientifically cooked and toasted." "Properly cooked, flaked and toasted." "The flakes are exceedingly light, thin, crisp and tender, toasted just enough." "Rolled into thin flakes and toasted at a very high temperature." "So delightfully and tastily toasted." "Light crisp flakes of toasted corn that melt in your mouth—rolled

into film flakes and then toasted to a tempting golden brown." "A good corn recipe: Select choicest White Indian corn; flake each kernel so that flakes are as thin as writing paper; place flakes in baking pans and toast slowly in oven." "Toasted corn flakes are scientifically cooked and then toasted to a delicate brown."

And in an advertisement bearing apparently a facsimile of the signature of the president of appellant this is found:

"There is a secret in preparing Kellogg's Toasted Corn Flakes—a secret of toasting, blending and flaking 'the sweetheart of the corn' that other foods have never been able to copy."

These interpretations of the process of producing this food derive emphasis from the fact that the same interpretations are found in the advertising matter put out in respect of the patented product and process which were embodied in patent No. 558,393, issued to Dr. Kellogg, April 14, 1896, for "a certain new and useful alimentary product and process of making the same," and assigned by the patentee to the partnership association doing business as the Sanitas Food Company. True, Judge Wanty held the patent invalid, and his decree dismissing the bill was affirmed by this court in Sanitas Nut Food Co. v. Voigt, 139 Fed. 551, 71 C. C. A. 535; true, also, as counsel for appellant say, the word "toasted" was not found in the specification or claims of that patent. It is, however, noteworthy that in commenting upon "granose flakes," as the food was there called, Judge Wanty said that:

"Bread crusts, toast, zwieback and shredded wheat biscuits are the same product, containing every element of granose flakes, and only differing from them in form and degree."

Another fact to be observed is that the patented process was in substance and effect the same as the present process, which we have already described. Still in their interpretation of the patented process appellant's predecessors considered it as involving "flaking and toasting," and in the recipe in part before set out, containing the statement "place flakes in baking pans and toast slowly in oven," it was stated by appellant over its former corporate name, Toasted Corn Flake Company, and as late as October, 1908:

"You won't be able to prepare corn in this way unless you buy our patented machinery and process, but you can buy Sanitas Toasted Corn Flakes at your grocers."

If it were necessary to add anything to the foregoing, we think it might be affirmed to be common knowledge that placing corn flakes such as these in an oven and subjecting them to the degree of heat and for the time before pointed out cannot but result in toasting the flakes. It certainly must be generally known that the object of toasting bread is both to extract the moisture and give the bread a brown color, and, further, that this may be done in an ordinary kitchen-stove oven. Moreover, this is shown by defendant, without denial, from named cook books. Bread may be toasted, it is true, before an open fire; and this is consistent with definitions found in dictionaries, say in the Century, where "toast," the noun, is defined to be: "Bread in slices superficially browned by the fire; a slice of bread so browned." Again, "toast," the verb, is there defined: "To brown by the heat of a

fire; as, to toast bread or bacon." But the intransitive verb "toast" is thus defined: "To brown with heat." It is safe to say that this latter definition is in harmony with common experience. It is in accord, too, with Webster's definition: "To dry and brown by the heat of a fire; as to toast bread."

It is to be observed further that appellant's counsel claim, though we fail to find anything in the record really supporting the claim, that the words "corn" and "flakes" are not descriptive as applied to the product in question. It is said, for instance, that "maize" or "cereal" is more apt than "corn" to describe the material of which the product is made; and that "film," "scale," "chip," or "wafer" is technically more accurate than "flake" to describe the form of the article. We are not impressed by this argument. It is, of course, true that there are many objects which are each known by two or more names and which may be intelligibly described by the use of one of those names. It would be difficult, however, to conceive of an article that would be more universally identified by a single name, especially in this country, than the basic ingredient of this product is by the name "corn"; in commerce it bears that name and is a commodity widely dealt in and readily and unmistakably recognized simply by the use of that name. It is true, also, that "flakes" has synonyms, but none has been suggested which is as apt to describe the ultimate form given to this product as "flakes." Indeed, appellant's product is corn, flaked and toasted; it is in truth "toasted corn flakes," and is described with accuracy by those words; in short, the words, apart from their separate descriptive qualities, collectively describe with precision the chief ingredient, its form and ultimate mode of treatment. See Computing Scale Co. v. Standard Computing Scale Co., 118 Fed. 965, 967, 55 C. C. A. 459 (C. C. A. 6), as to word "computing," and Horlick's Malted Milk Co. v. Summerskill, 85 L. J. Rep. (July, 1916) 338, 341.1

[2] It hardly is necessary to add that appellant and its predecessors could not rightfully appropriate the name "Toasted Corn Flakes" to their exclusive use as an original technical trade-mark. It is not claimed, and since the Kellogg patent has been adjudged void it could not with any show of reason be claimed, that appellant or its predecessors ever possessed the exclusive right to manufacture and sell such a product as this; and it is quite as futile to insist that words describing the product with exactness, as here, can be regarded as fanciful or arbitrary symbols designed to show the origin of the product. The very essence of a technical trade-mark is that it denotes the origin of the article, not its quality. The doctrine of technical trade-marks is

¹ The descriptive quality thus shown to be possessed by the words "Toasted Corn Flakes," as applied to appellant's product, clearly distinguishes the instant case from that of Hamilton Shoe Co. v. Wolf Brothers, 240 U. S. 251, 256, 257, 36 Sup. Ct. 269, 60 L. Ed. 629, where the words "The American Girl" were held to constitute a technical trade-mark by reason of the fact that, as applied to shoes, they are an arbitrary, and not a descriptive, name; a like distinction exists between the case of Dennison Mfg. Co. v. Thomas Mfg. Co. (C. C.) 94 Fed. 651, 653 (cited with apparent approval in the foregoing case), and the present, in that the words there in issue, "American Express," were held to be susceptible of exclusive appropriation as a trade-mark for the reason that, as applied to sealing wax, they are devoid of descriptive quality.

too well settled to justify an extended citation of the decisions which forbid the employment of essentially descriptive words to indicate the source of an article intended for sale in the market; and this for the manifest reason that the fact expressed by the primary meaning of such words is a fact which others are entitled to express by the same words for the same purpose. Elgin Nat. Watch Co. v. Illinois Watch Co., 179 U. S. 665, 673, 21 Sup. Ct. 270, 45 L. Ed. 365; Standard Paint Co. v. Trinidad Asph. Co., 220 U. S. 446, 453, 31 Sup. Ct. 456, 55 L. Ed. 536: Columbia Mill Co. v. Alcorn. 150 U. S. 460, 463, 14 Sup. Ct. 151, 37 L. Ed. 1144; Cellular Clothing Co. v. Maxton & Murray (1899) A. C. 326, 333, 336, 339, 340; American Wash Board Co. v. Saginaw Mfg. Co., 103 Fed. 281, 282, 43 C. C. A. 233, 50 L. R. A. 609 (C. C. A. 6); Computing Scale Co. v. Standard Computing Scale Co., 118 Fed. at page 967, 52 C. C. A. 459; Newcomer & Lewis v. Scriven Co., 168 Fed. 621, 625, 94 C. C. A. 77; De Voe Snuff Co. v. Wolff, 206 Fed. 420, 423, 124 C. C. A. 302 (C. C. A. 6); Trinidad Asph. Mfg. Co. v. Standard Paint Co., 163 Fed. 977, 90 C. C. A. 195, affirmed in 220 U. S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536; Marvel Co. v. Pearl, 133 Fed. 160, 162, 66 C. C. A. 226 (C. C. A. 2); Brennan v. Emery-Bird-Thayer Dry Goods Co., 108 Fed. 624, 627, 47 C. C. A. 532 (Č. C. A. 8); William Wrigley, Jr., & Co. v. Grove Co., 183 Fed. 99, 101, 105 C. C. A. 391 (C. C. A. 2); Duplex Metals Co. v. Standard Underground Cable Co. (D. C.) 220 Fed. 989, 991.

[3,4] We have now to consider the contention that the words "Toasted Corn Flakes" possess a secondary meaning in the public mind, which is designative of appellant's goods and the foundation for the charge of unfair competition. Where a person has so used descriptive words as in truth to establish in them such significance as this with respect to his goods, he is entitled to relief against a subsequent user who is employing the words in a way calculated to effect sales of the latter's goods as those of the former, since such acts constitute unfair and fraudulent competition. Elgin Nat. Watch Co. v. Illinois Watch Co., 179 U. S. 674, 21 Sup. Ct. 270, 45 L. Ed. 365; Computing Scale Company v. Standard Computing Scale Co., 118 Fed. 967, 55 C. C. A. 459, and citations. The relief granted in such cases is adapted to the circumstances of each particular case, though such as effectively to prevent confusion and fraud in sales of the subsequent user's goods; as, for example, in Hall's Safe Co. v. Herring-Hall-Marvin Safe Co.. 146 Fed. 37, 44, 74 C. C. A. 361 (C. C. A. 6); s. c. sub. nom. Herring's, etc., Safe Co. v. Hall's Safe Co., 208 Ú. S. 554, 560, 28 Sup. Ct. 350, 52 L. Ed. 616, decree below modified and affirmed; Dietz v. Horton Mfg. Co., 170 Fed. 865, 872, 96 C. C. A. 41 (C. C. A. 6); G. & C. Merriam v. Saalfield, 198 Fed. 369, 375, 378, 117 C. C. A. 245 (C. C. A. 6); Allegretti Chocolate Cream Co. v. Keller (C. C.) 85 Fed. 643, 644; Bates Mfg. Co. v. Bates Numbering Mach. Co. (C. C.) 172 Fed. 892, 898; and as the late Mr. Justice Lurton said, in announcing the opinion of this court in the Computing Scale Case, before cited (118 Fed. 967, 55 C. C. A. 461):

"But when the word is incapable of becoming a valid trade-mark, because descriptive or geographical, yet has by use come to stand for a particular

maker or vendor, its use by another in this secondary sense will be restrained as unfair and fraudulent competition, and its use in its primary or common sense confined in such a way as will prevent a probable deceit by enabling one maker or vendor to sell his article as the product of another."

- [5] If the words in issue in the instant case constituted a technical trade-mark, use by others of the mark would be presumed to be made with wrongful intent and so would be enjoined. Saxlehner v. Siegel-Cooper Co., 179 U. S. 42, 43, 21 Sup. Ct. 16, 45 L. Ed. 77; De Voe Snuff Co. v. Wolff, 206 Fed. at page 424, 124 C. C. A. 302. This, however, is not the rule in respect of the use by others of descriptive words which have acquired such secondary significance as is here urged. Samson Cordage Works v. Puritan Cordage Mills, 211 Fed. 603, 608, 128 C. C. A. 203, L. R. A. 1915E, 1109 (C. C. A. 6). It is conceded that the burden of proof is upon the appellant to establish such secondary meaning; and this is a substantial burden, since the ultimate fact to be proved is fraud, that is, that defendant is using the words in their secondary, not simply their primary, sense, and with the result of passing off its goods as the goods of appellant. Thus, in the language of the Lord Chancellor, in Cellular Clothing Co. v. Maxton & Murray, before cited (1899) A. C. at page 336:
- "* * Where you are dealing with a name which is properly descriptive of the article, the burden is very great to show that, by reason of your using that name descriptive of the article you are selling, you are affecting to sell the goods of somebody else. * * * It cannot be denied, therefore, under those circumstances, that it was for the appellants to establish, if they could, that an ordinary word in the English language, properly applicable to the subject-matter of the sale, was one which has so acquired a technical and secondary meaning, differing from its natural meaning, that it could be excluded from the use of every one else. That is the proposition the pursuers had to make out."
- [6,7] We assume, since there was evidence tending to show as before stated, that the predecessors of appellant were the first to employ the words in issue to describe a product similar to that made and sold by each of the parties to this suit. The manufacture of the product was begun, and the words "Toasted Corn Flakes," applied in 1898, and this continued without competition until 1906. Throughout this period and until the right to make and vend the product was transferred as stated to the Battle Creek Toasted Corn Flake Company in 1906, the cartons bore upon their face:

"Sanitas Toasted Corn Flakes, made by the Sanitas Nut Food Co., Ltd., sold by Battle Creek Sanitarium Co., Ltd., Battle Creek, Mich."

In 1906, and after the transfer had been made to appellant, then bearing the name Battle Creek Toasted Corn Flake Company, the language used on the face of the cartons was changed into this:

"Sanitas Toasted Corn Flakes. None genuine without this signature—W. K. Kellogg. Battle Creek Toasted Corn Flake Co., Battle Creek, Mich."

Appellant's counsel explain, without dispute, that the signature of W. K. Kellogg was added for the reason that a person named Blanke had put on the market an article and called it "Toasted Corn Flakes." The last-named form of the Battle Creek Company was continued until

its name was changed to Toasted Corn Flake Company, when the name of the signing company was accordingly changed, and at the top of the cartons "Kellogg's" was substituted for "Sanitas." The only alteration that has since been introduced upon the face of the cartons occurred when the present name of appellant was adopted, and then its name was substituted for that of the previously signing company. Furthermore, this plan of displaying names of the product and also names of the companies in charge of the business during these respective periods has uniformly been followed in the advertising matter, except only for a time prior to the organization of the appellant company in 1906, when some posters were placed in street cars and on billboards in "many towns," with the designation alone of "Toasted Corn Flakes," and, in 1903, certain pictorial matter bearing these words was used for magazine and newspaper advertising by the Sanitarium Company and the Sanitas Company, though without their names; in a comparative sense, these

exceptions to the rule seem to have been negligible.

Another feature of the record is to be noted. In May, 1911, appellant caused 21 women each to call at from 15 to 25 retail grocery stores to purchase "Toasted Corn Flakes," without disclosing name of manufacturer, and ostensibly in their own behalf; these instructions were carried out in 8 cities located, respectively, in Ohio, Illinois, Iowa, Minnesota, and North Dakota. Nine of the women made their purchases in different stores in Chicago, four likewise in Minneapolis, two in Des Moines, and two in Duluth, and each of the rest in a different city. The result was to secure about 80 per cent, of Kellogg's toasted corn flakes, and the rest in other brands. It was developed in this testimony that aside from the Kellogg brand there were then 15 other brands of toasted corn flakes on the market, though it does not appear how long before May, 1911, the other brands were or how long since then they have been on sale. It is observable that each of these other brands bore a name, in one instance the initials "E. C.," immediately preceding the words "Toasted Corn Flakes," in the same way as appellant and its predecessors have used the names "Sanitas" and "Kellogg's" preceding those words. It is further to be noticed that these women made their purchases of dealers whose obvious interest in the sale of toasted corn flakes and their consequent knowledge of the subject could scarcely be accredited to the ordinary class of real customers; and hence such testimony lends little aid in support of the claim of secondary meaning urged here. It is conceivable that some of these dealers, and presumably the minority, were actually selling one or more of the other brands, in as great, if not greater, quantities, than the Kellogg brand; and certainly the minority did not regard the disputed words as signifying only the appellant's brand. It is, moreover, to be observed of the testimony of these women that they all in substance testified that they had no difficulty whatever in distinguishing the different brands of toasted corn flakes, as, for instance, the cartons of appellant from those of the defendant.

Now, what significance of present pertinence have the facts thus pointed out? From 1898 to 1906 the predecessors of appellant had a virtual monopoly of the food product in question and likewise of the

term "Sanitas Toasted Corn Flakes," and so, inclusively, of the words "Toasted Corn Flakes"; but this was only because during that period no one else was either making or dealing in the article. The employment of descriptive words under such a condition of trade as this, does not give to the words a secondary meaning denoting only the maker's product; evidence that such a meaning is so acquired is of slight value; this is for the reason that in such circumstances the words could not refer to any product except the single and particular one so monopolized; and, consequently, the occasion for associating the words with the maker of the product does not arise, as it must when two or more competitors are making and selling similar products. Lord Davey said, in Cellular Clothing Co. v. Maxton & Murray, supra (1899) A. C. at page 343:

"The other observation which occurs to me is this: That where a man produces or invents, if you please, a new article and attaches a descriptive name to it—a name which, as the article has not been produced before, has, of course, not been used in connection with the article—and secures for himself either the legal monopoly or a monopoly in fact of the sale of that article for a certain time, the evidence of persons who come forward and say that the name in question suggests to their minds and is associated by them with the plaintiff's goods alone is of a very slender character, for the simple reason that the plaintiff was the only maker of the goods during the time that his monopoly lasted, and therefore there was nothing to compare with it and anybody who wanted the goods had no shop to go to, or no merchant or manufacturer to resort to except the plaintiff."

This rule was recently followed in the Court of Appeal in Horlick's Malted Milk Co. v. Summerskill, supra (85 L. J. Rep. July, 1916, at page 340), when passing upon the effect of a long period (25 years), during which "Horlick's Malted Milk" had been sold in England without competition.

In the next place, we have seen that in 1906 the virtual monopoly came to an end when one Blanke began to use the words "Toasted Corn Flakes" in introducing his product; and that by reason of this use the script signature of W. K. Kellogg was placed on appellant's cartons and in some of its advertising matter. According to appellant's brief, one or two others shortly afterward began to apply the words "Toasted Corn Flakes" to their products. We have also seen that in 1907 "Sanitas" was removed from the cartons and advertising matter, and "Kellogg's" was placed in its stead, immediately preceding the words "Toasted Corn Flakes." The prominently distinguishing words which have been displayed on appellant's cartons and in its advertisements, ever since the virtual monopoly ceased, have been "Sanitas Toasted Corn Flakes" and "Kellogg's Toasted Corn Flakes"; and it is this last form with which we are most concerned in the solution of the instant case. This collocation of words, "Kellogg's Toasted Corn Flakes," cannot be overlooked when considering the asserted secondary meaning solely of the words "Toasted Corn Flakes." Appellant has not been content with placing its corporate name and address at the bottom of its cartons or in its advertising matter; it has also been persistent in conspicuously associating the name "Kellogg's" with the particular words in issue. The only explanation of this practice is found in argument, not in the evidence.

Counsel say that it was "to emphasize origin, and not to distinguish makers." This in effect concedes that the words "Toasted Corn Flakes" were not sufficient to identify origin. The natural inference to be deduced from such a practice is that there was a consciousness, indeed, a belief, on the part of those in control of appellant, that these words were not enough to point out origin—even with the full corporate name displayed at the bottom of the cartons. This is not met by the suggestion that "Sanitas" was used in the same relation during the period of virtual monopoly. It is quite consistent with the practice during that period to infer that the use so made of "Sanitas" was in anticipation of competition. Competition actually arose during the use of "Sanitas" and was in existence when that name was displaced by "Kellogg's." It is not claimed that the practice did not operate to invest these names with efficient distinguishing characteristics. It is manifestly too late now to sever "Kellogg's" from the words "Toasted Corn Flakes" and ascribe to these latter words alone a meaning in the public mind which has never been relied on by the appellant itself. Appellant's conduct seems to savor too much of an admission to justify such a severance. Further, the showing that certain grocers have understood "Toasted Corn Flakes" to mean appellant's product does not prove that the average customer intending to purchase toasted corn flakes has any such understanding; and, in view of the many brands of this product that appear to have been on the market, it is most difficult to see how the use of such purely descriptive words as these can signify to any considerable portion of the public that they relate alone to appellant's product.

[8, 9] It must nevertheless be conceded that the evidence adduced here tends to show that some dealers in toasted corn flakes understand those words alone to denote appellant's product; and we assume for the purposes of this decision that there are customers of such dealers who, when asking simply for toasted corn flakes, expect to be supplied with the product of appellant. Such facts as these would, in a proper case, call for relief, not of an absolute but of a qualified character, such as would prevent others from selling their similar products as those of appellant. As this court said, when speaking of the distinction between the primary and secondary meaning of a descriptive word used as a trade-mark, in G. & C. Merriam Co. v. Saalfield, supra (198 Fed. at page 373, 117 C. C. A. at page 249):

"The alleged trespassing defendant has the right to use the word, because in its primary sense or original sense the word is descriptive; but, owing to the fact that the word has come to mean, to a part of the public, something else, it follows that when the defendant approaches that same part of the public with the bare word, and with nothing else, applied to his goods, he deceives that part of the public, and hence he is required to accompany his use of the bare word with sufficient distinguishing marks normally to prevent the otherwise normally resulting fraud."

And again (198 Fed. 375, 117 C. C. A. 251, and citations):

"So it is wrong, in such a case, and when this 'secondary meaning' is once established, to start with the premise that defendant is entitled to use the word; prima facie, viewed from this point, he is not. The right, for the purposes of such a case, is primarily vested in the complainant. Defendant may

not use the word at all, unless he accompanies it with the explanation; he must neutralize an otherwise false impression; he must 'unmistakably inform' the public that the article is of his production."

And as to the charge of unfair competition, this court has definitely stated and supported the rule thus (Samson Cordage Works v. Puritan Cordage Works, supra [211 Fed. 608, 128 C. C. A. 203, L. R. A. 1915E, 1109, and citations]):

"The existence of a valid trade-mark is not essential to a right of action for unfair competition, * * * in which action the essence of the wrong consists in the palming off of the merchandise of one person for that of another. * * * Unless such palming off is shown, the action fails. * * * And so unfair competition cannot be predicated alone on the use of another's mark which is invalid as a trade-mark because not appropriable as such; that is to say, when not used in such way as to amount to a fraud upon the public."

In Standard Paint Co. v. Trinidad Asph. Co., supra (220 U. S. at page 461, 31 Sup. Ct. at page 460 [55 L. Ed. 536]), when considering the use of the word "Rubbero," and its asserted resemblance to the word "Ruberoid":

"To preclude its use because of such resemblance would be to give to the word 'Ruberoid' the full effect of a trade-mark, while denying its validity as such. It is true that the manufacturer of particular goods is entitled to protection of the reputation they have acquired against unfair dealing, whether there be a technical trade-mark or not, but the essence of such a wrong consists in the sale of the goods of one manufacturer or vendor for those of another."

See Goodyear Co. v. Goodyear Rubber Co., 128 U. S. 598, 604, 9 Sup. Ct. 166, 32 L. Ed. 535; American Wash Board Co. v. Saginaw Mfg. Co., supra (103 Fed. at page 284, 43 C. C. A. 233, 50 L. R. A. 609); Apollo Bros. v. Perkins, 207 Fed. 530, 533, 125 C. C. A. 192 (C. C. A. 3); Rushmore v. Manhattan Screw & Stamping Works, 163 Fed. 939, 941, 90 C. C. A. 299, 19 L. R. A. (N. S.) 269 (C. C. A. 2).

Appellant is therefore not entitled to relief unless it appears that defendant fails clearly and effectively to distinguish the product it places on the market from appellant's product; and such failure is not shown. It can serve no useful purpose to describe in detail either the carton or the advertising matter employed by defendant to place its product on the market. There is no evidence tending to show that defendant either through dress or lettering imitates the carton or advertising of appellant. It is true that there is some resemblance in surface coloring between the two sets of cartons, but their appearance as a whole is strikingly different. There is no language, apart from the words "Toasted Corn Flakes," on defendant's carton that is at all like the language of appellant's carton. The pictorial parts are totally unlike and differently located. Where appellant uses "Kellogg's" in association with the words in dispute, defendant uses "Quaker," and the associated words are given more prominence on appellant's than on defendant's carton. Appellant's own witnesses testified that the cartons are readily distinguishable.

[10] Appellant shows that it expends vast sums in advertising its product, while defendant expends comparatively small sums for that

purpose, and yet that the sales of the latter have materially increased. It is argued from this that defendant is profiting from the demand created through appellant's large expenditures. The inference thus drawn, and it is only an inference, certainly derives no support from any suggestion ever made by appellant that defendant is even a producer of the article; and the inference is subject to a severe, if not a fatal, strain when it is considered that its effect would be to prevent another from honestly producing and selling his article unless he were prepared and willing to expend money in exploiting his product equally with his competitor. At most, then, whatever advantage defendant may derive through appellant's advertising expenditures, the advantage cannot rightfully be said to have been received through any act of fraud or unfair trade; and hence the inference might, for the sake of argument, be conceded, and still such an advantage would have to be treated purely as an incident to defendant's rightful pursuit of a lawful business, and as an advantage voluntarily bestowed by appellant.

[11] It is true, as appellant says, that in 1907 defendant began to manufacture toasted corn flakes from white corn and to call the product "Maz-All"; and, after giving up that enterprise, it commenced in 1909 to make the same product with yellow corn instead of white corn, and to call that product "Yello." It is not claimed that either of these names ever impinged in any way upon the rights of appellant. But it is insisted that these facts show that defendant's resumption of the manufacture of toasted corn flakes from white corn, and its use of the name "Quaker Toasted Corn Flakes," admittedly with notice of appellant's business and claimed trade-name, show an intentional invasion of appellant's rights as well as a substantial impairment of its good will. The answer to this is manifold: The insistence is not sustained by the evidence; the defendant has a legal right to manufacture toasted corn flakes from white corn, as well as yellow corn; and the manner in which it conducts its business is not calculated to deceive the public as to the origin of its product. No decision has come to our attention, which under the present showing would sanction judicial restraint upon defendant's method of conducting its business.

The decree is accordingly affirmed, with costs.

PENNSYLVANIA CANAL CO. et al. v. BROWN et al. BROWN et al. v. PENNSYLVANIA CANAL CO. et al. (Circuit Court of Appeals, Third Circuit. August 10, 1916.)

Nos. 2114, 2115.

1. Judgment \$\iffsizer 713(2)\$—Matters Concluded—Matters Not Determined.

While a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties, to this operation of the judgment it must

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either appear from the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1241; Dec. Dig. 5713(2).]

2. Corporations \$\iff 482(7)\$—Foreclosure of Mortgage—Res Judicata—Identity of Parties and Issues.

A decree of foreclosure and distribution in a suit to foreclose a corporation mortgage, to which the mortgage trustee, the mortgagor, and an intervening bondholder, raising a single issue as to the distribution of the fund, were the only parties, *held* not a bar to a subsequent suit by another bondholder to charge one not a party to the previous suit with wrongful diversion to itself of funds of the mortgagor, which by the conditions of the mortgage were to be used to create a sinking fund for the payment of the bonds.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1883–1886; Dec. Dig. ♦ 482(7).]

3. MORTGAGES &= 109—CONSTRUCTION—EXTRINSIC CIRCUMSTANCES—RELATION AND INTENTION OF PARTIES.

Where there is doubt as to the meaning of terms used in a mortgage, the purpose of the transaction and the intention of the parties, properly ascertained, may be admitted in aid of its solution.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 219, 246, 247, 268; Dec. Dig. ⇐=109.]

4. CORPORATIONS €= 486 - MORTGAGES - CONSTRUCTION - "NET ANNUAL EARNINGS."

The Pennsylvania Railroad Company purchased a system of canals from the state, which for a number of years it operated directly and then organized the Pennsylvania Canal Company, to which it transferred the property, taking practically all of its stock in payment. Thereafter it controlled the canal company through such stock ownership. On its organization the canal company made an issue of bonds secured by mortgage, to which contract the railroad company became a party by agreeing to "purchase" the coupons on their maturity in case of default by the canal company. The mortgage contained the following provision: "First, that the party of the first part will first provide in each year out of the net annual earnings, if sufficient for that purpose, a sinking fund of \$20,000 per annum, but if not sufficient therefor then such sum as shall be equal to the said net annual earnings, for the payment of the principal of the bonds hereby secured, * * * and the same shall from time to time be invested by the said party of the first part in the bonds hereby secured or in other good securities." Held that, taking into consideration the relations between the two companies, the "net annual earnings" of the canal company applicable to the sinking fund was the difference between the gross earnings and the operating expenses, and that the use of such earnings, without setting aside the sinking fund, for the payment of interest on the bonds, for the relief of the railroad company, was an unauthorized diversion for which the latter company, as controlling owner, was liable to the bondholders.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. 486.

For other definitions, see Words and Phrases, First and Second Series, Net Earnings.]

5. Statutes \$\infty\$80(2), 97(2)—Constitutional Limitations—"Special Law"—"Highways."

Const. Pa. art. 3, § 7, prohibiting the passage by the General Assembly of "any local or special law * * * authorizing the laying out, opening, altering, or maintaining roads, highways, streets, or alleys * * * creating corporations, or amending, renewing, or extending the charters thereof; granting to any corporation * * * * any special or ex-

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clusive privilege or immunity" does not extend to highways of transportation, such as canal or railroad systems, and does not render invalid Act Pa. June 2, 1870 (P. L. 1318), Act May 7, 1889 (P. L. 104), or Act March 16, 1899 (P. L. 9), each authorizing the Pennsylvania Canal Company to abandon for public use portions of its canal system; such acts not being local or special, either with respect to the subject-matter or the corporation, but evidencing a change of policy on the part of the state in regard to canals which had been to a large extent superseded by railroads and had become unprofitable and of little value to the public. [Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 87, 109; Dec. Dig. ©=80(2), 97(2).

For other definitions, see Words and Phrases, First and Second Series, Highway; Special Law.]

6. Canals \$\sim_3\$—Constitutional Law \$\sim_154(2)\$—Obligation of Contracts
—Statutes Impairing Obligation.

Neither are such acts in violation of the federal Constitution, as impairing the obligation of the contract made by a mortgage executed by the canal company before the last two were enacted, which contained no provision requiring the company to retain and operate the property it then owned.

[Ed. Note.—For other cases, see Canals, Cent. Dig. § 3; Dec. Dig. 3; Constitutional Law, Cent. Dig. §§ 461–473; Dec. Dig. ←154(2).]

7. Corporations \$\infty\$=186—Contracts—Transactions with Subsidiary Corporations.

A corporation, which through stock ownership controls and conducts the business of another, is held to the strictest account and to the observance of the highest rectitude in its transactions with its subsidiary and has the burden of proving their fairness.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 695–701; Dec. Dig. ⊗=186.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit in equity by Alice Frances Brown and others against the Pennsylvania Canal Company and Pennsylvania Railroad Company. Decree for complainants, and both parties appeal. Affirmed.

For opinion below, see 229 Fed. 444.

John Hampton Barnes, of Philadelphia, Pa., for Pennsylvania Canal Co.

Francis I. Gowen and John G. Johnson, both of Philadelphia, Pa., for Pennsylvania R. Co.

Thos. Raeburn White and John Cadwalader, Jr., both of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. These are cross-appeals from a decree of the District Court based upon findings for and against the parties on several issues raised by the pleadings. 229 Fed. 444. The issues on the merits are distinct, and being separately presented, may be separately decided. Preliminary to their consideration, however, it will be necessary to dispose of a defense to the action, extending to all matters involved in both appeals, which challenges the plaintiff's right to maintain her action in the District Court, because, as it is

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

alleged, the matters there presented could have been and therefore should have been determined in a previous action in another court. This defense is one of res adjudicata. We must therefore inquire what issues were involved and decided in the two actions, and whether the controversy in each was between the same parties or their privies. A very brief outline of the two cases will develop the facts.

In 1866, the Pennsylvania Canal Company acquired from the Pennsylvania Railroad Company certain canal properties. In 1870, the Canal Company placed a mortgage on the properties for \$5,000,000 to secure bonds for a like amount, of which \$3,000,000 were issued. The mortgage provided for an annual appropriation of \$20,000 from the net earnings to a sinking fund for the payment of the principal of the bonds, and the bonds bore by endorsement the obligation of the Railroad Company to "purchase" the coupons in the event of interest default by the Canal Company.

The business of the Canal Company decreased from year to year, and from various causes the canals fell apart and were abandoned. During this transition, the Canal Company sold many of its properties to the Railroad Company, under powers contained in the mortgage, the proceeds being applied in part to the purchase and retirement of its bonds. In 1888, the Canal Company defaulted in interest payments and the Railroad Company thereafter purchased the coupons.

After the mortgage matured in 1910, the trustee filed a bill of foreclosure in the Court of Common Pleas, No. 5, of Philadelphia County, State of Pennsylvania, praying a decree that he be awarded execution of the mortgage and be directed to apply the uninvested proceeds from sales previously made, as well as the proceeds of sales to be made under the decree, to the payment of interest coupons in priority to payment of the principal of the bonds. The Railroad Company was the sole holder of the coupons. The parties to that action when begun were Samuel Rea, trustee under the mortgage, and Pennsylvania Canal Company, mortgagor. John Cadwalader, a bondholder, intervened, and by appropriate pleadings between himself and the original parties, raised the issue that uninvested proceeds of sales were applicable to the payment of the principal of the bonds in priority to the payment of interest. That was the only controverted matter tried in that case. Its decision depended upon the character of the undertaking of the Railroad Company to take up defaulted interest coupons. The trial court found that the undertaking was one of payment and not of purchase. This finding was reversed by the Supreme Court of Pennsylvania, Rea, Trustee, v. Pennsylvania Canal Co., 245 Pa. 589, 91 Atl. 1053, which held that the contract was one of purchase and not of payment, that having purchased the coupons, the Railroad Company held them with all the rights of bondholders, and that the obligation of the bonds gave priority to interest over principal in the application of proceeds of sales.

That decree was pleaded as res adjudicate of the issues in this action before the District Court, not because the issues there presented had been decided in the action before the State court, but upon the contention that the issues raised in the action in the Federal Court

could have been and in legal propriety should have been raised and decided in the action in the State court; and therefore the plaintiff was precluded from maintaining this action in the District Court.

While the case in the State court was pending, Alice Frances Brown brought this action in the District Court of the United States against the Pennsylvania Canal Company, Pennsylvania Railroad Company and others, charging, by original and supplemental bills, three things: First, that the Railroad Company had caused the Canal Company to divert the annual sinking fund appropriations from the sinking fund to the payment of interest coupons, to the relief of its obligation to purchase the same; second, that certain conveyances made by the Canal Company to the Railroad Company were void in that they were made under authority of an invalid enactment; and third, that the considerations for properties otherwise validly sold were inadequate. It is conceded that these matters were not in issue in the State This is certain, for the first ground of action was raised in the District Court by a supplemental bill filed after the decree in the State court, and the other two grounds were expressly excluded by the trial judge from his findings.

The District Court found that the plaintiff was not precluded by the judgment of the State court from maintaining this action against the Railroad Company for diverting moneys from the sinking fund to her injury, but that she was precluded by the decree of the State court from urging in this action her claims of invalid conveyances of mortgaged properties and the payment of inadequate considerations for

properties purchased.

[1, 2] It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either from the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. Russell v. Place, 94 U. S. 606, 608, 24 L. Ed. 214; Cromwell v. County of Sac, 94 U. S. 351, 353, 24 L. Ed. 195; Linton v. National Life Ins. Co., 104 Fed. 584, 587, 44 C. C. A. 54; Harrison v. Remington Paper Co., 140 Fed. 385, 400, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314. It is admitted that in these cases the precise questions were neither raised nor determined. It is also admitted that the plaintiff in the action before us was at no time a party to the action in the State court, and that the Pennsylvania Railroad Company, the defendant in this action, was not a party to the action in the State court, except after trial, when it was admitted to the record, by consent of counsel, nunc pro tunc, for the purpose of appeal.

In a general way, we may assume as true the position of the defendants that it is a claimant's duty to assert in one action all rights he may have against the defendant, but clearly that duty is limited to the assertion only of those rights which are germain to the matter in controversy and are appropriate to the form of action, and which have been invaded or defeated by the party against whom the action is brought. The action in the State court was one of foreclosure;

the parties were the trustee of the mortgage, the mortgagor and an intervening bondholder raising the single question of priority to funds; and the decree was one of foreclosure and distribution. The Pennsylvania Railroad Company was not charged with wrongdoing, and if such a charge had been made, no conceivable decree could have reached it, until it had become a party and presented a defense. But the action in the District Court was against the Pennsylvania Railroad Company and recovery was sought for alleged unlawful conduct in diverting funds from the plaintiff to itself, the cause of action and the remedy being as distinct from and unrelated to the proceeding of foreclosure in the State court as though it were in tort.

We are satisfied that the first ground of the plaintiff's action charging the Railroad Company with responsibility for diverting moneys from the sinking fund was in no sense germain to the action of fore-closure in the State court, and that the District Court committed no

error in hearing and determining that issue.

The claim of invalidity of certain conveyances might conceivably have been asserted in the foreclosure proceeding by the trustee or an intervenor in determining what properties were covered by the mortgage, though we are slow to see how the claim of inadequate considerations could have been tried and decided in that form of action. Although the District Court held that the plaintiff was precluded by the decree of the State court from maintaining her action upon the last two grounds, we prefer to pass upon their merits, in view of the importance of the questions presented and amounts involved, rather than dispose of them by what is at best a doubtful legal impediment to their consideration. We, therefore, assume that the plaintiff was not precluded by the decree of the State court from obtaining in this case a determination of these issues, Powers v. Blue Grass B. & L. Ass'n (C. C.), 86 Fed. 705, and will consider them on the plaintiff's appeal under her assignments charging error to the court for refusing to find the conveyances invalid and the considerations inadequate.

Appeal of Pennsylvania Railroad Company and Pennsylvania Canal Company.

In this appeal we are called upon to construe the sinking fund provision of the mortgage, to inquire into actions of the Canal Company in carrying that provision into effect, and to determine the liability of the Railroad Company for the conduct of the Canal Company. The mortgage extended over a period of forty years. By its sinking fund clause, the Canal Company was required to appropriate annually to the sinking fund "for the payment of the principal of the bonds" the sum of \$20,000 out of the "net annual earnings," if sufficient, and if not, then a sum equal to the whole net annual earnings. During 24 years, the net annual earnings, if determined by the difference between gross earnings and operating and other expenses, not including interest charges, aggregated \$415,309.71, and were sufficient in each of those years to allow an appropriation to the sinking fund of \$20,000 or less. If, in ascertaining net earnings, interest is chargeable against gross earnings, there were but two years of the twenty-four

when the net earnings thus calculated were sufficient for sinking fund appropriations. During the remaining years of the mortgage there were no net earnings, howsoever calculated, applicable to the sinking fund. At different times, the Canal Company appropriated to the sinking fund various amounts, aggregating not over \$62,465.70. It withheld from the sinking fund the earnings of all other years and applied them mainly to the discharge of its interest obligations, either directly to the bondholders or to the Pennsylvania Railroad Company, the holder of purchased coupons, construing the expression "net annual earnings" to be such as remained after deducting interest charges as well as all other expenses.

With the funds paid into the sinking fund, \$159,000 of the bonds of the Canal Company were purchased. Interest on the coupons of these bonds was paid to the sinking fund until 1885, but in 1886 default was made and thereafter the Canal Company closed out the sinking fund by returning to its treasury the money then in hand and by cancelling the sinking fund bonds. Thereby and to that extent the Railroad Company was relieved of its obligation to purchase the sinking fund coupons. As the cash balance of the sinking fund was withdrawn, and the sinking fund bonds cancelled, and as no appropriations to the fund were thereafter made, there was no fund with which to discharge the principal of the bonds at maturity. The plaintiff, a bondholder, thereupon brought this suit, and among other things charged, that the Canal Company violated its undertaking to make annual appropriations to the sinking fund when there were funds applicable thereto: that it diverted such earnings from the sinking fund to the discharge of its interest obligation and to the relief of the obligation of the Railroad Company to purchase interest coupons; that it annulled the operation of the sinking fund provision by cancelling such bonds as the sinking fund held, and by appropriating to its own use the sinking fund cash balance; that it pursued this conduct under the influence and direction of the Railroad Company, to the advantage of the latter and to a corresponding detriment of the plaintiff and other bondholders; and prayed that the Railroad Company restore to the trustee, for the discharge of the principal of the bonds, the amounts so diverted, with interest,

The District Court found that:

"The loss sustained by said bondholders through the act of the said Pennsylvania Railroad Company in causing moneys to be diverted from the sinking fund provided for the payment of the principal of said bonds, and in causing the moneys in said sinking fund to be invested in the bonds of the Canal Company and then cancelled, amounted, on July 1, 1910, to the sum of \$1,379,941.28."

The court decreed, among other things, that:

"The said Pennsylvania Railroad Company * * * pay to Samuel Rea, trustee for said bondholders, the said sum of \$1,379,941.28, with interest thereon from July 1, 1910, the same, when so received, to be disbursed and distributed by him to and among the said Alice Frances Brown and the other holders of said bonds of the Canal Company, as the court shall direct."

This is an appeal from that part of the decree.

In this appeal, as in the case below, two questions are involved, first, the meaning of the expression of the sinking fund, "net annual earnings;" and, second, the fact and extent of the Railroad Company's relation to and corresponding liability for what the Canal Company did and failed to do. For defense, the Railroad Company maintains that under a proper construction of the terms of the mortgage, the Canal Company was not in default, and were it otherwise, the Railroad Company did not induce the default and is not responsible for it.

In the consideration of this defense, the Railroad Company insists that we ignore the origin of the mortgage transaction and its purpose, the Railroad Company's continued hold upon and use of the mortgaged properties, and its relation to the Canal Company, except that of stock control, and asks that the case be decided upon the terms of the mortgage as though they were free from ambiguity, and upon the absence of direct evidence of acts of the Railroad Company affecting the conduct of the Canal Company.

- [3] The protracted litigation, both in State and Federal courts, arising out of this mortgage, testifies to the uncertainty of its terms, and the fact that the Railroad Company was an actor in creating the Canal Company and in participating in the obligation and floatation of the mortgage warrants an examination into the origin, conduct and purpose of the transaction, in order to determine the meaning of terms which were employed or subscribed to by the Railroad Company. When there is doubt as to the meaning of terms, the purpose of the transaction and the intention of the parties, properly ascertained, are not infrequently admitted in aid of its solution. Pullman's Palace Car Co. v. Missouri Pacific Ry. Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499. We are therefore of opinion, that the actions of the Railroad Company in relation to the Canal Company and its properties, have an evidentiary bearing upon the meaning of the terms of the mortgage by which the properties were encumbered.
- [4] The canal properties covered by the mortgage now in suit were constructed by the Commonwealth of Pennsylvania and for a period of years were owned and operated as a part of the State Public Works. The main line of the Public Works included a railroad from Philadelphia to Columbia, a canal thence along the east bank of the Susquehanna River to a point opposite the mouth of the Juniata River, thence crossing the Susquehanna to Duncan's Island and along the valley of the Juniata to Hallidaysburg. From that point a portage railroad, so constructed as to carry canal boats in sections, ran by inclined planes over the mountains, and connected with a canal leading to Pittsburg. This line was completed in 1834.

The Pennsylvania Railroad Company was incorporated in 1846 and completed its line from Harrisburg to Pittsburg in 1854. It also operated a line from Harrisburg to Lancaster. The line of the Railroad Company ran parallel with the canal line of the State for a considerable part of its length. By authority of the Act of May 16, 1857 (P. L. 519), the main line of Public Works, above described,

was sold by the Commonwealth of Pennsylvania to the Pennsylvania Railroad Company, for the sum of \$7,500,000. From 1857 to 1866, the canals were operated by the Railroad Company as its canal division. By the purchase of the canal properties, the Railroad Company acquired the fee to the land, encumbered, however, by prior liens and obligations, amounting to about \$2,000,000. Having held and operated the properties for a period of eight years and recognizing their need of repair and enlargement, and that the obligations for which they were pledged as security were approaching maturity, the Railroad Company signified its purpose in its annual report of 1865 to change the manner of holding and enlarging them (at least with respect to a part) "by the organization of a separate company for these works" and to pursue a plan for raising money "by a mortgage upon them." To that end the Railroad Company caused the Pennsylvania Canal Company to be incorporated, and under authority of the Act of May 1, 1866 (P. L. 1068), sold to the Canal Company the fee of all its canal properties.

The Railroad Company took the stock of the Canal Company in exchange for its properties, acquiring thereby nearly all the capital stock of the Canal Company, and thereafter exercised an indirect control over the properties by stock ownership in lieu of its previous

direct control by property ownership.

In 1870, the Railroad Company completed its purpose to change the character of its holding and to finance the canal. In that year the indebtedness of the Canal Company amounted to \$2,367,000, consisting chiefly of issues of bonds by which the properties were encumbered when purchased by the Railroad Company. It was estimated that the sum of \$150,000 was needed for repairs and improvements. To meet these obligations and requirements, the Commonwealth, by the Act of June 2, 1870 (P. L. 1318), authorized the Canal Company to borrow money and pledge its property by mortgage. Acting under this authority, the Canal Company immediately set about to discharge its underlying obligations and raise additional money by the mortgage and bonds now in suit. To this end the Railroad Company did not limit its influence over the Canal Company to stock control, but entered directly into the mortgage transaction, and voluntarily assumed a contractual obligation in connection with it, which ultimately amounted to many millions of dollars. What was the purpose and legal effect of the Railroad Company's participation?

From the mortgage and its terms, as well as from the annual reports, several inferences may properly be drawn. The first is, that the Canal Company was without funds with which to meet its obligations and requirements; the second is, that the Railroad Company was not inclined to supply such funds from its own treasury. The plan therefore was to raise money from outside sources upon the security of the canal properties. The Railroad Company was a

party to this plan.

The properties were already encumbered. It may be assumed that at that time they were a fair security for the debts. As instrumentalities of transportation, canals had not then been superseded by

railroads, at least with respect to such rough staples as iron, lumber and coal. At that time the business was represented to be good and full of promise. The underlying obligations were first liens upon the properties, and their holders were able to prevent sales free of liens, and, in the event of default, were in a position to exact of the Railroad Company the protection of their holdings, or cause it to submit to foreclosure and sale with competitive bidding for properties, for the equity in which it had but recently paid \$7,500,000.

To induce the holders of the underlying obligations to surrender their liens and forego this advantage, the Canal Company and the Railroad Company had to offer an equally attractive security. So the Canal Company issued a prospectus of the new bonds, showing their merit and offering them to the holders of the underlying bonds in exchange and to the public for sale. Aside from showing the excellent condition of the revenues, tonnage carried, prospective business, etc., the prospectus called attention to provisions of the proposed mortgage for the payment of principal and interest of the bonds. It pointed out the mortgage provision for a sinking fund "sufficient to retire the whole debt at maturity," and set forth the obligation of the Railroad Company to purchase all coupons upon which the Canal Company might default. This evidently was acceptable to the holders of the old bonds, as well as to investors, and upon exchange being made, the properties were discharged from their underlying obligations. Now, what were the terms of the mortgage and what was done in executing its provisions?

The mortgage was an unusual one, and was evidently drawn with a regard to the original purposes for which the canal properties were acquired by the Railroad Company. The line of canals, as we have seen, ran parallel to the Railroad Company's line of rails, traversing the state and crossing the mountain range through valleys of easy grades and therefore of vast importance. The Railroad Company desired these canals for some purpose or purposes. Of these several are obvious, yet as they were not testified to, we are not inclined to discuss them. At all events, the Railroad Company paid \$7,500,000 for the right to use the canals in its business, which it did by never losing control of them, and by gradually absorbing the properties that comprised the canal beds and using them as roadbeds in important links in its main line from Harrisburg to Pittsburg.

The occasion for the mortgage being unusual, the mortgage itself contained many unusual features, which, however, were entirely consistent with the purposes for which the properties were acquired and with the legitimate objects for which they were held and mortgaged. Among these were the right of the Canal Company to abandon and dispose of the properties at private sale clear of the lien of the mortgage, and apply the proceeds to the purchase of the bonds, and the right of the trustee, upon default of interest payments, either to enter upon the mortgaged premises and operate them, or to sell them at public sale, and in either event to apply the income or proceeds first to interest and then to principal. As the property was primarily pledged for the payment of interest (Rea, Trustee, v.

Pennsylvania Canal Co., 245 Pa. 589, 91 Atl. 1053) and as the whole or any part of it could at any time be withdrawn from the secondary pledge for the payment of principal and sold free of the lien of the mortgage, it is reasonable that the bondholders surrendering first lien obligations in exchange for the bonds of the mortgage, should exact and the mortgagor give some security for the payment of principal. And such we find in the very first provision of the mortgage. It is as follows:

"First. That the party of the first part will first provide in each year, out of the net annual earnings, if sufficient for that purpose, a sinking fund of \$20,000 per annum, but if not sufficient therefor, then such sum as shall be equal to the said net annual earnings, for the payment of the principal of the bonds hereby secured * * * and the same shall from time to time be invested by the said party of the first part in the bonds hereby secured, or in other good securities."

We are called upon to construe the expression "net annual earnings." In interpreting that expression, we receive little aid from the cases in which it has been given an adjudged meaning, for in those cases, as in this, the meaning is controlled by the sense in which the expression is used in connection with the context and in connection with its evident purpose. The plaintiff maintains that the difference between gross earnings and operating expenses constitutes net earnings, first, because of authorities holding that view, United States v. Kansas Pacific Ry. Co., 99 U. S. 455, 25 L. Ed. 289; State ex rel. St. Charles R. R. Co. v. Assessors, 48 La. Ann. 1156, 20 South. 670; Commonwealth v. Pa. Gas Coal Co., 62 Pa. 241; St. John v. Erie Ry. Co., 10 Blatch. 271, 21 Fed. Cas. 167, 171, No. 12,226; Id., 89 U. S. 136, 22 L. Ed. 743, and second, because of the purport of the phrase, gathered from the terms of the whole instrument. The defendants hold to the opposing view, because of authorities contra, Union Pacific Railroad Co. v. United States, 99 U. S. 402, 25 L. Ed. 274, and upon the ground that as the general terms of the mortgage gave priority to interest in income from operations after entry, and in proceeds from sales, a like priority was intended to be given in earnings.

Reading the sinking fund clause in connection with the terms of the whole mortgage, we are of opinion that the expression "net annual earnings" meant the surplus of earnings after deducting operating and other expenses from gross earnings, and that interest payments having been otherwise provided for in the peculiar situation out of which the mortgage arose, were not properly chargeable against gross earnings in priority to the annual appropriations to the sinking fund. We therefore agree with the trial court that the Canal Company improperly diverted money from the sinking fund to the payment of interest.

Is the Railroad Company liable for the conduct of the Canal Company in violating the sinking fund provision of the mortgage? We may say, in the first place, there was nothing objectionable in the plan by which the Railroad Company held and financed its canal properties, if it were willing to abide the legal consequences. In its intention to hold fast the properties it had acquired at great cost for

its business purposes, no fraud is charged. In the transfer of title and re-acquisition of the properties for its railroad construction, under a mortgage, the terms of which were obviously framed with an especial regard to such re-acquisition and use, the Railroad Company is not open to the insinuation of legal or moral wrongdoing. It was merely doing with its own property through the medium of another corporate entity what it could legally have done if it had retained title in itself. But in employing the conveniences of another instrument and in using in that connection the money of others, the Railroad Company should not complain if the law imposes upon it the normal responsibility incident to such an arrangement. The Railroad Company avowed its purpose to operate and dispose of certain of its canal properties through a separate corporation rather than by direct ownership. It chose to do indirectly all that it could do directly. The transfer of control by property ownership to control

by stock ownership was a change only in form.

The control of the Canal Company by the Railroad Company was very different from the corporate control considered in the case of Pullman's Palace Car Co. v. Missouri Pacific Rv. Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499, where the holder of a majority of the stock of a corporation was not held responsible for its acts. the case before us, the stock ownership gave the power to control. But it is upon the exercise of that power, and not upon its mere possession, that we base our judgment of the responsibility of the Railroad Company for the conduct of the Canal Company. The Railroad Company created the Canal Company for its own use, acquired complete control over it by acquiring nearly all its stock, organized it by electing officers from its own directorate, participated in the obligation of a mortgage, the advantages of which it conceived and announced. and to the completed terms of which it subscribed, re-acquired the pledged properties from time to time as it needed them through the acts of the two corporations upon terms fixed by the same men acting as directors for both, with the consent of the trustee of the mortgage who was always a high official of the Railroad Company or of a subsidiary company, and permitted moneys to be diverted from the sinking fund to its own advantage. By this conduct the Canal Company was made and continued to be merely an adjunct or instrumentality of the Railroad Company, and, with respect to the bondholders as third persons, the legal fiction of separate corporate responsibility based upon distinct corporate existence disappeared. Pittsburgh & Buffalo Co. v. Duncan (C. C.) 232 Fed. 584; Foard Co. v. Maryland, 219 Fed. 827, 135 C. C. A. 497; and cases cited. We are therefore of opinion that the Railroad Company is liable for the loss occasioned the bondholders by the failure to maintain the sinking fund.

The sinking fund clause of the mortgage provided that the sinking fund appropriations "shall be from time to time invested by the said party of the first part (Canal Company) in the bonds hereby secured or in other good securities." The expressed object of the sinking fund was provision "for the payment of the principal of the bonds." After the Canal Company ceased to pay the interest on

the sinking fund bonds in 1885, the Canal Company closed out the sinking fund by transferring the cash balance and cancelling the bonds. By the cancellation of the bonds the Railroad Company was relieved of the purchase of their coupons. The Railroad Company maintains that it is not liable to the sinking fund for the money it saved by the cancellation, first, because the cancellation was not its act, and second, because its obligation to purchase coupons extended only to the "holders" of the canal bonds, and that the Canal Company could not be a holder of its own bonds. With respect to the first position, we are of opinion that the Railroad Company is liable for the act of the Canal Company, for the reasons before given; with respect to the second, it is sufficient to say that the sinking fund clause provided for the purchase of the Canal Company bonds for a sinking fund purpose, that the bonds in the sinking fund were there held in trust for the discharge of the principal of the outstanding bonds, and being held by the Canal Company not for itself but in trust for the bondholders, the holding was within the meaning of the Railroad Company's obligation to purchase their coupons. The Canal Company, holding the bonds in trust, had no more right to cancel them and to stop interest accretions thereon, than it had to cancel the bonds or obligations of any other corporation held in the sinking fund upon the same trust.

That part of the decree of the District Court from which the Pennsylvania Railroad Company and the Pennsylvania Canal Company appealed, is in all respects affirmed.

Appeal of Alice Frances Brown et al.

[5] By the second ground of her action, the plaintiff attacked the Railroad Company's title to that part of the Juniata Division of the Pennsylvania Canal, lying east of Huntingdon, upon the contention that the property was abandoned by the Canal Company and sold to the Railroad Company without legal authority, and therefore the conveyances are void. The plaintiff charges error to the District Court for refusing to find the conveyances invalid.

In considering this issue, it must be remembered that the canals in question formed at one time a part of the Public Works of the Commonwealth of Pennsylvania, and that the legislation respecting those works reflects the canal policy of the Commonwealth. The canals were constructed and owned by the Commonwealth and for many years were operated by it as a part of its State function. By the Act of May 16, 1857 (P. L. 519), the Commonwealth changed its policy to the extent of ownership and operation, by selling its main line of canals to the Pennsylvania Railroad Company, but it held to its policy of providing for the public an instrumentality of transportation by requiring of the purchaser:

"That the said sections of canal and railroad and every part thereof, except as hereinafter provided, shall be and remain a public highway and kept open and in repair * * * for the use and enjoyment of all parties desiring to use and enjoy the same."

By the Act of May 3, 1864 (P. L. 725), the Commonwealth further declared its policy with respect to canals as public works, by providing that the canals shall be maintained "in a condition of repair and fitness for use, which shall, at all times, during seasons of navigation, be equal to, and not inferior to, the condition of repair and fitness for use, in which the same were, at the time the Commonwealth delivered the same into the purchasers' possession."

In that period of the history of transportation, canals were recognized as useful and efficient instrumentalities. So, when the Railroad Company was authorized to sell the main line of canals to the Pennsylvania Canal Company, the Commonwealth, by the Act of May 1, 1866 (P. L. 1068), again declared its policy to provide canal systems of transportation for public use, by requiring the new purchaser to "keep said canal in good navigable condition during the season of navigation." Under legislation to this period, the owners of canals were bound to maintain them for public use, and they were without power to abandon them or diminish their public operation.

By the year 1870, railroads were rapidly encroaching upon the business of canals as means of public transportation, and the need of transportation avenues maintained or controlled by the Commonwealth was correspondingly diminished. In the Act of June 2, 1870 (P. L. 1318), the Commonwealth indicated its first change of policy. By this Act, the Pennsylvania Canal Company was authorized to execute the mortgage now in issue, and was given power "to abandon for public use, such portions of their roads or lines of improvement as may be deemed by such board unnecessary to be kept open for public use * * * provided further that nothing herein contained shall be construed so as to authorize the abandonment of any part of the North Branch Canal, north of Wilkes Barre, or of that part of the Pennsylvania Canal on the Juniata River, east of Huntingdon."

[6] The policy of the Commonwealth with respect to the maintenance of canals for public use was further and finally declared by Acts of May 7, 1889 (P. L. 104), and March 16, 1899 (P. L. 9), under which the owners were authorized to abandon the public use of the parts of the Juniata Division excluded from the provisions of previous acts and theretofore required to be maintained.

Although in framing the mortgage under authority of the Act of 1870, the Canal Company assumed a right to abandon and sell "any portion" of the canals, it did not attempt to exercise that right with respect to the Juniata Division until it was expressly conferred by the Acts of 1889 and 1899. Parts of the Juniata Division were subsequently abandoned for public use and sold to the Railroad Company. The conveyances are now attacked as invalid because of the alleged invalidity of the enactments under which they were made.

It is maintained that the Acts of 1889 and 1899 are void because they are special laws forbidden by Article 3, § 7 of the Constitution of Pennsylvania, which provides that:

"The General Assembly shall not pass any local or special law * * * authorizing the laying out, opening, altering, or maintaining roads, highways, streets, or alleys * * * creating corporations, or amending, re-

newing, or extending the charters thereof; granting to any corporation, association, or individual, any special or exclusive privilege or immunity."

It is urged that the canals of the Pennsylvania Canal Company were "highways," and the legislation authorizing their abandonment was special in character, and therefore forbidden by the Constitution. The evils which such an enactment is intended to check, are familiar to all. In forbidding the legislature to enact local or special laws with respect to "roads, highways, streets, or alleys," when resort is made to it for authority to open, alter or abandon the same, the framers of the Constitution had in mind a well known practice. This they intended to stop, and until we are shown an interpretation by the State courts to the contrary, we are of opinion that the provision does not extend to highways of transportation, such as canal and railroad systems. Subjects of such vast importance are not apt to be left to implication or to be embraced in general terms. The fundamental policy of a government respecting the public transportation systems of a great state, is not likely to be declared by one inclusive word, such as highways, especially when used in connection with the words,-roads, streets and alleys.

We are of opinion that the canals in question were not highways within the meaning of the Constitution and that the laws in question

were not enacted in violation of its provision.

But it is further urged that the Acts of 1889 and 1899 were local and special laws, in effect amending the charter of the Canal Company, and conferring upon it a special immunity by relieving it of the burden of maintaining the canals, and for those reasons are invalid.

Before the last enactment in question, the business of canals as systems of transportation had been almost wholly superseded by railroads. This was demonstrated by the failing business and fading receipts of such systems. Prior to the Act of 1899, the canal line under consideration had lost its eastern outlet to tidewater by the abandonment of a connecting canal owned by another corporation; and its western line had been destroyed by the Johnstown flood.

In pursuing its policy with respect to canals as public works, the Commonwealth had retained in itself power to enforce the maintenance of a part of the Juniata Division for public uses. It was clearly within its power to continue, alter or abandon that policy. It retained the right to judge whether that portion of a disconnected and in part demolished canal line any longer served a public use and should any longer be maintained. It exercised that right, and, by the Acts of 1889 and 1899, made its last declarations of its canal policy in that regard. That the Canal Company was relieved of a burden, is unquestioned. That relief, however, was a result of a law respecting a public matter, and did not constitute an amendment to a private charter or the grant of a privilege or immunity that would not have extended to any corporation holding property affected by that legislation.

And lastly it is maintained, that the Acts of 1889 and 1899 are unconstitutional, because they impair the contractual obligation of the

mortgage. The basis of this contention is, that at the time the bonds were issued, the law required the maintenance of a part of the Juniata Division, that thereby the purchasers of the bonds were assured a continuing security, and by the Acts of 1889 and 1899 that assurance was withdrawn and the security destroyed.

It is sufficient to say in this connection, that between the obligor and the obligees of the mortgage there was no contract that the properties in question should not be abandoned; on the contrary, the mortgage contemplated their abandonment under general terms which gave to the obligor the right to abandon and sell "any portion" of the mortgaged properties. The acts, therefore, could not have impaired the obligation of a contract which never existed. But it is maintained that the bondholders' rights were fixed by the law and not limited by the terms of the mortgage. Between the obligees of the mortgage and the Commonwealth there was, of course, no contract. It can scarcely be held that the acceptance by the obligees of the security of the mortgage under the law as it then stood, placed upon the Commonwealth an obligation to maintain its policy with respect to public transportation and to avoid legislation that might alter the law or disturb their security.

We are of opinion that the acts in question are not unconstitutional for the reasons given, and that the conveyances made under their authority are not invalid.

[7] We now reach the question of the adequacy of the considerations paid for properties purchased by the Railroad Company from the Canal Company, the last question we think necessary to discuss. The conveyances attacked by the plaintiff's bill are sixty-six in number. Of these, eleven were considered at the hearing and eight at the argument.

In support of the contention that the Railroad Company acquired from the Canal Company the plaintiff's security, without giving adequate consideration therefor, law is cited about which there can be no dispute. It is, that where one corporation deals through another, which it privately owns and directs, and in effect makes a sale to itself, the burden of proving the fairness of the transaction and the adequacy of price devolves upon it. Goodin v. The C. & W. Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95; Sage v. Culver, 147 N. Y. 241, 41 N. E. 513; Farmers' Loan & Trust Co. v. N. Y. & N. Ry. Co., 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689; Stebbins v. Michigan W. & T. Co., 212 Fed. 19, 129 C. C. A. 471; Barrie v. United Ry. Co., 125 Mo. App. 96, 102 S. W. 1073; Geddes v. Anaconda Copper Mining Co. (D. C.), 197 Fed. 860. So in a case like this, where a corporation owned and operated a property in its business of transportation, and changed the manner of its holding and the method of its operation by organizing another corporation, to which it conveyed the property, with which it co-operated in raising money on the property conveyed, and through which it thereafter indirectly conducted the same business which it had before conducted directly, that corporation is held to the strictest account and to the observance of the highest rectitude in its transac-

tions with its subsidiary. In an ordinary transaction of purchase and sale between independent corporations, it is the interest and the right of the vendee to acquire the property at the lowest price possible, and of the vendor to sell it at the highest. No other considerations enter. But in a transaction of purchase and sale between interrelated corporations, where the control of one by the other is active and complete, and where the acting officers of the two are identical in other words, where, as in this instance, the Railroad Company undertakes to deal in the double capacity of vendor and vendee with respect to property in which third parties have interests, and where the transaction is possible only by obtaining the consent of the representative of those equitably interested, who is one of its own officers, something more is required of the purchaser than to obtain the property on terms most advantageous to itself. A corporation in such a relation bears a duty to those whose security it is taking, to pay for it all that it is worth, and it makes the purchase at the peril of being called upon to prove the good faith of the transaction and the adequacy of the consideration.

In the plaintiff's attack upon the adequacy of considerations paid for properties purchased by the Railroad Company, fraud and bad faith are neither charged nor found. The plaintiff says that the Railroad Company was careless of her rights, that it has property in which she is interested for which it paid too little, and calls upon it to show that the amounts paid were sufficient, and failing, to pay the deficiency to the trustee of the mortgage for her benefit. She went further, however, and assumed to show that in certain instances

the considerations were inadequate.

The testimony of adequacy and inadequacy of prices paid many years ago for properties then open to limited uses and since subjected to many changes, is of little assistance in doing exact justice between the parties in this case. It is quite impossible at this late date to determine, as a matter of fact, precisely what the several properties were worth when purchased. Without discussing the evidence, which we have seriously and laboriously considered, we may state that, in our opinion, the testimony for the Railroad Company prima facie shows adequacy, and that the testimony for the plaintiff does not overcome or disturb that prima facie showing. We therefore hold that the trial court committed no error in refusing to find that the properties were acquired for inadequate consideration.

For the reasons given, that part of the decree of the District Court,

embraced in this appeal, is in all respects affirmed.

DOYLE, Internal Revenue Collector, v. MITCHELL BROS. CO. (Circuit Court of Appeals, Sixth Circuit. June 30, 1916.) No. 2864.

1. INTERNAL REVENUE 5-9-EXCISE TAX ON CORPORATIONS-INCOME.

A corporation engaged in manufacturing lumber, whose property consisted chiefly of timber lands and a sawmill, purchased long prior to the enactment of Corporation Tax Law (Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 [Comp. St. 1913, §§ 6300-6307]) timber lands which at the time the law went into effect had greatly increased in value. Preparatory to making the income return for 1909, the company revalued its land as of December 31, 1908, but failed to enter on the books the real value, though the land had previously been carried at the original valuation. Held, that as the net income or income received must, in view of the deductions necessarily allowed, be treated as the appreciation or gain resulting from the carrying on of business, or natural increase, the corporation was entitled to deduct from the value of timber cut from such land the actual value of the land, notwithstanding its previous undervaluation; this being particularly true in view of the rulings of the Treasury Department as to income.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⊕⇒9.]

In such case, neither the government nor the corporation is bound by the valuation fixed in the corporation's books, for, had the owner been an individual and kept no books, such deduction must have been made.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. \$\sim 9.]

In Error to the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Action by the Mitchell Bros. Company against Emanuel J. Doyle as Collector of Internal Revenue for the Fourth District of Michigan. There was a judgment for plaintiff (225 Fed. 437), and defendant brings error. Affirmed.

Myron H. Walker, U. S. Atty., of Grand Rapids, Mich., for plaintiff in error.

Mark Norris and Oscar E. Waer, both of Grand Rapids, Mich., for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and EVANS, District Judge.

DENISON, Circuit Judge. Mitchell Bros. Company, a Michigan corporation, acting pursuant to the Corporation Tax Law of 1909 (36 Stat. 112, c. 6, § 38 [Comp. St. 1913, §§ 6300–6307]), made an income return and paid the tax due thereunder. Later the Commissioner of Internal Revenue, after an investigation, raised the figures of income return and assessed an additional tax. The company paid under protest, and this action was brought in the court below to recover the amount so paid. The case was tried without a jury, and the District Judge made special findings of fact and of law, and rendered judgment for plaintiff. The collector alleges error.

Several items are involved, but all depend upon the same principles, and we state one only—and, for simplicity, in figures of acreage, instead of per thousand feet of lumber. The plaintiff corporation was organized in 1903. Its capital stock was represented mainly by timber lands entered on the books at their purchase price. This standing timber—or stumpage—then had a market value of \$20 per acre, and it was taken in as capital at this figure. Owing to the market increase in stumpage prices, and to new methods of using much stumpage formerly wasted, the market price of such standing timber had become, on December 31, 1908, \$40 per acre. No entry was ever made on the books representing this increase in value, but each year the company entered on its books, as a profit, the difference between the original cost, \$20, and the sums received for the manufactured product cut from an acre, less the cost of manufacture, and the profits so seeming to accrue were either paid out in dividends or carried into the surplus account. After the passage of this tax law, in August, 1909, and preparatory to making the income return for 1909, the company revalued this stumpage, as of December 31, 1908, and fixed that value at (about) \$40 per acre. The good faith and accuracy of this valuation are not questioned. It was made upon the basis of price per thousand, but the figures so reached were never entered in the corporate books of the company and never affected the showing of profits made thereon. In making its return for 1909, and in stating net income, the company deducted, from the proceeds of lumber sold, this sum of \$40; but the Commissioner restored \$20 of that amount, and held that the only deduction authorized by the law was the \$20 which had been originally entered and which had been carried on the account books as the cost of the stumpage. The decisive question here is whether the \$20 difference—the additional value of the timber which had accrued before 1909, but had not been entered on the books—was taxable income for 1909. The amount of the tax so in dispute for the four years, 1909-1912, is \$2,732, with interest at 5 per cent. from December 22, 1913, the date when payment under protest was made.

[1] The collector insists that the net income taxable under this law is a different thing from profits, and complains that the District Judge overlooked the distinction. The statute refers to "net income," but it expressly provides for deducting certain items from the gross income, and whether the residuum does or does not substantially differ from what are commonly called profits is an academic question in this case. It makes no difference what name is given to the net sum which thus becomes taxable. The collector also urges that the "income received," named in the statute, must be defined with specific reference to the word "received."

It is clear that, by the term "income," Congress did not intend to include the proceeds of capital assets sold or converted during the year; nor can it be material whether such proceeds are reinvested in other property or remain in the treasury of the company or are distributed to the stockholders; nor whether, in case of such distribution, they are called dividends or capital. The controlling question must be whether assets so converted were in fact, at the beginning of the tax

period, properly to be classed as capital assets. If they were of that character, they cannot be "income" received during the later period; they represent merely capital in a changed form. If an illustration were needed to show that money received from selling capital assets cannot be "income," it would be found in the statutory treatment of insurance money. A loss suffered during the year may be deducted from income, but not so if the loss was compensated by insurance. Fire insurance money is clearly a substitute for the assets burned; but we find that in case of a fire loss uninsured the loss may be deducted from income, while if it is insured, and if the insurance money is "income," the loss may not be deducted, and the insurance money must be added—an absurdity which can be avoided only by saying that such insurance money is not income at all. The proceeds of the sale of a building or other permanent assets are as clearly a substitute therefor as is the insurance money paid to indemnify for a building burned.

Indeed, no one disputes the proposition, in its broadest aspect, that the selling price of capital assets is not "income"; the assessment made by the Commissioner of Internal Revenue, and here involved, goes upon the theory that it is right to deduct the proceeds of such assets from the receipts of the year before ascertaining net income; but the only controversy is as to the proper definition of those capital assets which are to be thus excluded.

It is equally clear—to us—that "income" is not limited to cash receipts. Of course, the word is capable of this restricted meaning, and any number of interesting problems can be evolved through nice refinements in the precise meaning of "income," "received," "depreciation," "actually paid," and other statutory words; but this law was passed to make a workable system of raising revenue, and not to provide exercise in dialectics. The theory which should undertake to consider only the cash received during the year for property sold, and then to ascertain the cost of each item so sold, no matter whether produced during the year or long before, would, in the ordinary, typical manufacturing or merchandising business, be impossible of intelligent application. "Income received" need not be in cash. If, in the regular course of business, the property has been sold and is represented by a bill or account receivable, it is no undue stretch of language to say that these proceeds are income received. It is only a step further in the same line to say that property, regularly on hand for sale at the end of the year and which has an ascertainable market value, realizable at the owner's option, has been "received" by the busi-

¹ Treasury Decision No. 1606, March 29, 1910, § 76: "Removal of timber from timber lands, while depleting the lands to the extent of such removal, is regarded as a change in the form of assets, and not a depreciation, within the meaning of the act."

Treasury Decision No. 1675, February 14, 1911, § 75: "The mere removal of timber by cutting from timber lands, unless the timber is otherwise disposed of through sales or plant operations, is considered simply a change in form of assets. If said timber is disposed of through sales or otherwise, it is to be accounted for in accordance with regulations governing disposition of capital and other assets."

ness and should enter into a computation of income. Otherwise, a business which had been very profitable, but in which the bulk of the annual output was being held at the close of the year for a further market rise, would have no income at all. Indeed, in the present case, that part of the computation upon which the taxpayer and the Commissioner and the collector's counsel all unite, for ascertaining income, includes, as a part of the income for 1909, more than \$300,000 for lumber in the yard unsold at the end of the year, and the elimination of this item would wipe out all net income several times over.

Doubtless there may be difficulties in making the proper appraisal of property on hand. Perhaps it should be listed at market price less cost of sale, or perhaps at cost of production, because the element of gain or loss reached by comparison with market selling price may be too contingent to justify a permanent taking over into the accounts; but these are practical questions, and they can be met in a practical Those business enterprises which the law affects have wellknown methods and customs for meeting these problems, and have no difficulty in finding the gains or profits or income—or whatever they may be called—which have been received, and stating them surely enough and definitely enough to form an acceptable basis for the declaration and payment of dividends in a corporation, or for affecting and fixing the selling price of corporate stock or of any and every going business enterprise; and the use of the same methods, in good faith, will easily determine the taxable "net income" of such an enterprise as this.

If property on hand at the end of the year, figured at its true inventory or market value, must be put upon one side of the income account, there can be no escape from putting the corresponding true value at the beginning of the year upon the other side of the account; and this must include the raw materials which were on hand at the beginning. The law contemplates distinct periods. Everything before 1909 must be in one period; everything later in another; and then, for taxing purposes, each calendar year after that date forms a distinct subperiod; the law plainly contemplates that all income shall be definitely located somewhere. The law applied to and took effect upon business conducted after January 1, 1909; business is conducted with property; and so the law took effect upon the body of property existing at that date and upon the business thereafter conducted by and with the aid of that body of property. In the later successive years, and as to some classes of property, it may serve every purpose to delay the computation or entry of income or gains seemingly existing in one year until cash realization in the next, and to do this by carrying an arbitrary, but constant, inventory value; this will make no difference to taxpayer or to the government in the end; but not so with reference to the two main periods before and after the law took effect. In the sense in which we have seen "income" is and must be used at the end of each taxing year, it must be used at the end of the period preceding 1909. Whatever would be income for 1909, if it accrued after January 1st, had become income on that day if it had accrued in the earlier period.

The practical necessity of including a comparison between beginning and ending period priced inventories, as an element in computing net income is further illustrated by the provision as to "depreciation." This may be deducted; a drop in market prices provides the commonest instance of loss by depreciation; but unless there is a beginning appraisal, there is nothing from which to compute the loss. So, too, if a loss by depreciation is to be deducted, a gain by appreciation must be added; otherwise, the taxpayer would get permanent credit for a loss which might be temporary. A fall in market price in December, followed by an equivalent rise in January, ought not to diminish the taxable income for the two years; but it would do so if property on hand is to be considered at all, and if the loss the first year is deducted, and the later gain not added.

The true character of that particular accumulation on January 1, 1909, now involved, may be illustrated with reference to this corporation. To meet this \$20 per acre increase in market value, the company could lawfully have paid out a cash dividend or a stock dividend, or it could have sold its property for the original value plus the appreciation and have distributed the entire proceeds. If this had been done on December 31, 1908, there would be no income in 1909. the consummation were postponed for two days, upon no tenable theory could it be thought that the \$20 appreciation would become part of the income produced by carrying on the business during 1909. We are satisfied that the necessary and practical working of the law requires, and that its words fairly permit, income for one year to be computed by the aid of a comparison between the market value of the body of property on hand at the beginning and at the end of the year; and it follows that such a market value of property existing at the commencement of the period must be deducted from the selling price afterwards received. We are speaking only of those business assets the manufacture and sale or the purchase and sale of which constitute the regular business which is being measured for taxation purposes assets which were acquired and held for sale and are intended to be sold as soon as put in the selected selling form. Appreciation in assets intended for more permanent holding may or may not be governed by the same considerations.

Counsel for the collector takes something from the fact that income is not here taxed as such, but is used only as a convenient measure of determining the amount of business done, upon the doing of which business the excise tax is imposed. This is not controlling; it leads as well to the other conclusion. In such a business enterprise as this, the manufacturing of the raw material and putting it into ultimate salable form is much the greater fraction of the business done and receiving the protection of the laws; the final converting of the product into cash is much less; and "income" cannot be made the measure of this greater fraction, unless by the aid of comparing the body of property on hand at the beginning and at the end of the period. If the receipt of money for sales was the measure of income, and so of volume of business, the taxpayer could evade taxation by ceasing sales and accumulating stock as the law was repealed and the

end of the taxing period approached, or by abnormally ceasing manufacture and reducing stock in anticipation of the taking effect of the law.

There are three possible methods of treating such a business as this: (1) We may say that there is no income whatever, since the sale of capital assets determines their value in the raw material form and so nothing has been received except their fair price; (2) we may say that the entire selling price of the assets is income when the money is received; or (3) we may say that the appreciation therein and gain thereupon during the period and found at its end in realizable form is income. The first or second definitions conform rather better to the ordinary meaning of the word, but they cannot be accepted. The first was held, in Stratton's Independence v. Howbert, 231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. 285, to be erroneous and to involve a misapplication of Gray v. Darlington, 82 U. S. (15 Wall.) 63, 21 L. Ed. 45. The second is in conflict with the unbroken practice of the Treasury Department in administering this law,2 and in conflict with the assessment made by the Commissioner in this case; and we have pointed out some of the reasons why it cannot have been intended by Congress to be applicable to this kind of a business. The third is workable and practicable, and, as we think, the only fair interpretation. Counsel for the collector rely upon a number of cases, mostly Eng-

Counsel for the collector rely upon a number of cases, mostly English, to support the proposition that where the business which is being carried on contemplates and necessarily involves a wasting of the capital assets, the proceeds of that wasting are entirely income. Of those cases, it is to be noticed that they are mostly mining cases, and that mineral out of sight, in the ground, forms a peculiar class of

2 Treasury Decision No. 1571, December 3, 1909, § 5: "* * It is immaterial whether any item of gross income is evidenced by cash receipts during the year or in such other manner as to entitle it to proper entry on the books of the corporation from January 1 to December 31 for the year in which return is made. * * * If the capital assets were acquired prior to January 1, 1909, the amount of increment or depreciation representing the difference between the selling and buying price is to be adjusted so as to fairly determine the proportion of the loss or gain arising subsequent to January 1, 1909, and which proportion of the loss or gain arising subsequent to January shall be deducted from or added to the gross income for the year in which the sale was made."

Treasury Decision No. 1588, January 24, 1910, § 2: "In making up the gross income to be reported in item 3, the cost of the goods manufactured shall be ascertained by the addition of a charge to the account of the cost of the goods as manufactured during the year of the sum of the inventory at the beginning of the year, and a credit to the account of the sum of the inventory at the end of the year."

Treasury Decision No. 1742, December 5, 1911, § 62: "In the case of lands bought prior to January 1, 1909, and sold during any subsequent year, the profits arising from such sale, if no accounting of increased value of land was made in return for previous years, should be prorated in accordance with the number of years the land was held by the corporation and the number of years the law was in effect."

8 Stevens v. Hudsons Bay Co., 101 L. T. 96; Lee v. Asphalt Co., 41 Ch. Div. 1; Coltness Co. v. Black, 6 App. Cas. 315; Kauri Timber Co. v. Commissioner, 1913 App. Cas. 771.

capital assets. It has no market value because it cannot be measured, and neither quantity nor quality can be definitely known; it is predominantly speculative, and the difficulty of determining what is capital and what is income is very great; while this standing timber had at all times an easily ascertainable market price. In so far as these cases hold that the entire capital so realized is necessarily income, they are in conflict with Stratton's Independence v. Howbert, supra, since the latter case expressly recognizes that a suitable allowance for depreciation or consumption of ore in the ground should be made and the Treasury Decisions 1606, 1675, 1742, 1754, 1755, and 1833 have provided practicable systems for computing such allowance. It is to be further noticed regarding these cases that they depend upon the exact words of the particular statutes, differing materially from the statute here involved, and that to these statutes the considerations above stated and which we have thought controlling may not and probably do not apply.4

[2] There is nothing magical in bookkeeping; it does not create facts; it only records them. A citizen cannot be rightly taxable in one way if he keeps books and in another way if he keeps none; nor in one way if his books are accurate and kept up to date, and in another way if they are imperfect and neglected. Book entries may be of value as an admission when a tax is to be assessed and when there is a dispute as to the fact, but they cannot work an estoppel as to an undisputed fact.⁵ The insistence of the Commissioner that this \$20 per acre appreciation is income for the year in which the timber happens to be cut rests at last upon the theory that the taxpayer is estopped to claim that it was income for an earlier period because he had not so entered it on his books; and this theory we cannot accept. Its formal transfer into surplus or undivided profits account would have done nobody any good or any harm. Until this law was passed, it was a matter of indifference to the corporation and to the stockholders whether profits were entered up at one time or another, and any attempt after August, 1909, to make a book entry of these gains, nunc pro tune, as of December, 1908, would only have invited adverse comment.

On this subject, there cannot be one rule for a corporation and another for an individual. If this property had continued to be owned by the partnership which preceded the corporation, there might have been no capital account representing the land and timber. The existence or not of such an account would have been incidental to the bookkeeping system adopted. It is only the existence of the capital stock of the corporation which compels the maintenance of an account showing the corresponding assets. So, we find ourselves

⁴ E. g., In Kauri Co. v. Commissioner, the statute said: "No deduction shall be made in respect of * * * expenditure of capital, loss of capital, capital withdrawn."

⁵ See comments by Lacombe, C. J., in United States v. Nippissing Co. (D. C.) 202 Fed. 803, 804, and by Dickinson, D. J., in Baldwin v. McCoach (D. C.) 215 Fed. 967, 970.

unable to give any controlling force to the fortuitous circumstance that in this case the capital account was carried under the name of "Land and Timber," and that the accretions had not been entered.

We find no authority precisely in point. In Gray v. Darlington, supra, and in numerous cases which have followed that decision, including Gauley Co. v. Hays (C. C. A. 4) 230 Fed. 110, — C. C. A. —, the precise point involved was whether the entire profit made by a stockholder or bondholder in a corporation, upon a sale of his stock or bonds, as compared with the original purchase price, was income apportionable solely to the year of sale. It was held that this profit was not such income. These cases are not necessarily, if at all, inconsistent with some reasonable apportionment to the taxing period of that part of the profit which accrued during that period; and certainly, since the question now involved is not the income of the stockholder or bondholder on his investment, but the income of the corporation which issues the stock or bonds, these cases do not conflict at all with our conclusion that the body of property of such a corporation, at the beginning and at the end of the period, should be compared as one of the steps to ascertain that net income which is merely a measure of volume of business. The same thing is true of those decisions 6 which, as between life tenant and remainderman, classify a dividend when it is received by the stockholder as a part of his income rather than as part of the principal fund, even though it may include a capital distribution. In Baldwin v. McCoach (C. C. A. 3) 221 Fed. 59, 136 C. C. A. 660, we find a state of facts similar to that here involved in one respect. Capital assets which existed January 1, 1909, had never been entered on the books at all. They were appraised and so entered during the year 1909. It was held that they did not thereby become part of the income for that year. The reasoning of the District Judge, affirmed by the Circuit Court of Appeals, is to the effect that the matter of entering or not upon the corporate books is of no importance as against the truth. Whether an actual change in value of these assets, occurring during the year 1909, might rightfully have been taken into account, either as increase or decrease, was not involved.

The judgment of the court below is affirmed, but without costs.

 $^{^6}$ E. g., Oliver's Appeal, 136 Pa. 43, 20 Atl. 527, 9 L. R. A. 421, 20 Am. St. Rep. 894 ; Clark and Marshall, p. 1621.

KLINE v. ARIZONA MUT. SAVINGS & LOAN ASS'N et al. (Circuit Court of Appeals, Ninth Circuit. August 7, 1916.)

No. 2692.

Building and Loan Associations \$\iff 242(4)\$—Insolvency and Receivers—Preference in Distribution of Assets.

Complainant, a stockholder in a mutual loan association, with knowledge that it was insolvent and had transferred all of its assets to a trust company organized for the purpose, refused to exchange his stock for that of the trust company, but sold it to the latter for its book value, taking the note of the company, secured by a pledge of mortgage notes acquired from the loan association. Shortly afterward, at suit of other stockholders of the association, the transfer of its assets was adjudged fraudulent and void, and they were ordered returned for the benefit of the creditors and stockholders of the association, and a receiver was appointed for both corporations to carry out the decree and wind up their business as insolvents. Held, that complainant was not entitled in equity to retain the assets pledged to secure payment for his stock, but must come in and share ratably with other stockholders.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 63, 66, 86; Dec. Dig. \$\sim 42(4).]

Appeal from the District Court of the United States for the District of Arizona; Wm. H. Sawtelle, Judge.

Suit in equity by Arthur A. Kline against the Arizona Mutual Savings & Loan Association, the Arizona Trust Company, and Sims Ely, receiver of such corporations. Decree for defendants, and complainant appeals. Affirmed.

The bill in this case, after alleging the jurisdictional facts and the organization under the laws of the state of Arizona of the defendant corporations, alleges, among other things, that on the 2d day of March, 1912, the Arizona Trust Company, hereinafter called the Trust Company, excuted to the complainant its promissory note for \$5,532, with certain specified interest, to secure which it at the same time indorsed in blank and delivered to the Valley Bank of Phonix, Ariz., "in pledge for the use of said complainant," certain specified notes secured by mortgage on real estate in Arizona, each of which notes and mortgages were so delivered as collateral security for the payment of the \$5,532 note above mentioned, all of which, with the exception of \$200 of the interest, remains due and unpaid from the Trust Company to the complainant.

The bill further alleges that, the note executed by the Trust Company to the complainant not having been paid when due, the Valley Bank then delivered to the complainant all of the collateral notes and mortgages securing that note, all of which the complainant still holds and owns; that the Trust Company subsequently, after demand made, refused to pay its said note to the complainant, and that thereafter, at the suit of one Charles W. Clark against the Trust Company and the Arizona Mutual Savings & Loan Association, hereinafter referred to as the Loan Association, and which suit is still pending in the court below, the defendant hereto, Sims Ely, was by the said court duly appointed receiver of the assets of the Loan Association and of the Trust Company, who duly qualified as such receiver, and in that capacity claims the right of possession and control of the collateral security so held by the complainant as aforesaid, which collaterals the complainant, prior to the institution of the present suit, offered to deliver to the defendant receiver upon the payment of the note executed to the complainant by the Trust Company.

After alleging that the present suit is brought by permission of the court below, the bill prays, among other things, a decree directing the payment by the Trust Company and its receiver of the \$5,532 note, with interest, and decreeing that the lien claimed by the complainant on the collateral security

above mentioned is a valid lien, and that unless the complainant's note, with interest, is paid by the receiver within a time to be fixed by the court, all of the said collateral security be ordered sold for that purpose, and for general relief

The answer of the receiver of the two corporations denies that the complainant is the owner or entitled to the possession of the alleged collaterals, and in connection with that denial alleges that on the 27th day of February, 1913, by a decree entered in the Clark suit, "it was found and determined that at the time of the attempted transfer by the Arizona Mutual Savings & Loan Association to the Arizona Trust Company of the assets of said the Arizona Mutual Savings & Loan Association, including the assets involved in this section [action], the Arizona Trust Company, defendant herein, had no right, power, or authority to receive from said the Arizona Mutual Savings & Loan Association any of said assets, and that said attempted transfer was, for the reasons set forth in said decree, void and of no effect"; that by a subsequent modification of that decree, made on the 12th day of March, 1914, "it was further ordered, adjudged, and decreed that said attempted transfer of said assets was and is void, and in accordance with the terms of both of said decrees the receiver was directed to receive and report to the master in chancery of this court all claims against either said the Arizona Mutual Savings & Loan Association or the Arizona Trust Company, whether said claims should arise through claim as creditor [or] should arise through claim as stockholder or [of] either of said companies; that pursuant to said decree of March 12, 1914, Edwin F. Jones, master in chancery, has notified all creditors, stockholders, and claimants to present their claims to him for allowance or disallowance. And defendant further represents and shows that the complainant, Arthur A. Kline, is a claimant either as a creditor or stockholder of the Arizona Mutual Savings & Loan Association or of the Arizona Trust Company, and as such creditor or stockholder should be compelled to present his claims for allowance or disallowance to said master in chancery before being permitted to litigate his claims to the assets involved in this proceeding."

The answer of the receiver further alleges that the assets which are the subject of the present suit are, "under the terms of each of said decrees hereinabove mentioned, assets properly belonging to the Arizona Mutual Savings & Loan Association, for the reason, as hereinabove set forth, that the officers and directors of said Loan Association were without power, right, or authority to transfer said assets to the Arizona Trust Company, and said the Arizona Trust Company, at the time when it transferred and set over, or attempted to transfer and set over, said assets to the said Arthur A. Kline as a stockholder or creditor of the Arizona Trust Company, was without right, power, or authority so to do. Defendant further represents and shows that at the time of the attempted transfer by the Arizona Mutual Savings & Loan Association to said the Arizona Trust Company, and by said the Arizona Trust Company to the said Arthur A. Kline, of the assets, being the subject of this litigation, the said Arthur A. Kline was a stockholder in the Arizona Mutual Savings & Loan Association, which Loan Association was by the terms of both decrees hereinabove mentioned at the time of said attempted transfers adjudged and declared to be an insolvent association, and that the said Arthur A. Kline and all persons holding under or through him, or claiming any right, title, or interest in said assets, is subrogated to the rights which the said Arthur A. Kline at the time of said transfer held, owned, or enjoyed as a stockholder in said insolvent Loan Association. Wherefore defendant alleges that complainant, Arthur A. Kline, is not the owner of any of said securities or assets, being the subject of this litigation, except in so far as it may be determined by the master in chancery hereinabove mentioned he shall be the owner to the extent of his proportionate interest as a stockholder in the assets which may be marshaled and collected by the master and receiver of said insolvent Arizona Mutual Sayings & Loan Association, and distributed to the stockholders therein."

After trial, the court below, upon the evidence introduced by the respective parties, entered a decree adjudging in effect that the complainant take nothing by the suit, and that "he is not the owner of, nor entitled to possession of, any of the securities or assets, being the subject of this litigation, except in

so far as it may be determined by the master in chancery appointed in equity cause No. 53 (the Clark suit) that the said Arthur A. Kline shall be the owner of stock either in the Arizona Trust Company or the Arizona Mutual Savings & Loan Association, to which extent complainant shall be entitled to his proportionate interest as such stockholder in any of the assets of either of said corporations which may be marshaled and collected by the master appointed in said equity cause No. 53 and Sims Ely, receiver."

It is from that decree that the present appeal is taken.

Thomas Armstrong, Jr., Ernest W. Lewis, and R. L. Morgan, all of Phœnix, Ariz., for appellant.

George J. Stoneman, of Phœnix, Ariz., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The suit of Clark referred to in the statement has been twice before this court—the first time on the petition of a judgment creditor of the Trust Company to intervene, upon the alleged ground that the modification of the decree of February 27, 1913, made by that of March 12, 1914, was a nullity, and operated to the prejudice of the petitioner (appellant in this court) "because the latter had by its judgment acquired a vested property right in the surplus remaining in the possession of the Trust Company after the execution of the decree of February 27, 1913, and that it gave to the stockholders of the insolvent Trust Company, at whose instance the original decree was set aside, rights in the assets of that company prior and superior to those of the appellant as a judgment creditor." Farmers' & Merchants' Bank v. Arizona M. S. & L. Ass'n, 220 Fed. 1, 4, 135 C. C. A. 577. In affirming the decree in that cause we said, among other things:

"In that decree the rights of the appellant are fully protected, and provision is made for the presentation of its claim to the master in chancery to be paid out of the available funds which may remain in the Trust Company. Provision is also made therein for the ascertainment and recovery of assets in the hands of persons not parties to the suit."

The second time the cause was brought here was on application for a writ to the judge of the court below, prohibiting that court and the judge thereof from modifying or exercising any jurisdiction over the decree theretofore entered in that cause on the 27th day of February, 1913, and directing the annulment and vacation of the decree of March 12, 1914, modifying the previous decree of February 27, 1913. In disposing of that application, this court thus stated the facts, pleadings, and proceedings in the trial court:

"The cause was instituted by Charles W. Clark, of the state of California, against the Arizona Mutual Savings & Loan Association and the Arizona Trust Company, both of the state of Arizona. For convenience the defendants will be called, respectively, the Loan Association and the Trust Company. Clark is and was a stockholder in the Loan Association, and complains that the association is insolvent, but that the officers and directors thereof have failed and neglected to dissolve the corporation, to liquidate its obligations, or to wind out its business and distribute its assets, and further that, without the knowledge or consent of complainant and many others similarly situated, such officers and directors entered into a corrupt and fraudulent agreement with certain persons, whose names are unknown, whereby it, was agreed and understood that the defendant Trust Company should be organized for the purpose of taking over the assets of the Loan Association, and that thereafter, when said Trust Company was so organized, a pretended

and fraudulent agreement was entered into, whereby the Loan Association sold and transferred to the Trust Company all of its assets and property, including the good will, in consideration that the Trust Company should issue and deliver 1,300 shares of its capital preferred stock, of the par value of \$100 per share, to the Loan Association, it being understood that the Loan Association would thereupon suspend its operations and cease doing business; that accordingly, in the latter part of April or first of May, 1911, the Loan Association pretended to sell, assign, transfer, and set over to the Trust Company all of its said assets, notes, mortgages, and other securities of every kind and character, since which time the Trust Company has exercised exclusive control and dominion over, and has dealt with, said assets and securities as its own property, and that the Loan Association, or its officers and directors, or a majority of its stockholders, were possessed of no right, power, or authority so to convey or dispose of the assets of the association.

"It is further charged that, by reason of such fraudulent transfer of the assets and securities of the Loan Association, the said Trust Company, its officers and directors, became and were trustees of such property for the benefit of the complainant and other stockholders similarly situated, but that, in furtherance of their fraudulent scheme, they sought to induce the stockholders in the Loan Association to exchange their stock for stock in the Trust Company, and did so induce many of them to make or agree to make such exchange; that an intimate relationship of trust and confidence exists Letween the officers of the Trust Company and the officers of the Loan Association, and that the officers and directors of both said defendants have willfully violated their duties and the said trust and confidence which should have existed between them and complainant and other stockholders similarly situated, in that the officers and directors of the Trust Company have dealt with such property and assets for their own private and selfish ends and purposes, and without benefit to complainant and other stockholders similarly situated, and have used such assets and property of the Loan Association in the exploitation of various speculative enterprises in which the Trust Company has engaged, and have commingled such property with the Trust Company's own and after-acquired property, so that it will be difficult, if not impossible, to segregate the same; that it would be and is useless and futile for complainant and other stockholders similarly situated to demand of the officers and directors of the Loan Association to proceed for the recovery of the assets unjustly appropriated by the Trust Company, for the reason that it would require said officers and directors to repudiate their own acts, and hence the complainant (employing the language of the bill) 'brings this bill in equity in his own behalf and in behalf of all others similarly situated, to the end that the transactions herein set forth as heretofore made between the defendants above named be annulled and declared void and held for naught, and to the end that an accounting may be had between the two defendants above named, and between the defendant Loan Association and your orator and others similarly situated, and to the end that the property and assets of the defendant Loan Association, in which your orator and others similarly situated has and have respectively an interest, may be conserved and protected, and that a receiver of the defendant Loan Association may be forthwith appointed, with full powers to acquire and take possession of and to marshal the assets of the defendant Loan Association in whosesoever hands the said assets and properties may be, and to ascertain the amounts due and owing from the said defendant Loan Association to your orator and other stockholders thereof similarly situated, and that such sums of money, if any, as may be due and owing to the defendant Loan Association be ascertained and determined, and that your orator and others similarly situated, who may desire to intervene herein in support of this bill of complaint, may be permitted so to do, and that your orator and such persons as may intervene, as aforesaid, may be awarded such other relief as to a court of equity may seem proper.

"The complainant prays that the transactions complained against be annulled, that a restitution of the assets of the Loan Association be had, that an accounting between the defendants be had and taken, and also between the Loan Association and complainant and other stockholders similarly situated, that a receiver be appointed, and that the affairs of the defendant Loan As-

sociation be wound up, and its assets distributed to those found entitled thereto, and for general relief.

"Later there was filed in court a petition of intervention by 39 persons, 4 of whom claimed to be stockholders in the Loan Association, and the others claimed to have been stockholders in such association, but had previously exchanged their stock for stock in the Trust Company. All these, in support of their petition to intervene, refer to complainant's bill, and make all the allegations thereof part of their petition, except so much of paragraph 3 as relates exclusively to the complainant. It is further alleged that all the petitioners who had exchanged their stock in the Loan Association for stock in the Trust Company were induced to do so by fraud and deceit practiced on the part of those officers and directors of the two companies, and others in collusion with them, who were responsible for the sale and transfer of the Loan Association's assets to the Trust Company, and that the transactions whereby such stock was exchanged were fraudulent and void; the petition setting out at great length and in detail the specific facts constituting the fraud. The petitioners further show the commingling of the assets of the two companies, and the insolvency of the Trust Company also, and pray that they and each of them be permitted to intervene, and as to those of them who have exchanged their stock that such exchanges be rescinded as fraudulent and void, and that they be reinstated to their former holdings, and otherwise all demand relief as by the complainant's bill. Some time later three other petitions for intervention were filed, by nonexchanging and exchanging stockholders to the number of 77, with like allegations as in the preceding, and demanding like relief.

"After answer and replication, the court made and entered its decree, finding:

"First. That certain of the interveners were still stockholders in the Loan Association,

"Second. That certain others of the interveners had exchanged their stock in the Loan Association for stock in the Trust Company.

"Third. That the Loan Association was, about the month of March, 1911, insolvent, and that the Trust Company was organized by those in control of the Loan Association, the purpose of said organization being to take over the assets and properties of the Loan Association and to engage in business for itself.

"Fourth. That as to interveners and other nonconsenting stockholders of the Loan Association, who had not transferred their stock for stock in the Trust Company, the said transfer of assets and property was unlawful and invalid, and not binding upon them.

"Fifth. That pursuant to such purpose all the assets and properties of the Loan Association were transferred to the Trust Company, which latter company and its officers have dealt with them as their own, and have confused and inseparably commingled such assets and properties with those of the Trust Company, so that it is impracticable and impossible to direct and enforce a retransfer of the assets and properties of the Loan Association, and the profits thereof.

"Sixth. That the exchanging stockholders were induced to make the exchange of their stock through false representations, and it is decreed that such stockholders, and each of them, be restored to their original status as stockholders in the Loan Association.

"Seventh. And to the end that the rights of all of the interveners herein and of the outstanding stockholders in the defendant Loan Association, who never exchanged their stock therein for stock in the defendant Trust Company, may be adequately preserved and protected, the court hereby confirms to the defendant Trust Company, and adjudges that complete title is vested in the defendant Trust Company of, in, and to all of the assets and properties of whatsoever kind or nature heretofore owned by the defendant Loan Association, subject only to the lien and charges hereinafter specified.

"Eighth. And for the further protection of the rights of the said interveners and the said stockholders in the defendant Loan Association who never exchanged their stock therein for stock in the defendant Trust Company, the court adjudges and determines that all of the assets and properties now or hereafter owned or acquired by the defendant Trust Company be, and they

hereby are, impressed with the trust and lien in favor of each of the said interveners named herein to the extent and amount set opposite the names of each, and in favor of the stockholders in the defendant Loan Association who never exchanged their stock therein for stock in the Trust Company for the amounts heretofore paid in by such last-named persons in the following names and amounts [setting them out].

"The remaining paragraphs deal with directions to the temporary receiver, the disposition of counsel's and receiver's compensation, and the appointment of a permanent receiver for both the Loan Association and the Trust Company, with directions to such permanent receiver, after payment of certain costs and allowances, to 'pay pro rata in equal shares to each and all of the interveners herein and to the stockholders of the defendant Loan Association named in the preceding eighth paragraph such sums of money as may be received by such permanent receiver until the said interveners and the said nonexchanging Loan Association stockholders named in the preceding eighth paragraph are paid in full the amounts set opposite their respective names herein,' and the balance, if any remain, to the Trust Company.

"This decree was entered February 27, 1913. The term of court expired April 5, 1913. On that day, but after the adjournment of the court for the term, J. L. Waring and a number of others, all of whom, except one, namely John Wagner, were stockholders in the Trust Company, but had theretofore exchanged Loan Association stock for their Trust Company stock, filed a petition in intervention, adopting the allegations of complainant's bill, and also the allegations of the petitions of the preceding interveners, wheresoever applicable, and prayed that the decree of February 27, 1913, be set aside and held for naught, and that the case be referred, and that they be allowed to intervene, and for relief on a like basis as preceding interveners, but further that an accounting be had between the Loan Association and the Trust Company, and for other relief. Later, about July 15, 1913, these petitioners and many others filed another petition in the cause, seeking practically the same relief. Still later, to wit, on March 12, 1914, the cause having been brought on for hearing, the court directed a modification of the decree of February 27, 1913, and the restoration of the assets and property of the Loan Association by the Trust Company, and a vacation of all contracts and agreements between the companies, whereby such assets and property were transferred to the Trust Company, that an accounting be had before the standing master, and that the petitioners be allowed to intervene."

Upon that record, in denying the writ applied for, this court said, among other things:

"The manifest theory and purpose of the original bill is and was, first, to redress a wrong done by the Loan Association, its stockholders participating therein, and its directors and officers, in fraudulently, and without legal or rightful authority, transferring its property and assets to the Trust Company; and, secondly, to wind out the affairs of the Loan Association, it being alleged that it was insolvent and disabled from continuing further with the business for which it was organized and incorporated. Very naturally, the first relief was to recover back the properties that had gone into the hands of the Trust Company fraudulently. This must needs be for the benefit of the corporation, the Loan Association, as a corporate entity, and not for the individual benefit of the stockholders, or, in a more limited sense, for the stockholders suing. * * * Now, advancing further in the analysis of the the sale and transfer of all of the assets of the defendant Loan Association cause and the parties, we find there are two classes of stockholders, namely, those who have not exchanged their stock in the Loan Association for stock in the Trust Company, and those who have exchanged their stock, but who seek to be reinstated in their original right. These latter, such as have appeared, came in by intervention. But many others of the same class did not come in or seek to intervene prior to the entry of the decree, and they are not taken care of by the decree, as it takes care of many nonexchanging stockholders not made parties to the suit either as plaintiffs or by intervention. * * * Now, in view of the law and the practice in such cases, considering the nature of the suit and the scope of the pleadings, namely,

follows:

eventually to wind out the business of the Loan Association (developing really into a receivership for the Trust Company), that many of the exchanging stockholders were not protected by the decree, and that the creditors of the Loan Association are not taken into account, nor were they given an opportunity in any way of coming in and establishing their rightful claims and demands, we are of the opinion that the court was without authority to make and enter a decree foreclosing and precluding their rights in the premises. The decree of February 27, 1913, in effect does that, and we hold, therefore, that the decree of March 12, 1914, was not beyond the jurisdiction of the court to make, and should not be expunged.

"We come to this conclusion not unmindful of the reasoning of counsel that the decree provides for all the nonexchanging stockholders, as if the exchanging stockholders—that is, those who had exchanged their stock in the Loan Association for stock in the Trust Company—were not strictly entitled to come in and be made parties to the suit. But the intervening petitions disclosed the fact that there was a large number of exchanging stockholders entitled to essentially the same relief as the nonexchanging stockholders, and, while not absolutely of the same class, that they were similarly situated, and it became at once manifest that the suit could not be equitably disposed of without extending to them the same privilege as to the nonexchanging stockholders. Their interests ought therefore to have been conserved as well, or the proper steps taken to prevent them from further participation, should they not make known their demands.

"We may add, by reason of the point being strongly urged by the respondent, that we are firmly impressed that it was not beyond the power and jurisdiction of the court to declare the Trust Company trustee of the property and assets of the Loan Association, and to impress a lien upon the property in favor of the stockholders. The remedy is a common one, and well within the scope of the relief grantable under the pleadings. Erie R. Co. v. Dial, 140 Fed. 689, 691, 72 C. C. A. 183; Jones v. Missouri-Edison Electric Co., 144 Fed. 765, 778, 75 C. C. A. 631; Smith v. Township of Au Gres, Mich., 150 Fed. 257, 261, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876."

In the present suit it appears from letters written by the secretary of the Loan Association to the complainant in the summer of 1911, and introduced in evidence by the latter, that the complainant was at that time endeavoring to withdraw from the Loan Association the money for his stock, although the latter had not then matured, and the complainant himself testified that in the latter part of 1911 he heard that two of the officers of each of the corporations—Edwards and Le Baron-were contemplating the merging of the assets of the Loan Association with the Trust Company, and that Le Baron came to El Paso, where complainant resided, to see whether he would exchange his shares in the Loan Association for the same number of shares in the Trust Company. "I told him," said the witness, "that I did not want to change my shares and he assured me that I would get my shares about the 1st of January and they told me that it had not matured. Then I came to Phœnix myself and saw them. They did not pay the stock, and I made inquiries and discovered that the examiner had withdrawn and thrown out a certain amount of loans that they had made, and that had reduced the value of all the stock so that it had not matured." The complainant further testified as

"Q. Didn't you just testify that some officers of the Arizona Mutual told you that, because of the state auditor's directing that certain securities should be stricken from the assets because they were not good securities, they were unable to pay matured stock at its maturity? A. They could pay up to the value of the stock according to the value on the books. I came here with the idea of getting the cash payment for my stock at its matured value, but

Mr. Olsen told me that it had not matured. It was only worth \$5,532 instead of \$6,000. I did not wait until it matured. I sold it right there and then. I did not know whether the Loan Association had the money to pay it or not. They said they couldn't, according to their by-laws, declare the stock matured until it was matured. I said the reason it did not mature was because the bank examiner took out certain loans. I did not ask whether the Arizona Mutual had money in its treasury to pay off matured stock at its maturity. What I wanted to know was whether my stock had matured so I could get my money. I already testified exactly what the officer told me-that the bank examiner threw out certain loans which reduced the value of the stockholders' stock. I made no other inquiry as to the financial condition of the Arizona Mutual, except of Mr. Christy, who claimed he was a stockholder of the Mutual. I am a bookkeeper. I only went to the books to which I could get access. I did not ask to see the ledger and account books. I only asked to see the stockbooks, to see who the stockholders were. I had no talk with Edwards about his plan to secure stock of the Arizona Mutual for the Arizona Trust Company. When Mr. Le Baron was in El Paso, he told me that he wanted to exchange my stock."

It is perfectly clear, we think, from the complainant's own testimony, that he was well aware that the Loan Association was unable to pay its obligations to him prior to his sale of his stock in that corporation to the Trust Company, in consideration of the promissory note of the latter company secured by the collaterals that have been mentioned. Obviously he thereby secured an unlawful preference over the other shareholders of the insolvent Loan Association, which, as has been seen, had long before undertaken to sell and transfer all of its assets of every kind to the Trust Company-a part of which assets are those involved in the present suit. To sustain the appellant's exclusive claim to them would be to subordinate to that extent the rights of all of the other stockholders of the insolvent association, which would be manifestly contrary to the well-established law upon the subject. Aldrich v. Gray, 147 Fed. 454, 77 C. C. A. 597, 8 Ann. Cas. 832; Standard Savings & Loan Association v. Aldrich, 163 Fed. 216, 89 C. C. A. 646, 20 L. R. A. (N. S.) 393, and the numerous authorities cited in those cases.

The judgment is affirmed.

TERRY v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. October 3, 1916.) No. 2847.

1. CRIMINAL LAW \$\infty\$639(3)\top-Criminal Prosecution\top-Procedure\top-Appointment of Special Prosecutor.

In a prosecution against a bankrupt for knowingly and fraudulently concealing from his trustee property belonging to his estate, the trial proceeds not under the state act but under the federal Act June 22, 1870, c. 150, 16 Stat. 162, and Act June 30, 1906, c. 3935, 34 Stat. 816 (Comp. St. 1913, § 534), and no complaint can be made that the attorney who represented the petitioning creditors was duly appointed special assistant to the United States district attorney and participated in the prosecution, though, under the state practice, such proceeding would have been improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1487, 1488, 1490, 1491; Dec. Dig. ← 639(3).]

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In a prosecution against a bankrupt for knowingly and fraudulently concealing property from his trustee, evidence *held* sufficient to take the case to the jury and warrant conviction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 912; Dec. Dig. \$\infty 495.]

In Error to the District Court of the United States for the Eastern District of Michigan; Clarence W. Sessions, Judge.

George W. Terry was convicted for knowingly and fraudulently concealing, while a bankrupt, from his trustee, property belonging to his estate in bankruptcy, and he brings error. Affirmed.

N. C. Bigelow, of Detroit, Mich., for plaintiff in error.

Clyde I. Webster, U. S. Atty., and B. B. Selling, Sp. Asst. U. S. Atty., both of Detroit, Mich.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

SATER, District Judge. Terry, the defendant below, was indicted, convicted, and sentenced for knowingly and fraudulently concealing, while a bankrupt, from his trustee, property belonging to his estate in bankruptcy. He seeks a reversal of the judgment rendered against him. On December 24, 1907, his stock of goods, which was insured for \$8,000, was substantially destroyed by fire. Aside from some uncertain small sums owing for household and living expenses, wages due clerks, and a bank indebtedness slightly in excess of \$1,800, all of which liabilities he paid, he owed his merchandise creditors more than \$5,400. By suffering a deduction of one per cent., he collected on his insurance policies, by January 10, 1908, \$6,000. He also claims to have received \$500 from a brother-in-law for his equity in a farm, and \$500 from a son-in-law for the unconsumed portion of his goods. On January 11, he wrote his creditors that the insurance companies had taken advantage of the 60-day clause in their policies, but that when a full settlement was made he would at once inform them. On the following day, on account, as he claims, of the ill health of himself and wife, having reduced to cash the several payments made to him and the sums received from his son-in-law and brother-in-law, he and his wife left for California, but without giving any information as to his destination, unless to his immediate relatives. The cash carried with him on his person must have been more than \$4,000. Excepting \$490, he did not at any time deposit in bank any of the money received by him. He obtained possession of his funds so deposited by delivering checks to his daughter and son-in-law, who cashed the same and delivered to him the proceeds. He did not take with him a list of his creditors or any statement of how much he owed them, or "think very much about it." He was unable to give any reason why he did not pay his merchandise creditors after the fire, other than that there was a panic on and money was hard to get, and, considering the condition of his wife, he did not think it was right to use up all of his money, selfpreservation being the first law of nature. He visited various points in California, and in late January went to Callexico on the Mexican

border, where he claims some one took from him, when he was intoxicated, about \$3,000, leaving him only his return ticket to Redlands and a few pieces of silver. At another time he states he does not know what became of that sum. He made no effort to ascertain how it disappeared, if it did so, or to recover it. He claims to have been drinking and dissipating heavily ever since the burning of his store occurred—a course of conduct hardly conducive to the restoration of alleged broken health. After his return to Redlands, he assigned to his brother his two remaining insurance policies, for which he received some time in January, \$1,800, which, he says, he kept in a trunk at Redlands and spent in traveling about and in satisfying expenses of himself and wife. He is unable to detail, except in a single instance, any place they visited, or to name a single hotel at which they stopped.

A petition in bankruptcy was filed against him on March 6th. Ten days later adjudication was had. A trustee in bankruptcy was elected April 21st. He knew of the bankruptcy proceeding as early as April 16th, for on that day he aided his wife in proving a claim against his estate. He did not give his wife any part of the funds which he at any time received, or, while in California, do any thing toward earning a livelihood. All efforts in that direction were made by his wife, to whose ill health he mainly attributes his going to California. He denies having possession of any funds belonging to his estate on or after the date of the election of the trustee in bankruptcy; but, excepting about \$200 expended on the wardrobe of himself and wife, wholly

fails to account for his money other than as above stated.

- [1] Defendant's main reliance for a reversal rests on the fact that the attorney who represented the petitioning creditors, the receiver appointed by the court, and the trustee in bankruptcy, aided, as a duly appointed special assistant United States district attorney in the prosecution of the case against him, taking an active part in the trial, although not as matter of fact (so far as shown) appearing before the grand jury. There is no claim that such assistant was paid for his services in this case otherwise than by the government, nor is his conduct upon the trial criticized. Under the law of Michigan, such counsel would have been disqualified from so acting. Howell's Mich. Stat. § 1158; Meister v. People, 31 Mich. 99; People v. Hurst, 41 Mich. 328. 1 N. W. 1027. The appointment, however, was made and the trial proceeded, not under the Michigan act, but under the federal statute. which imposes no such restriction. See Act of June 22, 1870, c. 150, 16 Stat. L. 162; Act of June 30, 1906, c. 3935, 34 Stat. L. 816; U. S. v. Rosenthal (C. C.) 121 Fed. 862, 872; U. S v. Twining (D. C.) 132 Fed. 129, 132; Browne v. U. S., 145 Fed. 1, 4, 76 C. C. A. 31 (C. C. A. 2). A writ of certiorari was denied in the last-named case, 200 U. S. 618, 26 Sup. Ct. 755, 50 L. Ed. 623. The error assigned is without merit.
- [2] There was ample evidence to carry the case to the jury. The verdict is irreconcilable with any theory other than the jury's disbelief of the defendant's evidence. Its rejection required his conviction. A critical analysis and a more extended statement of it would not be helpful either to the bench or the bar. Its inconsistencies and unsatisfac-

tory character are manifest and justify the conclusion reached by the

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The remaining 28 assignments go to either the introduction or the exclusion of evidence. We have carefully examined all or them and find no error.

The judgment of the District Court is affirmed.

UNITED STATES v. MAHAFFEY (COOPER, Intervener). (Circuit Court of Appeals, Ninth Circuit. October 2, 1916.) No. 2738.

1. Public Lands = 120-Patents-Homestead Entries-Vacation.

In a suit to cancel a patent to land issued under the Homestead Law (Act May 20, 1862, c. 75, 12 Stat. 392), on the ground of fraud in the final proofs as to the entryman's residence, evidence held to warrant a decree dismissing the bill.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. €==120.]

2. Public Lands = 120-Patents-Presumptions.

It is presumed that all preceding steps required to obtain a patent to public lands have been observed; and, in view of the importance and necessity of the stability of titles, a patent should be set aside for fraud in proofs only where the fraud is clearly established.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335;

Dec. Dig. \$\sim 120.]

Appeal from the District Court of the United States for the District

of Montana; Geo. M. Bourquin, Judge.

Suit by the United States against William A. Mahaffey, in which Nelson Cooper intervened. From a decree dismissing the bill, complainant appeals. Affirmed.

The United States brought this suit in December. 1909, against Mahaffey to cancel a patent for land in Montana issued to Mahaffey under the Homestead Law. The complaint alleged fraud in final proofs, in that the depositions of Mahaffey and of his witnesses were false as to the residence of Mahaffey and cultivation and improvements made by him upon the land. As Mahaffey could not be found in the jurisdiction of Montana, order proconfesso was entered against him. Nelson Cooper intervened with an answer, and denied that Mahaffey's proofs, relating to his residence and improvements, were false. Cooper also pleaded that he was an innocent purchaser from Mahaffey in good faith and for full consideration, and that after purchase he had sold to one Heaton. After trial to the court, decree dismissing the bill was entered. The United States appeals, and assigns that the court erred in finding the evidence insufficient to sustain the allegations of the complaint.

T. W. Gregory, U. S. Atty. Gen., Burton K. Wheeler, U. S. Atty., of Butte, Mont., Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont., and Frank Woody, Asst. U. S. Atty., of Butte, Mont.

James A. Walsh, of Helena, Mont., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] A brief summary of the testimony will suffice. Mahaffey made his homestead entry in April, 1899, and made final proof in June, 1904. These proofs, which were taken before the land officials at Great Falls,

Mont., were that Mahaffey built a cabin and established his residence on the land in June, 1899; that his cabin was 16x18 feet; that the land was fenced; had a corral upon it; that the value of the improvement was \$300; and that Mahaffey had resided continuously upon the land since he established his residence thereon in June, 1899. To sustain the averments of the present complaint that the original proofs in respect to these matters were false, the government introduced the testimony of five witnesses. One testified, in substance, that he lived within a mile or two of the land; that he first saw the land in March or April, 1904, and that there was then an old log cabin on it, with big cracks between the logs, no window, door, or floor, no stove pipe in the roof: that there was no fencing on the land except on the east end, and no corral except some lambing pens belonging to Cooper, father of intervener; and that he never saw Mahaffey on the place. Two other witnesses said, in substance, that they knew the land in 1902, 1903, and 1904; that they had seen the cabin on the land; that it had a dirt floor, was about 10x12 feet; that they had never seen Mahaffey or any one else living on the land, and saw no fence except on the east side; that there was a reservoir upon the place, the reservoir having been built after 1904. Another witness said that he knew the land in 1904; that the cabin then had no roof or floor or door or window, and that there were no other improvements, buildings, or fences of any kind, except a fence east of the land; that he never saw Mahaffey on the land. A special agent of the General Land Office testified that he first saw the place in 1909, and then found a 10x12 log cabin on the land; that at that time there was no floor, window, or door in the cabin; that the land was then inclosed in the fields of Cooper, the intervener's father.

To meet this evidence the intervener introduced four witnesses. The intervener's father said that he purchased the land from Mahaffey for the intervener; that he saw Mahaffey on the land in 1900. and saw furniture in the cabin at that time; that the cabin had a board roof and floor, and that he (witness) had sold wire fence to Mahaffey to use upon the land; and that he saw a reservoir and ditch on the place. Another witness testified that he knew Mahaffey between 1900 and 1904; that the cabin, about 14x16 feet, was plastered, had a stove pipe in the roof, had a door and window, and that there was a reservoir and ditch and some fence on the land; that he had often seen Mahaffey, who had worked for Cooper under witness in 1904, and observed Mahaffey "traveling to and from the direction of his ranch." Another witness, who had lived near the land for 25 years, described the Mahaffey place as rough land only fit for grazing, and said that the Mahaffey cabin had a stove pipe through a board roof; that there was a floor, window, and door in the cabin in 1905; that there was a reservoir, ditch, and some fences on the east side; that Mahaffey was there, and "was considered a pretty good man in that community." Another witness for the intervener said that he knew Mahaffey; that he had been upon the land several times when Mahaffey lived there; that he had been in the cabin (about 1905), and had stayed there several days; that it was plastered between the logs and was furnished; that there was a little corral and 235 F.-45

a ditch there; that Mahaffey kept some saddle horses, and was at the place whenever he was there.

From this résumé of the testimony it will be noticed that there was a serious conflict in the evidence of the respective parties. Witnesses disagreed in respect to the actual inhabitancy of the land by Mahaffey, as to the nature and extent of the improvements, and particularly as to detailed facts which were important to enable the court to reach satisfactory conclusions. The case largely turned upon the credibility of the witnesses. The District Judge, in his opinion, commenting upon the testimony of the witnesses for the government, said that it was negative, that the opportunities of the witnesses for observation were few, and that their testimony was "hesitant and drawn out, modified, strengthened, and shaped by leading questions," and that little credibility and weight could be given it in the main. We cannot say that this judgment of the evidence of the government was inaccurate and ought to be overturned. The judge saw and heard the witnesses, and was in far better position than is this court to judge of the value of their statements, and we cannot say that the finding made is plainly against the evidence.

[2] We must therefore affirm, under the rule that the case belongs to that class where, as laid down in United States v. Stinson, 197 U. S. 200, 25 Sup. Ct. 426, 49 L. Ed. 724, the respect due to the patent, the presumptions that all the preceding steps required by law have been observed before its issue, the importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are fully sustained. Diamond Coal Company v. United States, 233 U. S. 236, 239, 34 Sup. Ct. 507, 58 L. Ed. 936; Connor v. United States, 214 Fed. 522, 131 C. C. A. 68.

Affirmed.

In re JACOBS et al. JACOBS et al. v. HILLS.

(Circuit Court of Appeals, Ninth Circuit. October 9, 1916.) No. 2804.

Bankruptcy \$\iff 136(2)\$—Concealment of Assets—Judgment—Propriety.

On a petition by a trustee for delivery of assets which the trustee averred the bankrupts had in their possession and under their control, the court found that the bankrupts, at the time of the filing of their petition in bankruptcy and ever since, had in their possession and under their control certain merchandise, which they had concealed, and were then concealing from the trustee, and that the bankrupts had present ability to deliver such assets. Held, that though two questions were involved, one that of the original concealment, and the other that of present ability to deliver the property, the order is not improper as a matter of law because uniting a finding on both questions, notwithstanding such order might be conclusive that the bankrupts were guilty of contempt in event of their failure to deliver the property pursuant to the order of

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 235; Dec. Dig. &==136(2).]

Petition to Revise in Matter of Law an Order of the District Court for the Northern Division of the Western District of Washington;

Jeremiah Neterer, Judge.

In the matter of the bankruptcy of David Jacobs and Isaac Jacobs, copartners, doing business as Jacobs Bros. Petition by S. T. Hills, as trustee, for delivery of assets claimed to have been concealed by David Jacobs and Isaac Jacobs, bankrupts. The order of the referee in favor of the trustee was affirmed, and the bankrupts petition, under Bankruptcy Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (Comp. St. 1913, § 9608), to revise the order. Dismissed.

In his petition for delivery of certain assets the trustee alleged removal and concealment by the bankrupts, and that the bankrupts "have in their possession and under their control" goods of which the trustee is the owner and to possession of which he is entitled. After hearing before the referee, and thereafter upon hearing and review, the District Court sustained the view of the referee, and found from evidence which satisfied the court that the bankrupts, and each of them, at the time of the filing of their petitions in bankruptcy, and ever since, and at the time that the court made its findings, had in their possession and under their control certain merchandise of the value of \$3,189 belonging to the estate, which assets the bankrupts and each of them had concealed, and was then concealing and withholding, from the trustee, and that the bankrupts had the present ability to deliver such assets to the trustee. The order conformed to the findings and conclusions, and directed delivery to the trustee within 20 days after entry of the order, unless appeal should be taken, in which event the bankrupts were given 20 days after the disposition of the appeal to comply.

Walter Schaffner, of Seattle, Wash., and Romaine & Abrams, of

Bellingham, Wash., for petitioners.

Nelson R. Anderson and Wettrick, Anderson & Wettrick, all of Seattle, Wash., and Hudson & Madison, of Bellingham, Wash., for respondent.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The record discloses a careful analysis and review of the facts by the learned judge of the District Court. His findings were made upon evidence which he characterizes in his opinion as "clear and convincing," and which satisfied him beyond all reasonable doubt that when the petition in bankruptcy was filed and at the time of his decision the bankrupts were in possession and control of the merchandise described in the order.

Petitioners' principal point is that the court erred in finding that the bankrupts had a present possession and a present ability to surrender and deliver to the trustee. The contention is that such a finding is not material or proper, and that the question of present ability becomes material only in a contempt proceeding arising after failure to obey the order to deliver. Petitioners urge the importance of the point because, in Power v. Fuhrman, 220 Fed. 787, 136 C. C. A. 393, which was a contempt proceeding, this court held that a judgment of the District Court, not appealed from, which ordered the bankrupt to turn over, and which was based upon a finding that there was a present ability to perform, established that at the date of entry of the order the money there in question was in the actual possession and under the control of the bankrupt, and was then being fraudulently con-

cealed and withheld. It is argued that the application of this rule to the present case would lead to a situation where, if the bankrupts should fail to comply with the order under review and obedience to such order should be sought to be enforced in contempt proceedings, the order and findings of the District Court would be conclusive against these petitioners, and that as a consequence they would be prevented from having this court render judgment upon the question of their guilt.

Petitioners cite Schmid v. Rosenthal, 230 Fed. 818, — C. C. A. —, where the Court of Appeals of the Third Circuit had before it for review a finding made by the referee in the District Court that the bankrupt "had and now has in his possession," and an order to pay over forthwith. The court distinguished that proceeding, which was one asking for an order requiring money alleged to be concealed to be turned over, from a proceeding to punish for contempt, and said:

"Nothing has been done thus far except to ascertain what sum of money the bankrupt should have accounted for at the time of the adjudication, and should have turned over to his trustee afterward. * * * The finding should have been restricted to the date of bankruptcy, and should therefore be modified by striking out the words, 'And now has in his possession,' and by substituting therefor the words 'At the time the petition in bankruptcy was filed.'"

The court, approving Epstein v. Steinfeld, 210 Fed. 236, 127 C. C. A. 426, recognized two stages to a proceeding where a charge is that assets have not been accounted for: One as involving inquiry into what assets should have been in the bankrupt's possession or control at the time of the bankruptcy; and the other involving a determination whether or not the property required is still in the possession or control of the bankrupt, and whether he is physically able to deliver it to his trustee. We agree that the proceeding may have the two stages, but if the two are covered by the one investigation and such inquiry has fairly responded to the averments of the petition by the trustee that there is a present possession and control, we see no valid reason for holding that as matter of law the findings and order responsive to the issues tried should be nullified. In re Rosser, 101 Fed. 562, 41 C. C. A. 497; In re Lans, 158 Fed. 610, 85 C. C. A. 432. It may be that inconvenience to the bankrupts will follow in the event of their failure to comply with the order, but we find no sufficient legal ground for disturbing the order in the respect complained of.

Petition dismissed.

SUNDH ELECTRIC CO. v. GENERAL ELECTRIC CO.

(District Court, N. D. New York. September 4, 1916.)

1. Patents &= 8—Requisites and Validity—Description of Invention.

A patent is not granted for a result, but must intelligently describe the means to be employed in producing either a new result or an old result in a new or better way.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 7; Dec. Dig.

2. PATENTS @=161-CONSTRUCTION-LIMITATION OF PRIOR ART.

The prior art is always to be considered and given due weight in construing a valid patent and in ascertaining its scope.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 236½; Dec. Dig. ६ 161.]

3. Patents €=236—Infringement—Change of Form.

To constitute infringement, it is not necessary that the infringer use the form of the patented structure, unless form be of the essence of the invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 372, 373; Dec. Dig. ६⇒236.]

4. PATENTS @=328-INFRINGEMENT-ELECTROMAGNET.

The Lindquist patents, No. 744,773 and No. 764,608, each for an alternating current electromagnet, both *held* infringed by certain structures made by defendant and not infringed by others.

In Equity. Suit by the Sundh Electric Company against the General Electric Company. On application by complainant to make subject to prior decree certain new structures made by defendant. Granted in part.

See, also, 198 Fed. 116, 204 Fed. 277, 122 C. C. A. 475, and 217 Fed. 583.

This matter is now before this court on an application or motion to bring into the case and make subject to a prior decree of this court, which was affirmed by the Circuit Court of Appeals (Second Circuit), seven structures made by the defendant, each of which is alleged to infringe the Lindquist patents, Nos. 744,773 and 764,608, dated November 24, 1903, and July 12, 1904, respectively, and spoken of as the senior patent and the junior patent. Each is for an alternating current electromagnet. These patents were before this court on final hearing in this case and held valid and infringed as to the claims in issue by the structure then before the court. (D. C.) 198 Fed. 116. The decree was affirmed by the Circuit Court of Appeals, 204 Fed. 277, 122 C. C. A. 475, Lacombe, C. J., Ward, C. J., and Noyes, C. J. Thereupon, and before the decision by the Circuit Court of Appeals, the defendant commenced making the alternating current electromagnets now alleged to infringe, whereupon the complainant, instead of instituting contempt proceedings, or bringing new suits, moved for a supplemental decree, bringing within the operation of the injunction heretofore granted herein the said devices so alleged to infringe. (D. C.) 217 Fed. 583. The application was presented on affidavits and exhibits, and this court held the seven devices sought to be brought within the said injunction, and which enjoined a structure known here as Exhibit H, to be infringing devices, and granted the motion. (D. C.) 217 Fed. 583, supra. On the argument the defendant had intimated its desire to cross-examine the affiants in the case, who had made affidavits in favor of the complainant on this motion as to the infringing character of the new devices known here as Exhibits A, B, C, D, E, F, and G, and the court had indicated its opinion that such practice was just and proper, but as no arrangement was made for such cross-examination, the court supposed the suggestion or request had been abandoned by defendant, and proceeded to decide the motion on such affidavits without cross-examination. fendant then requested that no injunction issue, and that cross-examination by both parties be permitted. This request was complied with, and the respective parties, at a later date, cross-examined such of the said persons who had made affidavits they desired to cross-examine. Some additional prior art was placed before the court with testimony relating thereto, not on the question of the validity of the Lindquist patents or the infringing character of the device, Exhibit H (the original device alleged to infringe), but on the question of the construction or interpretation of such patents and their scope, and the question whether or not the new devices A to G, inclu-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

sive, infringe. The question is do these new devices infringe such patents—the claims in issue—or either of such patents, or, does either one of such devices infringe if all do not?

Emerson Newell and Alfred Wilkinson, both of New York City, for complainant.

Fish, Richardson, Herrick & Neave, of New York City (Charles Neave, of New York City, of counsel), for defendant.

RAY, District Judge. The cross-examination of witnesses, mostly experts, occupied several days, and the argument was full and complete; no limitation having been placed thereon, and the whole scope of the prior art and of the patents in suit was gone into. The defendant's brief contains 237 printed pages, and is profusely illustrated, and the court has had the benefit of seeing the practical operation of the devices in question, or some of them, accompanied by explanations from the experts on both sides. The experts differ radically in some respects, but I think the whole controversy may be reduced to the simple proposition, Must the complainant's patents be so narrowly and strictly construed as to permit others without infringing to make and use structures in which, operating on the same general principle and producing the same result as the device of the patents, the pull travels slightly from a center point to the right and left, or, in order to infringe the complainant's patents, or either of them, must the resultant pull of the structures be constantly at one point and constant and uniform?

Claims 1 to 4, inclusive, of the senior patent and claims 1 to 3, inclusive, of the junior patent were in issue in this suit, and their validity has been established, as well as their meaning and scope, to an extent, as between these parties. These claims read:

Of the senior patent:

"1. An electromagnet having a plurality of coils symmetrically disposed around a central axis, the individual axis of each of said coils being parallel to said central axis, and means for producing currents of different phase in said coils.

"2. An electromagnet having a cylindrical core and a plurality of symmetrically disposed coils thereon, the said coils having their individual axes parallel to the axis of said core, and means for producing currents of dif-

ferent phase in said coils.

"3. An electromagnet having a cylindrical core, with symmetrically disposed pole-pieces at one end thereof, coils on said pole-pieces and means for

producing currents of different phase in said coils.

"4. An electromagnet having a cylindrical laminated core with integral symmetrically disposed pole-pieces at one end thereof, coils on said pole-pieces and means for producing currents of different phase in said coils."

Of the junior patent:

"1. An electromagnet having a polygonal core and a plurality of symmetrically disposed coils thereon, the said coils having their individual axes parallel to the axis of said core and means for producing currents of different phase in said coils.

"2. An electromagnet having a polygonal core with symmetrically disposed pole-pieces at one end thereof, coils on said pole-pieces and means

for producing currents of different phase in said coils.

"3. An electromagnet having a polygonal laminated core with integral symmetrically disposed pole-pieces at one end thereof, coils on said pole-pieces and means for producing currents of different phase in said coils,"

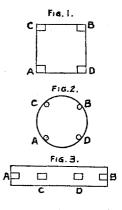
Claim 1 of the senior patent says nothing as to the shape of the core, while claims 2 and 3 of that patent call for a cylindrical core, and claim 4 for a cylindrical laminated core. Claims 1 and 2 call for a plurality of coils, in the one symmetrically disposed around a central axis, with the individual axis of each of the coils parallel to the axis of the core, and in the other for coils symmetrically disposed on the core and having their individual axis parallel to the axis of such core. Claim 3 calls specifically for symmetrically disposed polepieces at the end of the cylindrical core with coils thereon, and claim 4 calls for integral symmetrically disposed pole-pieces at one end of the cylindrical laminated core with coils thereon, and all four claims call for means producing currents of different phase in said coils.

The claims of the junior patent call for polygonal core and a polyg-

onal laminated core instead of a cylindrical core.

These parties have models showing cores with pole-pieces or legs thus:

[1. 2] It is seen that in each case we have polepieces, and that they are symmetrically disposed with reference to the common center. It is also evident that, if we have coils on these pole-pieces energized by alternating currents so as to attract or take hold of the armature all of same phase, all acting together in pulling and letting go, we would have a constant pounding called "chattering" and caused by the incessant pounding of the core or legs against the armature. It is also evident that if we have out of phase currents so that poles A and B pull or attract when C and D let go, and C and D attract and hold when A and B let go, we will have largely, if not entire- $A \square$ ly, done away with the chattering. The sum of the pull is centralized. It is also self-evident that



symmetrical disposition and arrangement of the pole-pieces is unavailing, unless we have such a symmetrical action and pull of the currents as will exercise a uniform and a substantially constant attraction and pull on the armature at the central point or axis of the whole. If in Figs. 1 and 2, A and C hold and pull while B and D let go, or in Fig. 3, A and C hold while B and D let go, we will have chattering. If, however, A and B hold while C and D let go, we will have less chattering or none. This is merely illustrative. The essential thing and dominating idea of these patents are a substantially uniform distribution of symmetrically balanced magnetic forces, and such geometrical symmetry only as is necessary to secure this. We must have the electrical pull symmetrical and substantially uniform, and if this be so, then the geometrical arrangement is of little or no consequence. But to secure the former the latter is more or less essential. At this late day it is settled that a result is not patentable, but means for producing a result may be. A patent must intelligently describe the means to be employed in producing either a new result or an old result in a better way or a new way. The prior art may anticipate, and it may not, but it is always to be considered and given due weight in construing a valid patent and in ascertaining its scope. If a pioneer, it covers and protects everything within its general scope which operates in the same way to produce the same, or even a better, result, provided the elements of the patented structure are all present. Every patent is to be construed in the light of legally known structures and devices existing at the time the patent was applied for. In determining the true scope of a patent we are to place ourselves back in the same light the inventor had, or which the law says he had, whether he saw it or not. Here the problem was to use alternating currents in electromagnets, and when energized by such currents to not only attract the armature, but hold in position by a *substantially* constant pull and without chattering.

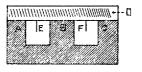
[3] To constitute infringement it is not necessary that the infringer use the form of the patented structure, unless form be of the essence of the patent, and hence mere changes in form do not avoid infringement, except in the case mentioned. If all the elements of a complainant's valid patent are used by another so combined and arranged as to produce the same general result as the patent, operating in the same way and in obedience to the same laws, we have infringement, even if there be some variation in arrangement which makes the result imperfect. Of course if this departure be a return to the prior art, and but a use of the prior art, then the alleged infringing structure is not within or covered by the patent. This, as I understand, covers the contention of the defendant here. Some new references are cited, and evidence relating thereto was permitted as bearing on the question of infringement, for if defendant's magnets are in substance the same

as the prior art, then they cannot infringe Lindquist.

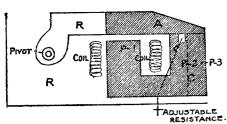
[4] The new citations or prior art, not before this court either on the final hearing of the original suit or the motion for a preliminary injunction, are the Tesla patents, No. 511,559, No. 416,193, and No. 381,968; Thompson patent, No. 428,650; Fleming patent, No. 430,-898; French patents, Nos. 308,145, and 322,254; Electrical Review Publication of November 29, 1910; and Publication Le Genie Civil. These two French patents and the two publications show magnets attracting an armature and holding it to a core. The others do not. The Thompson and Tesla patents are for electric motors which rotate an armature in a direction transverse of the magnetic core. Thompson patent shows a shading coil, and the patent is for the rotation of a disk in a meter or motor. Tesla is for a motor device. Waterman says, in substance, that Thompson would be defendant's structures D or E, if the core were movable, but it is not. This he admits. Neither Thompson nor Tesla ever suggested in the art that they could be used as an alternating current traction magnet. It is obvious that the Fleming patent owned by defendant has little, if anything, to do with this controversy. Unitary core structure and magnetic symmetry are absent. It is said—and I think correctly said—that the pull would shift about in a circle. The Scott patent and Schuckert were both fully considered in this court and by the Circuit Court of Appeals originally. Scott is a three or a four legged structure, energized by three phase currents, and the resultant pull shifts from side to side. One or more of defendant's witnesses admits that the pull

shifts. Is it substantially a central pull? I think not. It would be a waste of time to go through all the defects of this and the French patents which are pointed out in the testimony and not disproved, and which differentiate them from Lindquist. But defendant says that in its structures, A to G, inclusive, the pull shifts, and therefore they are of the prior art, and not within the Lindquist invention when properly construed, which demands a pull that does not or will not shift at all. Defendant's magnets, A, \hat{B} , and C, alleged to infringe, have magnetic symmetry exact, except that in the large magnets the pull shifts one-fourth of an inch away from the center. Magnets D and E, because of a reluctance introduced by a curved upper surface causing the magnetic flux to crowd to the center, have substantially perfect magnetic symmetry and magnets F and G, which are furthest away from infringement, have, substantially, magnetic symmetry at the business end or main pole where a shading coil is located. The threelegged Scott and French patents, Nos. 308,145 and 322,254, are fairly illustrated, as is the pull, quite simply.

Energize poles A and B while the current at leg C is at zero and the pull will center at E. Now energize B and C while the current at pole \mathbb{R} | \mathbb{E} A is at zero, and the pull will center at F. In short the pull is traveling or shifting from Eto F and back again. The defendant's struc-



tures do not have this shift in pull except to a slight degree. Defendant's magnet F may be roughly illustrated as follows:



This magnet has a pivoted armature, indicated by A and R, and a shading coil, indicated by small c and the slot to receive P-3 same cut in C, which indicates the laminated core, the laminated armature being indicated by A. The laminæ are clamped to TADJUSTABLE a central rib, indicated by R. which rib forms their support

and a means for pivoting the armature. The laminations of this magnet are made of silicon steel, not in use when the patents in suit were applied for, and it is conceded it has a higher electrical resistance than ordinary steel, and is less subject to eddy currents, which are troublesome when shading coils are introduced. The windings of the energizing coil are on pole 1 (P-1), and the introduction of the shading coil, small c, in effect to an extent divides the other pole into two poles, indicated as P-2 and P-3, and it is conceded the effect is the same as if the slot were extended to near the base of the core. We have a single phase alternating current which energizes the coil on pole 1, and sets up a single phase magnetic flux which passes to the armature and attracts same towards the pole faces. It will be noted in the illustration above that pole I does not contact with the armature, while the other poles do. When the coil around P-1 is energized, the magnetic circuit is up into the armature, and then follows the laminations of the armature, A, to the poles 2 and 3, and

down into them and the laminations of the core C, and back to the lower extremity of pole 1. The copper wire, small c, is carried through the slot to the support on which the magnet is mounted, and is closed by a resistance which is adjustable. It is testified by complainant's witnesses, and is conceded by the defendant, that the electrical effect of this shading coil is the same as though made of a shorter turn of wire and closely surrounding the pole 3, assuming the slot to be cut deeper. That portion of the magnetic flux which is opposed by the shading coil in its path will lag behind, and is, of course, dephased. Without the shading coil there would be two pulls on the armature, one at pole 1, the left-hand leg, and one at the right-hand leg (now with the shading coil, poles I and \mathcal{Z}). These pulls emanate from the coil around the left-hand leg, and hence without the shading coil would be substantially in phase with each other, and both pulls would come at the same time, and the "let go" would come at the same time, and we would have chattering. With the shading coil dividing the right-hand leg into poles, 2 and 3, and one of these dephased, we have three pulls, one at pole 1, one at pole 2, and the other at pole 3, and as one pole is out of phase with the other, there is a constant pull on the armature, more or less, and hence chattering is avoided up to a certain point certainly. Of course if the shading coil were not introduced into the structure, the magnetic flux in the face of the right-hand leg (as a whole) would be substantially symmetrical. It is unnecessary to say that shading coils were old in the art. The contention of the defendant, as I understand, is that in structure F, we have a magnet made up of three poles, all in a straight line operated on a single phase circuit, and that the resultant of the magnetic pull of defendant's magnet F does not remain at a fixed point, but is constantly shifting from a point near the middle of the right-hand leg to a point near the edge of the windings on the left-hand leg. It is obvious that in magnet F the poles 1, 2, and 3 are not symmetrically spaced as the distance from 1 to 2 is much greater than from 2 to 3. This, of course, is not the structure of the French patent, nor is it the structure of Lindquist as described by him. In the French patent the poles are equally spaced, and Lindquist symmetrically disposes his poles. However in magnet F, poles \hat{z} and \hat{z} are in effect symmetrically arranged or spaced as to each other, although out of phase with pole 1, and both contact with the armature, while pole 1 does not contact therewith. Each pole has a magnetic circuit of some sort, but these are not equal. obvious. There can be no chattering at pole 1, as the pole face does not contact with the armature. It seems to be conceded that in the operation of magnet F there is no chattering, of any account at least, up to a certain point, and that after that point is reached there is chattering more or less, as at a load of 50 pounds and more, although this magnet will support a load of 65 pounds. I take it that a magnet not within the claims of Lindquist here in issue does not infringe, even if not within the claims of the prior art patents. But the operation of the magnet F with the shading coil introduced is that when the coil at pole 1 is energized the magnetic current passes up into the

laminations of the armature and along to poles $\mathcal Z$ and $\mathcal Z$ and then down, a part of the current meeting the copper wire, or shading coil, and there is then set up another current around this shading coil point of contact which lags behind the main current and affects the whole of poles $\mathcal Z$ and $\mathcal Z$, when but for this they would be at zero, and causes both to be out of phase with pole $\mathcal I$ when at zero and pulling on the armature when pole $\mathcal Z$ is not, and as a consequence at one point of time poles $\mathcal Z$ and $\mathcal Z$ are in effect two poles, but at another point of time one pole, or an entire pole affected by the out of phase current. This causes poles $\mathcal Z$ and $\mathcal Z$ to hold on the armature when pole $\mathcal I$ is at zero. The air space between pole $\mathcal I$ and the armature is purposely left, for if not left when the current is shut off, the switch would not oper. In this structure, magnet $\mathcal F$, when the main coil current passes through zero, the shading coil is to do, and does, its work.

The Lindquist patent, as we have seen, calls for a "substantially constant pull," with a "plurality of coils symmetrically disposed around a central axis, the individual axis of each of said coils being parallel to said central axis.' This is an electrical device operated by an alternating electric current, and magnetic symmetry and magnetic parallelism was in the mind of Lindquist, and that is the spirit and gist of his invention. Geometrical symmetry and geometrical parallelism in the absence of magnetic symmetry and parallelism would accomplish nothing, and this court and the Circuit Court of Appeals. with reference to these claims in issue, have decided that a device of this kind having the magnetic symmetry and parallelism of Lindquist are infringements. Change the form of the structure as much as we please, but do it in such a manner as to leave a plurality of coils symmetrically disposed around a central axis with the individual axis of each of the coils parallel to the central axis, and we are within Lindquist. If I understand the contention of the defendant, it is, with other things, that Lindquist not only describes, but expressly calls for, a laminated cylindrical core in claim 4 of the senior patent and claim 3 of the junior patent, made up of laminations concentric with the support described in the specifications, and for the reason so much stress is laid on the language used in the description of the magnet described in the specifications, I assume the defendant's counsel claims Lindquist had in mind a core with concentric laminations in all the claims. But this is neither said in the patent nor in the claims of the patent. It was not incumbent on Lindquist to describe every form of structure which could be used in practicing his invention, and he is not confined to one structurally like or in form similar to the one described by him. If the alleged infringing structure has a plurality of coils symmetrically disposed (magnetically) around a central axis and the individual axis of each of such coils is (magnetically) parallel to the central axis, and we have a "substantially constant pull" and an absence of chattering, we have Lindguist. It is hardly necessary here to point out the difference between "humming" and "chattering" in these structures. As already stated, when the face or faces of the core and of the armature come together with force, a noise is made, and if this is rapidly repeated, we have what is known as "chattering." Take a number of thin pieces of metal (laminations) and place them side by side and either clamp them firmly or rivet them together, and, as it is impossible to have perfect constant contact at all points of the adjacent flat laminæ, when we apply an electric current, we get a jarring of the one sheet against another to a slight extent, and this causes a humming. In all laminated cores there will be some humming. The defendant contends that Lindquist's invention and contribution to the art consists: (1) In providing a concentrically wound core forming a "cylindrically laminated core"; (2) providing mathematically equal lengths of paths of the magnetic circuits in which; (3) the expansion due to heating is radial, so as not to distort the pole faces out of their proper plane, and which when it occurs produces chattering; and, also, (4), in which form wound coils may be used instead of expensive hand wound coils. Defendant's counsel says:

"The invention—the contribution to the art—is found in *the form of the core* which has the structural and functional advantages just referred to."

It cannot be doubted that Lindquist has these advantages to an extent in the structure which he describes in his patent, but this court cannot agree with the contention of defendant that therein lies the entire invention of Lindquist. It seems to me that Fig. 5 of Lindquist's senior patent sets at rest the proposition that his patent calls for and demands a constant uniform pull of the same magnitude at a particular and fixed point at all times. In Fig. 5 of the patent, we have a magnet with three poles symmetrically disposed and having the axis of each parallel with the central axis of the whole. We will indicate this thus:



Assume we have suitable windings and connections and one pole must be out of phase with the two others to get a constant pull. If poles A and C pull when B is at zero, it would seem clear enough that the resultant pull would be somewhere on the line AC, and when C and B pull and A is at zero, the pull would

seem to center at a point on the line CB, and when B and A pull and C is at zero, it would seem the resultant pull would be somewhere on the line BA. That is, while D is the central point of the whole, the resultant pull is not there, but shifts as from I to \mathcal{D} , and from \mathcal{D} to \mathcal{D} , or approximately so. Of course the currents rise and fall gradually and not abruptly, and it is useless to inquire just the line which the pull would follow in moving from point to point, but it seems clear the point of resultant pull would not center at D at any time.

Nonchattering alone is not the test of infringement, nor is non-chattering at the rated load of the magnet, and I do not understand complainant to so claim.

The defendant's magnets A to E, inclusive, are clear infringements of the claims in issue of the patents in suit. In substance this has been determined by the Circuit Court of Appeals in this suit. The addition of shading coils with shifting of location from right to left or left to right, so done as to maintain magnet symmetry, parallelism, and the other essentials of Lindquist, does not avoid infringement.

This is mere change of form. There is no functional change, and the mode of operation is the same substantially. The displacement of the shading coils in D and E does not substantially change the center of pull because of the curved face of the plunger. This introduces a magnetic resistance which increases in width as you go from the center, and hence the magnetism is forced to the center. It is self-evident from an examination of the defendant's devices and of the drawings, which show the location of the shading coils, that an effort was made to get as near as possible to Lindquist, but avoid infringement. It has not been done in magnets A to E inclusive; but, I think, it has been done in magnets F and G. The complainant contends that the axis of each of these structures F and Gis at the axis of the main pole at what is termed the "business end" of the magnet, and with which the armature actually contacts. But is this a central axis within the meaning of the Lindquist patent claims in issue? Complainant's counsel says of these magnets F and G, as follows:

"The axis of these structures is, in our opinion, the axis of the main pole or 'business end,' with which the armature contacts and at which the shading coil is located. Before the injunction, the shading coil was located centrally of this pole face, but now it is slightly displaced. The action, however, is substantially the same. It is probably true that the resultant out-ofstep pulls on this pole face shift very slightly because of this displacement, but not more than a small fraction of an inch, if at all. The sketch of magnet F on page 72 of defendant's record by Dr. Sheldon shows clearly that, although the coil has been displaced somewhat, the pull does not shift materially, if at all. As he there shows, the flux produced by the main wound coil is indicated by the line A. This flux, of course, produces a pull substantially centrally at the contacting pole face where the shading coil is located. The local flux produced by the shading coil is indicated by C and merely passes around the shading coil into the armature and back again. Wherever it passes from the core into the armature, or from the armature into the core, it produces an attractive pull, as will be obvious. In other words, it produces a pull on both sides of the shading coil, and, therefore, the resultant is at the shading coil, and, as Dr. Sheldon has shown it, it is an extremely small fraction of an inch from the center of the main coil flux and pull. In other words, if there is any shift at all at this business end, it is such a minute fraction of an inch that it is not worth considering. So, for all intents and purposes, there is practically no shift of pull on this main or business end, which is the only one that contacts with the armature. The same is true of defendant's magnet G.

"There was a half-hearted attempt by one of the defendant's witnesses in his affidavit to lead the court to believe that there was a material shift, not of the pulls at the business end, but because there was a slight pull between the armature and the return flux leg. Look at Dr. Kennelly's sketch of this magnet F and of magnet G, between pages 10 and 11 of complainant's supplemental record, vol. 1. The return flux pole does not contact with the armature. The flux produced by the main-wound coil of course passes around the entire U-shaped core and into and out of the armature. A good deal of it passes through the pivot also, but some of it, of course, passes through the air gap between the armature and the return flux leg, and consequently produces a slight pull on the armature at that point, although probably most of it is blocked off by this air gap.

"Defendant's contention in this respect is apparently that there is a slight pull at this point, and that therefore the resultant of the two simultaneous pulls produced by the main coil flux is somewhere between the center of the business end and a point at the left of that center. Prof. Ganz (page 204) states that the pull of the main pole would be greater. Ob-

viously it will be greater because there is no air gap between the main pole and the armature, but there is a considerable air gap between the return flux leg and the armature.

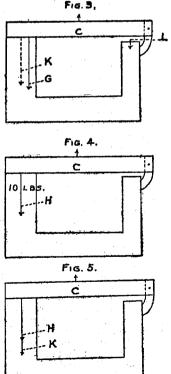
"Now it is true, in all probability, that if you consider the instant of time when there is a pull due to the main wound coil on the business end and on the return flux pole, the resultant of those two pulls will be somewhat to the side of the center of the business end, but what effect does this have on the magnet or the operation thereof? Look at the sketch as shown below. It may be taken to represent defendant's magnet. When the main coil flux is present, it will produce a pull indicated by K, in the center of the main pole, and a very small flux and pull L at the return flux pole. The resultant of these two pulls, we will say, is at G, shifted a little to the right of the center (in the Cutler-Hammer suit on a similar structure Prof. Sheldon admitted that the resultant of these two pulls shifted 33/100 of an inch on a 60 cycle 220 volt circuit, and 39/100 of an inch on a 30 cycle 110 volt circuit). Now look at Fig. 4 of the sketch. That is supposed to represent the pull exerted by the shading coil when the main coil flux is zero. Obviously the pull exerted by the shading coil can never be as large as that produced by the main coil. Consequently, the amount of pull exerted by the shading coil determines the chattering point of the magnet, and therefore determines the maximum useful work done by that magnet. Consequently, even if we threw away the pull L on the return flux pole, there would still remain the larger pull K in the center of the main pole, and the magnet would operate precisely as it does at present, so far as the useful work or the chattering point is concerned. In other words, the slight pull L at the return-flux pole (although it may raise the pull-off point a pound or two)

has absolutely nothing to do with the chattering point or the useful work of the magnet. Therefore, so far as the work of the magnet is concerned, it is all done by the out-of-step and substantially centrally located pulls H and K on the main pole or business end, as indicated in Fig. 5 of the sketch."

Figs. 3, 4, and 5, referred to, are as follows:

This is a strong argument and almost convincing. We, in substance, get a result which is substantially the equivalent of Lindquist. It is neither a prior art structure nor a prior art operation. It seems to me it is one not described by Lindquist or an equivalent covered 10 Las by the claims of the patents. In this case, on the motion to bring structures A to G, inclusive, under this decree, I held ([D. C.] 217 Fed. 583) that all were infringements. This was before the cross-examination of the witnesses. On going over the briefs of counsel and all the evidence I am constrained to modify that holding and hold structures A to E, inclusive, infringements, but that structures F and G, do not in-

The order or decree will be in accordance herewith.



MARCONI WIRELESS TELEGRAPH CO. OF AMERICA v. KILBOURNE & CLARK MFG. CO.

(District Court, W. D. Washington, N. D. February 11, 1916.)

No. 71.

PATENTS \$\igsigma 305\to Suits for Infringement\to Enjoining Suits Against Customers of Defendant.

Where the owner of a patent has brought suit against the manufacturer of an alleged infringing device, in which the questions of validity and infringement are at issue and ready for hearing, such issues should be determined therein, rather than in suits against purchasers of the device, and until they are heard the court may properly enjoin complainant from instituting and prosecuting widely scattered suits against customers of defendant, which it is morally bound to defend, especially when complainant is a strong corporation and defendant a comparatively weak one, and there is evidence tending to show that one purpose of such suits is to injure defendant's business and cause it unnecessary expense.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 499; Dec. Dig. \$305.]

In Equity. Suit by the Marconi Wireless Telegraph Company of America against the Kilbourne & Clark Manufacturing Company. On application by defendant for temporary injunction. Granted in part.

Sheffield & Betts and James J. Cosgrove, all of New York City, and Peters & Powell and E. C. Hughes, all of Seattle, Wash., for complainant.

Donworth & Todd and E. L. Skeel, all of Seattle, Wash., for defendant.

NETERER, District Judge. On August 14, 1915, suit was filed by complainant against the defendant to enjoin the infringement of two patents, issued August 16, 1898, and June 24, 1904, respectively, and for an accounting, profits, gains, and advantages, and assessing of damages. It is alleged that the defendant, without license of the plaintiff, manufactured, sold, installed, caused to be used, and is still manufacturing, selling, installing, and causing to be used, in this district and elsewhere within the United States, devices, structures, or wireless telegraph apparatus or system, having or embodying in one and the same unitary device the inventions and subject-matter claimed in the letters patent of the complainant. Motion was made for a preliminary injunction, but this, after several continuances, was not pressed, the court indicating that the cause could be assigned for early trial. The defendant filed its answer, in which it denied infringement, and thereafter, on the 1st of December, filed an amended answer to the bill of complaint, in which issue was taken upon the contention of the complainant, and the patents of the complainant attacked. On the 21st of January a supplemental answer, counterclaim, and petition for affirmative relief was filed, in which it is stated, in substance, that since the commencement of the action the complainant has brought three suits against customers of the defendant who have procured from the defendant and are using wireless telegraph apparatus; said suits being commenced in the United States District Court for the Western District of New York and the Eastern District of New York, and in this district, respectively, and then alleges, in substance, that these suits were commenced for the purpose of annoying and harassing the customers of the defendant, and with a view of destroying its business and "affecting and extending the attempted monopoly on behalf of complainant to gain control of all wireless telegraph apparatus in the United States and foreign countries," and alleges that the complainant is threatening many other suits in the various districts of the United States court, and that such suits are not begun in good faith, but solely for the purpose of oppressing the defendant, and that unless the complainant is restrained from prosecuting further suits and the pending actions are suspended until the issue as to infringement can be determined in this case, the defendant will, by such oppression, be ruined. The complainant has replied, denying that it has in any way wrongfully abused its right, and denying all of the material allegations of the petition. Upon the presentation of this petition, a preliminary injunction was issued, and a show-cause order directed to the complainant to show cause at a stated time why the supplemental answer and petition should not be permitted to be filed and the plaintiff enjoined as prayed for. This matter is now presented upon the petition of the defendant for a temporary injunction.

I think the objection of the complainant to the filing of the supplemental answer should be denied. I think this is permissible under equity rule 34 (198 Fed. xxviii, 115 C. C. A. xxviii). The conceded facts upon the presentation of this motion are that the defendant has been engaged in the manufacture and sale of radio telegraph apparatus for something over one year; that it is doing a growing and profitable business, and has in its employ from 35 to 40 men; that the business of the defendant does not as a rule enter into new avenues of trade, but invades that of the plaintiff; that the complainant does not sell wireless telegraph apparatus, but only leases the same under contract running for a term of years; that the defendant sells outright apparatus manufactured by it; that there is in the shipping world at the present time a great demand for wireless telegraph apparatus, and the filling of such demands constitutes a valuable and profitable business: that the defendant sells on better terms than are afforded by the complainant, and therefore greatly encroaches upon the business of the complainant; that the complainant has erected and is now maintaining 54 land or shore stations located along the Pacific Coast as far north as Alaska, and along the Great Lakes, and along the Atlantic Coast as far south as Florida; that these stations have been erected and acquired at a cost of something over \$260,000; that the complainant maintains a force of 110 operators at these shore stations, and has divided these various shore stations into 15 divisions and subdivisions, with headquarters in various designated places, where it employs approximately 35 additional men; that the cost of operating these stations amounts to approximately \$125,000 a year; that the complainant company is required to receive messages from whatever source transmitted; that, after commencing this action, three other suits were commenced by complainant, one in the Eastern and one in the Western district of New York, and one in this district.

It further appears that a dedimus potestatem was issued for the purpose of taking the depositions of two important witnesses on the part of complainant in New York last December. Counsel for the defendant was advised that it would not be convenient to take the depositions at the time named. Counsel for defendant, however, was present in New York at the time, saw counsel for the complainant, and suggested the taking of the depositions. Counsel for complainant stated that he was not ready to take the depositions. The cause was assigned for trial at a time agreeable to both sides; application was made by complainant for a postponement of the trial to a later date, and several continuances were had, and the cause finally assigned for trial on the 23d of the instant month. Application is now made for a continuance, and one of the reasons for continuance is the absence of the witnesses whose testimony was to be taken by deposition and another witness. It appears that, on the day the last continuance was granted, application was made to one of the District Courts in New York, where the other cases were pending, for a preliminary injunction, and such a showing was made that a preliminary injunction was issued, and thereafter a temporary restraining order granted on default of the defendant, after show-cause order had been served upon one of the users of defendant's apparatus. One of counsel for the defendant was in the city of New York and saw and conversed with parties representing complainant within a few days prior to application for temporary injunction, but no intimation was given to the attorney that the injunction would be sought, and no opportunity afforded to the defendant to arrange for representation at the hearing. Upon the granting of the temporary injunction, without resistance, the plaintiff caused clippings from the press to be reproduced upon a circular with prominent headline, "Infringement Wireless Apparatus to be Removed from Steamship by Order of Court," which headline was surrounded with a heavy, black line, arrow-shaped end pointing to the press clipping, and sent to the Alaska Packers' Association, San Francisco, Cal., and others. At the bar it was stated by the plaintiff that not to exceed 100 of such copies had been printed and used. These clippings indicated that after a hearing the court had found in favor of complainant as against defendant's appliances and ordered the removal of its appliances. Application was also made to Judge Hazel at Buffalo, N. Y., before whom the other Eastern case is pending for an injunction, which was to be heard on the 3d of February, but on account of the pendency of this motion, was postponed until the 14th of this month. The defendant contends that the complainant is about to bring many suits in different districts in the United States. The complainant, at bar, said that only two suits are in contemplation, one at Portland, Me., and one, possibly, at Chicago, There are other circumstances developed, but not in themselves of sufficient importance to be specifically set out.

The primary and fundamental issue, the foundation of each of the 235 F.—46

suits pending, as well as those contemplated to be brought, is the validity of complainant's patents, or infringement by the defendant, if such patents are valid. The record shows that one of the patents of complainant expired by limitation within a few days after the filing of the complaint. If the complainant's patents are not valid, or not infringed, no cause of action could be raised against any user of defendant's apparatus; and yet, if suits were prosecuted in different courts from Portland, Me., to Seattle, Wash., before that issue is determined, by a strong plaintiff, a comparatively weak defendant would be driven from the field, not by the rule of right, but rather by the power of might. The issue involving the validity of a patent or infringement should be litigated between the patentee and the principal infringer, when such parties are before the court, and such suit, as stated by Judge Quarles (Commercial Acetylene Co. v. Avery Portable Lighting Co. [C. C.] 152 Fed. 642), should be regarded as the parent suit, where the main issue, for obvious reasons, should be tried. The plaintiff, the patentee, has commenced this action against the defendant, the manufacturer, the principal infringer, in this court. The case is ready for trial and the business of the court accommodated to its trial at this time. It is very apparent that if the trial of this cause is delayed, and the plaintiff, perchance, brings suits in Portland, Me., as contemplated, and at Chicago, Ill., that a great hardship would be placed upon the defendant, who is morally bound to protect its production, and it presents a situation which strongly appeals to the conscience of a chancellor, and as strongly appeals the right of the plaintiff to have its invention protected and saved from infringement by any one, and all of its rights guarded against invasion. There is no question as to a patentee's right to pursue in good faith every infringement; but when the parent suit is at issue and assigned for immediate trial, and the defendant is a small concern, a little more than a year old, whose business, as shown by the record, must necessarily be limited, shall it be said that justice requires that this defendant prepare to meet, in sundry subsequent suits distributed throughout the various districts from Portland, Me., to the city of Seattle, the identical issue which is presented in this forum, or permit the cases to go by default, when the matter can be determined immediately in this suit, and before such suits could be pressed to final hearing? Equity and good conscience will not permit this issue to be spread over 6,000 miles of territory and in various jurisdictions, unless for good cause, and no good reason is made to appear. Foster's Federal Practice, § 269; Birdsell v. Hagerstown Agr. Imp. Mfg. Co., 1 Hughes, 64, Fed. Cas. No. 1,437; Ide v. Ball Engine Co. (C. C.) 31 Fed. 901; Commercial Acetylene Co. v. Avery Portable Lighting Co. (C. C.) 152 Fed. 642: Commercial Acetylene Co. v. Avery Portable Lighting Co. (C. C. A. 7th Cir.) 159 Fed. 935, 87 C. C. A. 206; Dittgen v. Racine Paper Co. (C. C.) 164 Fed. 85, at page 89; Commercial Acetylene Co. v. Avery Portable Co. (C. C.) 166 Fed. 907; Atlas Underwear Co. v. Cooper Co., 210 Fed. 347, at pages 349, 350; Paterson v. United States, 222 Fed. 599, at page 643, 138 C. C. A. 123; Stebler v. Riverside Heights Co., 211 Fed. 985; Stebler v. Riverside Heights Co. (C. C. A. 9th Cir.) 214 Fed. 550, 131 C. C. A. 96, L. R. A. 1915F, 1101; National Cash Register Co. v. Boston Cash Indicator Co. (C. C.) 41 Fed. 51.

My attention has been called to Sherman, Clay & Co. v. Searchlight Horn Co. (C. C. A., this Circuit) 225 Fed. 498, 140 C. C. A. 539, as modifying the holding in Stebler v. Riverside, etc., Co., 214 Fed. 550, 131 C. C. A. 96, L. R. A. 1915F, 1101, affirming the District Court, 211 Fed. 985. In the Sherman, Clay & Co. Case, the manufacturer had not been sued and was unknown, and the court held that the defendant and the Victor Company were joint tort-feasors, and in effect said that it was of no concern to Sherman, Clay & Co. whether the patrons of the Victor Company were harassed or not, and the same issue was not presented in the Sherman-Clay Case as was at issue in the Victor Co. Case referred to in the same decision. That matter had already been before the Circuit Court of Appeals in a former case, where damages had been recovered in a law action for infringement, and on review for the granting of a temporary injunction in that case. In this case all the issues in pending and threatened suits are in issue profits, gains, advantages, and damages for manufacturing, selling, installing, and causing to be used—and the complainant, having elected its forum for redress of infringement of these several rights, cannot, under the facts in this case, be permitted to cause the same issue to be raised in subsequent suits in other jurisdictions. Judge Wolverton, who wrote the decision in the Sherman-Clay Case, sat with the Court of Appeals in the Stebler Case, and I think the Sherman-Clay Case fully supports the decision in the Stebler Case. Judge Sanborn, who sat with the Court of Appeals affirming Judge Quarles' decision, likewise, in a subsequent case, Kryptok Co. v. Stead Lens Co., 190 Fed. 767, 111 C. C. A. 495, 39 L. R. A. (N. S.) 1, distinguishes with relation to the right of recovery, but does not take from the former holding of the Circuit Court of Appeals, 159 Fed. 935, 87 C. C. A.

Time forbids an analysis of the voluminous authorities cited by plaintiff. An examination of them does not show any necessity, as no fault can be found with the law in the main, but many have no application to the facts in this case. I think the reason given by Judge Quarles and Judge Wellborn, which has the indorsement of the Courts of Appeal of the respective circuits, is the better reason, where there is a contrary view expressed by any of the judges in other districts. I think the plaintiff should be enjoined from prosecuting, or threatening to do so, suits against any vendee of the defendant for use or sale of the radio wireless telegraph apparatus made by the defendant, and enjoined from prosecuting the suit against the city of Seattle, pending in this jurisdiction, until the determination of this suit. As to the suits pending in other jurisdictions, the matter will be left with the discretion of Judge Hazel and Judge Veeder, before whom, respectively, those suits are pending. The rights of all parties, I am sure, will be conserved by such course.

The purpose of an injunction being to keep the status quo of the parties as nearly as possible until the issue can be determined, this order will be limited to all apparatus sold and installed at this time;

the order not to affect apparatus sold and installed after the entry of this decree, as it would be unfair to tie the hands of plaintiff and permit the defendant to sell its apparatus, displacing the apparatus of the complainant. This order will be on the condition that the defendant, within ten days, will file a bond in the sum of \$5,000, with surety to be approved, for the payment of any damages that may be adjudged against the defendant in this suit by reason of the entry of this order.

The motion of plaintiff for postponement of day of trial will be

granted, and a continuance be had to March 13th.

THACHER v. BOARD OF SUP'RS OF POLK COUNTY, IOWA, et al.

(District Court, S. D. Iowa, C. D. September 12, 1916.)

1. PATENTS \$\sim 312(3)\$—Prior Patents—Evidence of Anticipation of Intervention.

I'roof to show that a patentee's invention antedated an earlier patent must be satisfactory and convincing, if not beyond a reasonable doubt, in order to warrant relief.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 548, 549; Dec. Dig. $\Longrightarrow 312(3)$.]

2. Patents ←328—Construction—Infringement—Improvement in Concrete Arches.

The Thacher patent, No. 617,615, for an improvement in concrete arches, consisting of a combination with abutments and a concrete arch spanning intervening space, of a series of metal bars in pairs, held, in view of a prior patent, proceedings in the Patent Office, and the self-imposed limits in the patent and the claims to a combination in which the bars of each pair are physically and mechanically independent of each other, and, as so limited, not infringed.

3. PATENTS == 289-ENFORCEMENT-ESTOPPEL.

Where a patent for an improvement in concrete arches was issued in 1899 and the patentee, though in close touch with the progress of concrete construction, thereafter allowed municipalities and individuals to proceed in good faith to erect structures which he subsequently claimed infringed his patent, but brought no suit for infringement until shortly before the patent expired, his laches bar recovery, after the expiration of his patent, against a municipality which, by reason of his acquiescence, erected a structure that the patentee asserted was an infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 467-469; Dec. Dig. €=289.1

In Equity. Bill by Edwin Thacher against the Board of Supervisors of Polk County, Iowa, and others. Bill dismissed.

Frank H. Drury, of Chicago, Ill., and E. J. Kelly, of Des Moines, Iowa, for complainant.

Wallace R. Lane, of Chicago, Ill., and George Cosson, Henry E. Sampson, Henry & Henry, and Geo. A. Wilson, all of Des Moines, Iowa, for respondents.

WADE, District Judge. This case involves the validity and infringement of United States patent No. 617,615, issued to complainant, Edwin Thacher, January 10, 1899, relating to concrete arches for

bridges, or vault covering, or for spanning openings in building construction.

[1] I do not pass upon the validity of the patent in so far as the same was affected by the prior art, or previous publication, except as the same is affected by the Von Emperger patent. I agree with Judge Rose, in Thacher v. Mayor, 219 Fed. 909, that the patent to Von Emperger embodies the idea upon which the plaintiff procured his patent, and I hold that the Von Emperger invention was an anticipation of the patent granted to the plaintiff.

I also hold that the proof furnished to the Patent Office to establish the fact that the plaintiff's invention antedated the Von Emperger invention is not, in view of the evidence in this case, sufficient to justify a court in sustaining the claim of the plaintiff. Such proof must be at least "satisfactory and convincing," "if not beyond a reasonable doubt." Brooks v. Sacks, 81 Fed. 403, 26 C. C. A. 456; Torrey v. Hancock, 184 Fed. 61, 107 C. C. A. 79. The proof in this case is not "satisfactory" nor "convincing." It is too uncertain to justify a court in setting aside letters patent, solemnly issued by the government. So that, in my view, the patent to plaintiff is invalid because anticipated by the Von Emperger invention described in his patent. In truth I am convinced that the only invention upon which the plaintiff procured a patent was developed by him, not prior to the Von Emperger patent, nor even at the time he filed application for his own patent, but that it really was invented by him, if at all, under the spur of repeated rejections by the Patent Office of his application for a patent upon an invention entirely different from the one for which patent finally issued.

[2] I agree with Judge Thomas in Thacher v. Transit Construction Co., 228 Fed. 906, that the Thacher patent is specifically limited by the language "each bar of a pair being independent of the other." The proceedings in the Patent Office, and the proof as to the prior art, clearly convince me that it was only by reducing his claims to this specific description that plaintiff ever procured a patent; in fact, a broader construction would, in my judgment, render the patent void because of the prior art, aside from the Von Emperger patent. But whether it would or not, the proceedings in the Patent Office clearly make effective the self-imposed limitation that the bars, to come within the scope of the patent, must be each "independent of the other." To quote from Judge Thomas in Thacher v. Transit Co. Case, supra:

"Moreover, the proceedings in the Patent Office, preceding the issue of the patent in suit, confirmed the defendant's contention that it was the feature of physical and mechanical independence or severance which led the Patent Office to allow the patent. The claims presented in the original application, and subsequently in the prosecution of the claim, were repeatedly rejected by the Patent Office, and the Milliken patent was cited as a reference, and the patent was finally allowed only when the claims were put in their present form, with the limitation in each claim of 'each bar of a pair being independent of the other.' I cannot accede to the plaintiff's contention that this was a broadening of the claims. On the contrary, I hold that it was not. It was manifestly narrower, and was accepted by the patentee as a condition precedent to the grant of the patent."

Under this construction of the plaintiff's patent, even if it were valid, there was no infringement in this case. The bars used in the constructions in issue are not "each independent of the other." The bars are part of a rigid, or semirigid, structure, consisting of longitudinal and cross-bars and lattice bars, all firmly bound together by wire ties at intersections. As Dean Marston expresses it:

"They are tied together by the transverse bars and by the lattice bars in such manner that they must act together."

So that the very element of independence of each bar, upon which Thacher procured his patent, is not present; nor are the cross-bars and ties a mere attempt to evade. The cross-bars, lattice bars, and ties serve a purpose. This purpose is expressed by Dean Marston in part as follows:

"A. The longitudinal bars in the model served directly to take the compressive and tensile stresses in the concrete and to assist in connection with the strains and stresses when the arch deflects after the manner of a beam. The cross-bars, including the transverse bars and also the lattice bars, serve to tie the reinforcing rigidly together and transmit the stress from one bar to another so as to make it act in monolithic manner. The cross-bars and the transverse bars also serve to hold the reinforcing rigidly in place during construction and during the hardening period of the concrete. Q. In that connection, will you state whether or not the longitudinal bars are independent of each other, or not? A. They are not in this design. Q. For what reason? A. They are tied together by the transverse bars and by the lattice bars in such manner that they must act together. Q. If I understand you correctly, the whole structure is tied together with the transverse bars, and longitudinal bars and the wiring, and the longitudinal bars act as a unitary structure? A. Yes. Q. And all parts act simultaneously when actually in the bridge? A. That is true. These cross-bars assist in making it act that way."

Dean Marston further says:

"Q. That bridge was constructed under the Melan patent, not the Thacher? A. Not the Thacher patents. Fourth. The longitudinal bars and the other bars in this structure will have better adhesion to the concrete and show greater efficiency by reason of being held rigidly in place during the period of hardening of the concrete. If at the time of construction these cross-bars should be removed as soon as the concreting reaches them, then as the concreting in the next section proceeded, the longitudinal bars in the soft concrete would be subject to displacement and movement until the concrete hardened, and this would injure their adhesion to the concrete and possibly push them out of the place in which they were intended to be according to the design. Fifth In designing reinforced concrete bars which are subject to bending stresses, such as beams, there are usually shearing stresses, and it is a standard practice in designing reinforced concrete beams to use metal stirrups at right angles to the longitudinal reinforcing to keep the concrete from The combination of the shearing stresses and the longitudinal cracking. tension stresses cause a tension stress in an inclined direction, and these bars are intended to prevent cracking and shearing therefrom. Sixth. Concrete is an elastic material, and when it is deformed in one direction, it tends to deform in every direction at right angles. When compressed, it tends to swell out in every direction at right angles to the line of compression. If it could be restrained in every direction at right angles, it would be much stronger to resist deformation. Any reinforcing attached to the longitudinal rods in directions at right angles to them will have some effect upon the stresses in those rods, owing to the restraint which has been produced in the lateral deformation of the concrete.'

I am convinced upon the whole testimony that the cross-bars and lattice bars and ties have functions to perform. I cannot agree with the apparent theory of Mr. Thacher as a witness that these serve only the purpose of maintaining "independent" bars in place during the construction. If anything were necessary to convince me that the construction used by the defendants does not consist of pairs of bars, each bar "being independent of the other," I find it in the letters written by Thacher himself through many years, while a member of the Concrete Steel Engineering Company, in which he repeatedly recites the fact:

"The Melan system, as we have always understood it, [words not shown upon copy] stiff ribs, whether I beams or 4 angles latticed. The Von Emperger system can use either stiff ribs or bars for reinforcement. It was gotten out as an improvement on the Melan system, and really is an improvement, as the ribs are firmly connected together by radial and diagonal bracing."

In one place he says:

"The stiff ribs, built according to the Von Emperger system, are much superior to any bar system, not excepting even my own."

These appeals by Thacher for use of the Melan and Von Emperger types in preference to his own, and the failure to use the strictly independent bar system in any construction, so far as the record discloses, convinces me that Thacher himself recognizes that cross-bars and ties and lattice bars used with longitudinal bars have a function and a purpose in concrete construction; in fact it is quite apparent from the record in this case that, limited strictly to the bars independent of each other, in no manner connected, or held together, or held apart, the Thacher invention is not, and has not been, of practical use.

Without further discussion of the evidence, I am convinced that there is no infringement in this case.

[3] I am also of the opinion that the plaintiff is estopped by laches from asserting any such construction of his patent as would bring the

structure involved in this case within its meaning.

This patent was issued in 1899; it expired before this case was tried. During all the years from the issuance of the patent up to the present, the plaintiff has been in close touch with concrete construction all over the United States. For years bridges and other structures have been erected which come as near infringing the plaintiff's patent as do the structures in controversy, and no action was ever brought by the plaintiff until 1913 or 1914—14 or 15 years after the issue of his patent. The plaintiff permitted individuals and municipalities to proceed, apparently in good faith, with private and public work, and made no protest until a comparatively short time before his patent expired. In fact I am convinced that the plaintiff's present view of the construction of his patent as including structures such as those in controversy is a discovery made by him or some one else within recent years. I do not believe, during all these years, when he quietly allowed those he now claims to be infringers to proceed without asserting any right, that he understood or believed that these structures came within the claims of his patent. A court of equity should not now proceed to a decree which would enable the plaintiff to pursue individuals, cities, counties, and states with suits for damages for the infliction of a wrong which he, by his acquiescence, invited. As Judge Ray said, in Safety Car Heating Co. v. Consolidated Car Heating Co. (C. C.) 160 Fed. 476:

"There can be no question that the complainant knew just what defendant was doing. There was no possible concealment or covering up. When those devices went into use they were plain to see, and open to inspection by all the world, and it is impossible to suppose that complainant did not keep its eye on what defendant was doing. I do not think the complainant ever expected to rely on the Dixon patent as a valid patent, or as broad enough to cover the defendant's construction. The following cases are sufficiently in point, and all are directly applicable: Lane & Bodley Co. v. Locke, 150 U. S. 193, 14 Sup. Ct. 78, 37 L. Ed. 1049; Richardson v. D. M. Osborne & Co., 93 Fed. 828, 36 C. C. A. 610; McLaughlin v. People's R. Co. (C. C.) 21 Fed. 574; Woodmanse & Hewitt Mfg. Co. v. Williams, 68 Fed. 489, 15 C. C. A. 520; Meyrowitz Mfg. Co. v. Eccleston (C. C.) 98 Fed. 437; Starrett v. Stevens Arms Co. (C. C.) 96 Fed. 244—all patent cases; Speidel v. Henrici, 120 U. S. 377, 387, 7 Sup. Ct. 610, 30 L. Ed. 718; Abraham v. Ordway, 158 U. S. 416, 15 Sup. Ct. 894, 39 L. Ed. 1036; Penn Mutual Life Ins. Co. v. Austin, 168 U. S. 685, 697, 18 Sup. Ct. 223, 42 L. Ed. 626; Gildersleeve v. N. M. Co., 161 U. S. 573, 16 Sup. Ct. 663, 40 L. Ed. 812; Gill v. U. S., 160 U. S. 426, 16 Sup. Ct. 322, 40 L. Ed. 480."

In the language of Judge Ray, I do not think the complainant ever expected to rely on the Thacher patent as a valid patent, or as broad enough to cover the defendant's construction.

There will be a decree, dismissing the plaintiff's bill, and judgment

against the plaintiff for costs.

Counsel for defendants will prepare decree, and submit to counsel for plaintiff, who will have ten days in which to file objections to the form thereof.

THE T. W. WELLINGTON.

(District Court, E. D. New York. September 5, 1916.)

SHIPPING \$\infty 209(1)\to Limitation of Liability\to Time of Taking Proceedings\to Conditions.

The owner of a vessel may maintain proceedings for limitation of liability after recovery of a judgment at law against him on the claim against which limitation is sought, and even after an appeal has been taken and a supersedeas bond given; but in such case he will be required, in addition to the surrender of the vessel, to pay the costs of the trial and appeal, and an amount equal to the deterioration in value of the vessel since the claim originated, with interest on the value of the vessel from the date of the judgment.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646, 662; Dec. Dig. $\Longleftrightarrow 209(1)$.]

In Admiralty. Petition of David J. Conroy, owner of the steam tug T. W. Wellington, for limitation of liability. On motion for restraining order against claimant. Granted on conditions.

Foley & Martin, of New York City, for libelant. Theodore F. Kuper, of New York City, for claimant.

CHATFIELD, District Judge. The petitioner in this proceeding to limit liability was the defendant in an action in the state court in which judgment was obtained for the sum of \$1,251.12, upon the 28th day of January, 1916, for an injury received December 23, 1913. An appeal was taken from the judgment, which was based upon a claim for personal injuries, but no security given, so as to stay execution pending the appeal. Upon the judgment debtor's promise to give such security, the issuance of execution was delayed. Subsequently the bond was given, but the papers on appeal were not completed, and again the plaintiff and judgment creditor delayed the making of a motion to dismiss the appeal upon the promise of the judgment debtor to pay up the judgment. Thereafter the judgment debtor instituted the present proceedings to limit his liability, under sections 4283 and 4285 (Comp. St. 1913, §§ 8021, 8023), to the value of the boat, and has surrendered the boat, which at the time of surrender has been reported to be worth only about \$500. The boat was transferred to a trustee on July 18, 1916.

It has been held in the case of The Passaic (D. C.) 190 Fed. 648, that a surrender upon a petition to limit liability, at a date long after the liability was incurred, could only be allowed where the boat had not depreciated beyond ordinary wear and tear. In other words, if the owner surrendered the boat, or desired to substitute a bond for the same, the amount of the surrender must equal the fair value for the boat at the time when the liability was incurred. As was said in the case of The Ticeline, 221 Fed. 412, 137 C. C. A. 207, this liability was in the form of a maritime lien accruing at the time of the accident. The owner of the boat has no right to limit his responsibility by surrendering the property, and at the same time use up that property to his own profit. See The Capt. Jack (D. C.) 169 Fed. 455, holding that a petition to limit liability will be dismissed if the entire "vessel" is not surrendered.

In a case where the boat is sold, a petition to limit liability should not be granted, if the surrender of the boat would deprive the creditor of the right to obtain the fair value of the boat as it was at the time when the owner of the boat first had the election of remedies. It has also been held that limitation can be had where but one claim is presented. White v. Island Transp. Co., 233 U. S. 346, 34 Sup. Ct. 589, 58 L. Ed. 993; The Benefactor v. Mount, 103 U. S. 239, 26 L. Ed. 351. But the total liability must exceed the value of the boat. The Defender (D. C.) 201 Fed. 189.

The boat may be surrendered while liability is contested, and a bond given as security for carrying on litigation. The Benefactor, supra. A judgment may have been obtained before hearing of or application for the limitation, and the court may prevent the parties from attempting by execution or otherwise to collect any moneys recovered by them beyond the amount awarded in the said proceedings. The Benefactor, 103 U. S. 244, 26 L. Ed. 351; In re P. Sanford Ross (D. C.) 196 Fed. 921 (reversed on other grounds 204 Fed. 248, 122 C. C. A. 516); The Capt. Jack (D. C.) 169 Fed. 456.

In Gleason v. Duffy, 116 Fed. 298, 54 C. C. A. 100, the Circuit Court of Appeals agreed with the court below, which held that the peti-

tioner, Gleason, could have a decree restraining a judgment creditor, Duffy, from collecting his judgment and from prosecuting the suit upon the appeal bond. The surety was not before the court, but the action against the surety was brought to the court's attention. The Circuit Court of Appeals said that the proceeding could be instituted after the "rendition of a judgment at common law," but should be "seasonably instituted," so as to allow proper determination of the "extent" of liability, citing Transportation Co. v. Wright, 13 Wall. 104, 20 L. Ed. 585. It therefore made a condition of the limitation payment of costs in the trial court and on appeal in the damage action.

So, also, in Monongahela River Consol. Coal & Coke Co. v. Hurst, 200 Fed. 711, 119 C. C. A. 127, costs and interest on the value of the vessel, etc., from the time when execution could have been issued, were allowed in a case holding that an appeal and the giving of a bond post-poned only the time when limitation could be had. The court said:

"We think it the better view that the obligation of the surety was only coextensive with that of the principal, that the liability incurred under the supersedeas bond was impliedly subject to the enforcement of the limited liability statute, and would be itself superseded, at lease pro tanto, by the decree limiting such liability. We see no merit in the proposition that the surety can be held to full liability, notwithstanding the discharge of the principal. Decisions based upon the express provisions of the Bankruptcy Act are not in point."

But in all these cases the liability which is to be limited is that for the claim or claims admittedly liens against the boat itself. Under circumstances shown in the present case, the owner of the boat did not elect to surrender the boat while the matter rested in the condition of a lien claim. Nor did he file his petition to limit liability during the time that the lien claim was protected from collection by the operation of law. He delayed until, in the place of the maritime lien, the creditor had a judgment and a valid contract to pay this judgment as a personal obligation, based upon sufficient consideration of forbearance, as well as the bond of a surety. In the meantime the petitioner had also used the boat and received the advantage from such activities as caused unusual wear and tear. He has sought to throw upon the judgment creditor the loss which the boat has received through apparently unexpected deterioration.

Under these circumstances, a petition to limit liability cannot be presented for the consideration of a court applying a statutory remedy under the rules of equity, unless the petitioner can put the other parties to the action in the same position in which they would have been if he had proceeded when first called upon to elect as to his course of action. It is evident that the only way in which he could do this is to pay the costs of the trial and of appeal, and such amount as may be found to represent the difference in value at the time of the accident, with interest on the value of the boat from the date of judgment.

The absence of the surety from this proceeding is of no importance, in this case, as the creditor is before the court, and a restraining order against him will avoid the seeming violation of the statute prohibiting any interference with the state court in the conduct of its own trials.

Motion granted upon above terms.

DAVIS v. SOUTHERN PAC. CO.

(District Court, N. D. California, Second Division. July 15, 1916.)

No. 15710.

1. Contracts \$\infty 108(1)\$—Enforcement—Public Policy.

The courts will not enforce a contract opposed to public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 498; Dec. Dig. $\implies 108(1)$.]

2. CARRIERS \$\ightharpoonup 35-Agreement to Refund Local Freight Charges-Violation of Interstate Commerce Act.

A railroad's agreement, offered to all California hop growers, if they would ship by its line, to reimburse them for all local freight charges necessary to transport the hops to shipping points, and also storage charges, and, if the growers would use the road's rail and water route, to reimburse them for marine insurance, was violative of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379, § 6, as amended March 2, 1889, c. 382, 25 Stat. 855, § 1 (Comp. St. 1913, § 8569), and of the Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (Comp. St. 1913, §§ 8597–8599), prohibiting rebates from published tariffs, concessions, or discrimination by common carriers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 94; Dec. Dig. \$35.]

3. Courts \$\iff 96(1)\$—Decisions of Supreme Court—Effect in District Court.

A decision of the United States Supreme Court is controlling on the District Court in determining whether a railroad's contract with hop growers to transport hops at a lesser rate than the road's published tariff is violative of the Interstate Commerce Act.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 327, 334; Dec. Dig. \Longrightarrow 96(1).]

4. CARRIERS \$\infty 35\$—Regulation of Rates—Contracts—Statutory Prohibition.

A contract by a carrier contrary to express provision of law prohibiting rebates, concessions, and discrimination, and opposed to public policy as declared by the supreme legislative authority of the country, cannot be enforced in any court.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 94; Dec. Dig. ©=35.]

5. Contracts \$\infty\$ 138(1)—Illegality.

With respect to unperformed features of a contract illegal as contrary to express provision of law and opposed to public policy, the court will leave the parties where it finds them.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681, 687; Dec. Dig. ⇐ 138(1).]

Suit by Ralph Davis against the Southern Pacific Company. Judgment for defendant.

Plaintiff, as the assignee of Philip Wolf & Co., C. C. Donovan, and Herman Klaber & Co., brought suit against the Southern Pacific Company for the total sum of \$4,621.16, with legal interest thereon from appropriate dates, under the terms of alleged agreements had and made with the defendant, that it would pay the above aggregate sum to plaintiff's respective assignors.

Counsel for plaintiff in his brief states that: "The following facts stand proved in this case either by uncontradicted testimony of the witnesses, adducted at the trial thereof, or by the admissions of the pleadings:

"Defendant corporation, during the period within which the claims of plaintiff's assignors arose, and long prior thereto, and all antecedent to the

passage of the so-called Hepburn Act, offered to and did agree with all dealers in hops in the state of California, without distinction or discrimination, firstly, that upon all interstate shipments from points of delivery in California to points east of the Missouri river, and upon full payment of the legal tariff rate therefor, it would reimburse said dealers in the amount of any local freights advanced or paid by them to transport the hops to said points of delivery, together with all proper warehouse and cartage charges incurred in the assembling thereof; and, secondly, that in the event such hops were shipped to Atlantic points, either directly or in transit to Europe over defendant's Sunset route, a rail and water route instead of all rail, it would reimburse said dealers in the amount of the excess insurance charge upon freight shipped by said Sunset route over and above the insurance charge on the same freight shipped all rail.

"It is a proved fact that the defendant corporation, during all the times aforesaid, was engaged in intrastate business, but that all of the hops shipped by plaintiff's assignors were not shipped alone upon defendant's intrastate lines, but also upon the lines of other intrastate railroads.

"It is a proved fact that at all of the foregoing times the Santa Fé Railroad was an independent transcontinental or interstate carrier and a competitor of the defendant corporation, with its California terminal at San Francisco; that said Santa Fé Railroad had no intrastate lines and that said Santa Fé Railroad maintained and established warehouses of its own at different terminal points; and that in competition with defendant corporation, and in furtherance thereof, it made the same offer to and agreement with dealers in hops generally in the state of California upon which the claim of plaintiff is predicated.

"It is a proved fact that the all-rail route from point of origin in California to an Atlantic Seaboard terminal, via defendant's road, required the services of connecting carriers and a consequent division of the freight rate exacted in consonance with the tariff; that the so-called Sunset route was owned entirely by the Southern Pacific; and that said all-rail route via Southern Pacific was in fact a competitor with the defendant corporation's Sunset route in and for the shipment of freight from point of origin in California to points upon the Atlantic seaboard.

"It is a proved fact that plaintiff's assignors Philip Wolf & Co., one of said dealers in hops, did during the years 1905–1906, and prior to the going into effect of the Hepburn Act, make numerous shipments over defendant's line from California to points east of the Missouri river, relying upon and in acceptance of the offer of defendant corporation to reimburse Philip Wolf & Co. in the amount of local charges, cartages and storages by Philip Wolf & Co., expended upon and in the assembling of said shipments at point of delivery to defendant corporation for interstate shipment; that said Philip Wolf & Co. did actually pay the full tariff rate upon all of said shipments; and that the admitted amount paid by Philip Wolf & Co. for such local freights (all necessary intrastate), cartages, and storages was the sum of \$1,342.17, and that claim therefor was duly filed with defendant corporation on the 6th day of March, 1907.

"It is a proved fact that plaintiff's assignor C. C. Donovan (one of said dealers in hops) did, during the period aforesaid and prior to the effective date of the Hepburn Act, ship numerous consignments of hops over defendant's interstate line from California to points east of the Missouri river in reliance upon and in acceptance of the aforesaid offer and agreement of defendant corporation: that said C. C. Donovan did actually pay the full tariff rate upon all of said shipments, and did pay storage charges in the assembling thereof; and that the admitted amount paid by said C. C. Donovan for such storages was the sum of \$941.05, and that claim therefor was duly filed with defendant corporation on or before the 1st day of January, 1907.

"It is a proved fact that the firm of Philip Wolf & Co., plaintiff's assignor, during the period aforesaid, and when said offer and agreement to absorb the excess of insurance charges by defendant's Sunset route over said charges by its all-rail route was in full force and effect, and so generally made to dealers in hops, did ship various consignments of hops over the Sunset route

of defendant to Atlantic ports in transit to Europe, and did pay the full tariff rate therefor; that it did carry insurance upon said consignments; that the amount of the excess premium paid by said Philip Wolf & Co. was the sum of \$570.70; and that claim therefor was made upon and filed with defendant corporation prior to the 18th day of March, 1909.

"It is a proved fact that none of the amounts admittedly due under the

agreements aforesaid have been repaid to plaintiff or his assignors.

"Finally, it is admitted that the aforesaid concession granted all dealers in hops, and plaintiff's assignors in common with them, were not stated in the tariff schedules published by the defendant corporation during the period aforesaid." Italies mine.

The complaint contains three causes of action covering the three different assignments referred to, and allegations of the different causes of action are all substantially in the same form. The ones in the first cause of action ma-

terial to a consideration of the issues presented are as follows:

"That during all the times hereinafter mentioned and until the dissolution thereof as hereinafter set forth, Philip Wolf & Co. was a copartnership, the partners of which were Philip Wolf, Max Wolf, and M. J. Netter, with its principal place of business in the city and county of San Francisco, state of California, and engaged in the business of buying hops from the producers thereof in said state of California and elsewhere and selling said hops to purchasers located in different portions of the United States outside of said state of California and in Europe, and that in and by the terms of said sales said Philip Wolf & Co. was required to transport said hops to the respective places of business of said purchasers outside of said state of California.

"That in addition to said copartnership of Philip Wolf & Co. there were numerous other persons and firms during all the times hereinafter mentioned engaged in the business of buying hops produced in said state of California and in selling the same to purchasers at various points outside of the state of California, and such other dealers also were required to transport said hops to the places of business of their said customers outside of the state of

California and to there deliver them.

"That said defendant was anxious to procure from said Philip Wolf & Co. and said other dealers in hops during the period of time hereinafter mentioned the business of transporting said hops from the state of California to various localities outside of said state and east of the Missouri river and to which localities said Philip Wolf & Co. and said other dealers were required to deliver said hops, as aforesaid; and as an inducement to said Philip Wolf & Co. and to said other dealers to intrust the transportation of said hops between said state of California and points east of the Missouri river to it, said defendant did make the following offer unto them: Said defendant did agree, during all the period of time during which the claims hereinafter specified arose, to and with said Philip Wolf & Co. and all other persons, firms, or corporations in the state of California engaged in a like business, that if said Philip Wolf & Co. and such other dealers would intrust to said defendant, at the regular tariff therefor, for transportation between the state of California and any point east of the Missouri river, the various shipments of hops they were required to deliver east of said Missouri river, it would reimburse said Philip Wolf & Co. and all such other dealers in the amount of any local freights which said Philip Wolf & Co. and such other dealers would advance and pay to transport the hops constituting and embraced in such shipments from the fields in California to points of delivery to said defendant in California, as well as all warehouse charges arising out of the assembling thereof at said points of delivery for shipment, and all cartage charges to and from the warehouses; and did further agree, in the case of hops shipped to Atlantic ports, either directly or in transit to Europe, that if preference were given defendant's Sunset route, which route included water transportation from Galveston, Texas, to divers Atlantic ports, over its all-rail route, it would reimburse said Philip Wolf & Co. and all such other dealers in the difference between the cost of marine insurance and railroad insurance actually expended by said Philip Wolf & Co. and such other dealers.

That said Philip Wolf & Co. did accept the arresaid offer of said defendant and did in pursuance thereof and during the years 1905 to and including

1906, ship numerous consignments of hops over the lines of said defendant from the state of California to points east of the Missouri river, and in connection with said shipments did expend for local freights, cartages, and storages the sum of two thousand and four hundred and nineteen dollars and fifty-four cents (\$2,419.54); and for which amount said Philip Wolf & Co. did make demand upon said defendant for reimbursement in accordance with its said agreement, immediately after the respective disbursements were made and all prior to the 6th day of March, 1907; and that said Philip Wolf & Co. in further pursuance of the said offer of defendant did during the period embraced between the month of September, 1904, and the month of November, 1906, ship various consignments of hops over the Sunset Route of said defendant to Atlantic ports in transit to Europe, and by reason thereof did pay for the marine insurance covering said shipments an excess of five hundred and seventy dollars and seventy cents (\$570,70) over what would have been the cost of insurance in the same amount covering said shipments had they been transported by the all-rail route of defendant; and that at various times subsequent to said payment of said marine insurance and prior to the 18th day of March, 1909, said Philip Wolf & Co. did make demand upon said defendant for reimbursement for said differential by it paid and expended between marine and rail insurance, in accordance with the agreement of said defendant."

Defendant in its answer, among other things, alleged "that it did not agree to transport said shipments from the fields to points of delivery, but did agree to transport said shipments from the railroad station near the fields to the points of delivery; and in this connection, defendant alleges that at the time of the execution of said agreement, defendant was informed and therefore believed that it was lawful to transport said shipments locally, as alleged by plaintiff, without charge therefor, but that subsequently to the execution of said agreement and the movement of said shipments as contemplated thereby defendant was informed and therefore believed and now believes that said shipments could not be moved locally by defendant without charging the full tariff rates provided by its tariffs then published."

Though the defendant company was represented by counsel at the trial it has filed no brief herein in opposition to the claim of the plaintiff; its position is very aptly expressed by its counsel in a letter to the court, in which he says: "You are correct in your assumption that the defendant's attitude is largely one of disinterestedness, and that the Southern Pacific Company is merely desirous of discharging an obligation which it voluntarily assumed."

Jacob Samuels and Oscar Samuels, both of San Francisco, Cal., for plaintiff.

C. W. Durbrow, of San Francisco, Cal., for defendant.

BLEDSOE, District Judge (after stating the facts as above). [1, 2] The legal question presented in this case can be stated in a very few words. It is this: Prior to the so-called Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 584), and under the provisions of the Elkins amendment to the Interstate Commerce Act, was it competent for a common carrier, as an inducement to business, to enter into a valid enforceable contract with its shippers generally to transport freight in interstate commerce at a rate less than that specified in its published schedule of charges? Unless the question be answered in the affirmative, plaintiff is not entitled to recover herein, and this even though defendant be acquiescent toward such recovery, because a question of public policy is involved, and the courts will not lend their aid in the consummation of a judgment which is grounded in opposition to public policy. Beasley v. Texas & Pac. Ry. Co., 191 U. S.

492, 498, 24 Sup. Ct. 164, 48 L. Ed. 274; Harriman v. Northern Securities Co., 197 U. S. 244, 298, 25 Sup. Ct. 493, 49 L. Ed. 739. The determination of this question involves a consideration of the provisions of the Interstate Commerce Act as the same existed at the time of the transaction in question, and as amended by the so-called Elkins Act. Act Feb. 19, 1903, c. 708, 32 Stat. 847 (Comp. St. 1913. §§ 8597–8599). The portions of the statute material are appended in the margin.

- ¹ A portion of an "Act to regulate commerce," approved Feb. 4, 1887, 24 Stat. at L. 379
- "* • Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate drawback, or other device, charge demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." Comp. St. 1913, § 8564.
- 1. A portion of "An Act to Regulate Commerce," approved Feb. 4, 1887, as amended March 2, 1889, 25 Stat. at L. 855.
- " * Sec. 6. That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. * * * And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force. * * * Every common carrier subject to the provisions of this act shall file with the commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said commission of all changes made in the same. Every such common carrier shall also file with said commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any tariffs affected by the provisions of this act to which it may be a party.
- "** * It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the commission in force at the time." Comp. St. 1913, § 8569.
- 1. A portion of the Elkins Act to further regulate commerce, approved Feb. 19, 1903, 32 Stat. at L. 847.
- "* * * Section 1. * * * it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced." Comp. St. 1913, § 8597.

Much of the argument of plaintiff's counsel is devoted to a discussion of the proposition that the contracts of reimbursement relied upon herein did not constitute any "discrimination" and consequently do not contravene section 2 of the act to regulate commerce, and this because of the fact, as claimed by plaintiff and admitted by the defendant, that such contracts were entered into "with all dealers in hops in the state of California, without distinction or discrimination." may be assumed for argument's sake that the aforesaid contracts did not in any wise violate any of the provisions of section 2 of the Interstate Commerce Act, that section, as will be observed, being of the original act of 1887, and having to do only with the general prohibition of discriminations. If, however, it be true, as I am constrained to conclude is the fact, that the contracts in question were inhibited by any one provision of the Interstate Commerce Act and thereby rendered unlawful and invalid, it is idle to inquire or to indulge in academic discussion as to whether or not they were likewise violative of some other provision of the law.

As will be noticed by the excerpts in the margin, the Elkins Act forbad any person or corporation, either to give or to receive any rebate, concession, or discrimination in respect of the transportation of property in interstate or foreign commerce by any common carrier whereby such property should by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as required by the act to regulate commerce. tion 6 of the original act made express provision for the printing and keeping open to public inspection of the schedules showing the rates and fares and charges for the transportation of passengers and property which might be established by a carrier; and it was further provided that such schedules should plainly state the places upon its railroad between which such common carrier would carry property and passengers. It was also provided in the same section that upon the establishment and publication of such rates it should thereafter be unlawful for a common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than was specified in such published schedule then in force. Provision was also made that copies of such schedules should be filed with the Interstate Commerce Commission, and appropriate provision was made providing that changes could be made only upon due notice, etc.

We thus have two plain, unambiguous, and unequivocal declarations by the Congress of the United States in force at the time the contracts in question were entered into, the one in the original Interstate Commerce Act that no carrier should charge or receive from any shipper a greater or less compensation for the transportation of freight than that specified by it in its published charges, and the other in the Elkins Act, that no carrier on the one hand, or shipper on the other, should either give or receive any rebate or concession whereby freight should be transported at a less rate than that named in such published schedules or tariffs.

Reduced to its last analysis, and stated briefly, the proposition of the defendant railroad company in this case, which was made to these shippers, along with others, in order that it might get their business in preference to some other competitive line, was, that in consideration of their shipments from California to the East or to European markets of the products grown on their hop fields, at the rate specified in its published charges as the through rate from California to the Eastern or European markets, as the case might be, it would, on the one hand, reimburse them for all local charges in the way of local freights, cartage, warehouse, and similar charges necessary to transport such freight to the port of San Francisco, and that, on the other hand, if they would thereafter ship such freight over the rail and water route of the defendant company, as contradistinguished from its all-rail route, it would reimburse them for the extra marine insurance made necessary thereby. From whatever angle such a contract may be viewed, the net result of its performance was to enable hops to be shipped from California to the distant markets, through the medium of interstate commerce, at a less rate than that specified by the railroad company as the rate from California to such markets. actual diminution in the rate was to be, of course, the amount necessary to be expended by the railroad company in the reimbursement of the shipper for all the local charges and for marine insurance. this does not constitute a plain and substantial violation of the two provisions of the Interstate Commerce Act last hereinabove referred to, then I am unable to comprehend the meaning of language or to appreciate the force of valid statutory prohibitions.

The point is made, of course, all through the thread of plaintiff's argument, and is countenanced by defendant's counsel, that, because of the fact that it was open to all shippers of hops in Northern California to be the recipients of this bounty from the Southern Pacific Company, in case they saw fit to ship their products over its lines, in consequence, as adverted to hereinabove, there was and could be no discrimination, as that word is employed in the Interstate Commerce Act. In furtherance of that contention it is then urged by counsel

for the defendant that:

"The primary purpose prompting the passage of the Interstate Commerce Act was to afford all shippers equal protection in shipping facilities, and in freight rates, to secure uniformity and reasonability in such rates, and to prevent unjust discrimination in favor of one shipper to the prejudice of others under substantially similar conditions of location and traffic."

It is then said that if no violation of this general purpose is to be observed, no transaction brought under review could be held to be prohibited by such act.

The answer to this contention, however, in my judgment, is that though we may concede for present purposes the general aim and intent of the act to regulate commerce was as stated by counsel, yet it is emphatically obvious that Congress, in determining the most effective means whereby such general aim and intent might be attained, has said, with no qualification, that shipments of the sort under consideration might not be made, save at the rate announced in the pub-

lished tariffs. It will not do then, in the face of this valid congressional declaration intended to secure at all hazards the ultimate aim of the statute, to contend that such ultimate aim having apparently in a particular case been attained, the positive mandate of the statute may nevertheless be laid out of consideration, and that, because, forsooth, no harm has actually been done. It was competent for Congress to provide ways and means whereby uniformity and equality in the matter of railroad rates might be secured to those who were compelled to make use of public utilities. It was also competent for it, in its wisdom, to determine the means whereby discrimination, nonuniformity, and inequality, as among shippers, might be most advantageously perpetrated. In that spirit, as a means of putting it beyond the power of a carrier to do that which might give it the opportunity of indulging in discriminatory practices, it was likewise competent for that body absolutely to prohibit the doing of those things which might become the cloak of unbridled discrimination and favoritism. Congress has done in saving that there shall be no departure from the published tariffs. So it will not do, in my judgment, to say merely that as long as no discrimination apparently results, a carrier may do any and all of the things prohibited by the act. Congress has said these prohibitions are necessary, presumably to attain the end desired. It is not open to this court, then, the end apparently having been attained, to hold the prohibitions unnecessary and their enactment a futility. If the Commerce Act is to be made an efficient instrumentality in the abolition of special privileges and the equalizing of rates, which, as demonstrated by repeated amendments, has been the aim, the practices which Congress in its wisdom and competency saw proper to prohibit must be regarded at all times as being under the ban of the law.

- [3, 4] These conclusions, I feel, are sustained by controlling language of the United States Supreme Court. In Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, wherein the plaintiff in error was being prosecuted as for a criminal violation of the Interstate Commerce Act, and in which, in consequence, the usual strictness in the construction of the statute as against criminality would be employed, the court, after quoting the provisions of the Elkins Act hereinabove referred to, said:
- "* * * We find the word device disassociated from any such words as fraudulent conduct, scheme or contrivance, but the act seeks to reach all means and methods by which the unlawful preference of rebate, concession or discrimination is offered, granted, given or received. Had it been the intention of Congress to limit the obtaining of such preferences to fraudulent schemes or devices, or to those operating only by dishonest, underhanded methods, it would have been easy to have so provided in words that would be unmistakable in their meaning. A device need not be necessarily fraudulent; the term includes anything which is a plan or contrivance. Webster defines it to be "that which is devised or formed by design; a contrivance; an invention: a project," etc. * * *
- "* * The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. It is not so much the particular

form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published.

* * Having in view the offense charged in this case, we think it is clearly within the terms of the act making it penal to procure the actual transportation, by any of the means denounced in the act, of goods at a less rate than that named in the tariffs. It is the purpose of the act to punish those who give or receive transportation, in the sense of actual carriage, at a con-

cession from the published rates.

"* * It is strongly urged that there is nothing in the acts of Congress regulating interstate commerce which can render illegal the contract between the shipper and the railroad company covering the period from June to December, 1905. The contract, it is insisted, was at the legal, published and filed rate, and there is nothing in the law destroying the right of contract so essential to carrying on business such as the petitioner was engaged in. But this contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper.

"In the Elkins Act, Congress has made it a penal offense to give or receive transportation at less than the published rate. This rate can only be raised by ten days' or lowered by three days' notice. Section 6, 25 Stat. 855. There is no provision excepting special contracts from the operation of the law. One rate is to be charged and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

"It is said that if the carrier saw fit to change the published rate by contract the effect will be to make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to

prohibit and punish.

"Nor do we find anything in the provisions of the statute inconsistent with this conclusion in the fact that the statute makes the rate as published or filed conclusive on the carrier. The carrier files and publishes the rate. It may well be concluded by its own action. But neither shipper nor carrier may vary from the duly filed and published rate without incurring the penalty of the law."

So also in New York, New Haven Railroad v. Interstate Commerce Commission, 200 U. S. 361, 391, 26 Sup. Ct. 272, 277 (50 L. Ed. 515). the court said:

"* * * It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. * * * If a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that

the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about.

On page 396 of 200 U. S., on page 279 of 26 Sup. Ct. (50 L. Ed. 515), with reference to the contention advanced by the carrier that in the instance under consideration it had the right to depart from the rates specified in its published tariffs, the court said:

"* * This simply asserts the proposition which we have disposed of, that a carrier possesses the power, by the form in which he deals, to render the prohibitions of the act ineffective, since it implies the right of a carrier to shut off inquiry as to the real result of a particular transaction on the published rates, and thereby to obtain the power of disregarding the prohibitions of the statute. * * *"

This case is also authority for the proposition (200 U. S. 398, 26 Sup. Ct. 272 [50 L. Ed. 515]), which is of substantial import herein, that the application of the prohibitory features in the Interstate Commerce Act does not depend upon the question of whether the carrier intended to violate the statute, but upon the question as to whether the effect of the acts done is to violate the prohibitions of the statute.

effect of the acts done is to violate the prohibitions of the statute.

In American Express Co. v. United States, 212 U. S. 522, 532, 29 Sup. Ct. 315, 317 (53 L. Ed. 635), after citing and quoting from, with approval, the decisions in the New Haven and Armour Packing Cases, supra, the court said:

"* * But the power of Congress over interstate transportation embraces all manner of carriage of that character—whether gratuitous or otherwise—and, in the absence of express exceptions, we think it was the intention of Congress to prevent a departure from the published rates and schedules in any manner whatsoever. If this be not so, a wide door is opened to favoritism in the carriage of property, in the instances mentioned, free of charge. * * *"

The same court in Union Pacific Railway v. Goodridge, 149 U. S. 680, 691, 13 Sup. Ct. 970, 975 (37 L. Ed. 896), having under consideration the provisions of an act of the state of Colorado not dissimilar to the federal Interstate Commerce Act, said, with respect to a claimed right on the part of the railroad to violate the statutory prohibition against secret departures from the published tariffs, that to uphold such right—

"would open the door to the grossest frauds upon the law, and practically enable the railroad company to avail itself of any consideration for a rebate which it considers sufficient, and to agree with the favored customer upon some fabricated claim for damages, which it would be difficult, if not impossible, to disprove. * * * "

Plaintiff advances the thought that:

"Section 2 of the Commerce Act contains legislative recognition that privileges and concessions may be granted if they do not discriminate against other persons," etc. If section 2 were the only prohibitory provision of the entire act, plaintiff's contention would probably be well taken, but the other provisions referred to hereinabove are in addition to section 2, and what is of more importance, as I read the occurrences, they were enacted subsequent to the passage of section 2, and largely because it, in con-

sequence of its general tenor, had failed of its full purpose.

The argument is advanced that the prohibitions of section 6 and of the Interstate Commerce Act refer only to freight rates and terminal charges, they being specified in the Act, and that there was no intention to prohibit an abatement of other charges, meaning, that in spite of the provisions of the act, and while the carrier might not suffer an abatement as to any of its freight rates or terminal charges, per se, it might do as it wished with respect to its storage and cartage charges. This contention is to be considered in connection with the further assertion of defendant that:

"None of these local freights, cartage or warehouse charges were incurred or assumed while the shipments affected thereby were in transit for purposes of interstate commerce, but all were intrastate and antedated the inception of any interstate traffic."

For the sake of argument, it might be conceded (although it would seem as if the concession under all the circumstances were a violent one, Daniel Ball, 10 Wall. 557, 19 L. Ed. 999) that the interstate journey of the hops began at San Francisco, the "point of delivery." But this cannot affect the situation. The "regular tariff" which plaintiff's assignors agreed to pay, and in consideration of the payment of which defendant agreed to reimburse said assignors for all local charges, and for excess insurance, was the tariff from this point of delivery to market. It was an interstate tariff. The tariff which was to be abated by the reimbursement of plaintiff's assignors was this interstate tariff and precisely the sort of a tariff which the statute said might not be abated or diminished. It can make no difference what was actually to be done with the money that was to be paid to plaintiff's assignors. This payment when made, as a matter of fact, would serve to reduce the tariff paid by such assignors as for an interstate journey, and it would at the same time serve to violate an express prohibition of the statute. The case would be precisely the same if defendant company instead of agreeing to reimburse plaintiff's assignors for local charges, including cartage and warehousing, had agreed to reimburse them for expenses incurred in the harvesting and curing of their hops, or some other expenditure by them previously made. The violation of the statute results not from a consideration of where the money was to go to, but from where it was to come from. It was to come from a fund which the law said might not be diminished for any purpose. In this view of the case all of defendant's argument with respect to cartage and warehousing being excepted from the provisions of the Interstate Commerce Act fall to the ground. defendant had agreed to rebate some of the cartage or warehousing charges, this argument would be entitled to consideration.

For similar reasons, cases cited by defendant having to do with cartage charges "after the completion of the interstate journey" (Interstate Commerce Commission v. Detroit Railway Co., 167 U. S. 633, 17 Sup. Ct. 986, 42 L. Ed. 306) have no application herein.

In connection with this phase of the case, it might be assumed that it would be competent for a carrier itself to determine precisely what services it would render in performance of an agreement to transport property as between two designated places, and as for a certain specified charge. It may also be assumed, as suggested by defendant, that:

"Patently there are many services which can be rendered, or facilities granted by carriers not embraced within the specific classes enumerated, and publication of which is made mandatory by the act."

Still there is no theory under the act and in recognition of its terms under which there may be a secret agreement, as between the carrier and a shipper, not appearing upon the published schedules, wherein or whereby the carrier may deliberately promise to reimburse the shipper as for his expenditures incurred in the securing of the rendition of such services or facilities, and the effect of which will be to abate the

charges specified in the published schedule.

Both plaintiff and defendant concede that the contracts in question would now be invalid under the provisions of the Hepburn law, which went into effect August 29, 1906 (34 Stat. 584, 838), and defendant contends that, as a necessary corollary, they were not invalid previous to the passage of the Hepburn law. Such an inference is too subtle a one for this court to indulge in. The question involved here is not what law may now be in force, but what law was in force, and what is the proper construction to be accorded to it as it was in force, at the time these shipments were actually made. That Congress may have piled "Ossa upon Pelion" in passing the Hepburn law, would in no wise serve to validate that which would have been otherwise invalid under the provisions of the Elkins law.

Defendant finally refers the court to a holding by Judge Van Meet of this court, rendered in March, 1909, in an action between one Uhlmann and the Atchison, Topeka & Santa Fé Railroad Co., involving substantially the same proposition as is presented herein, and in which, in an unreported decision, Judge Van Fleet held that the claim sought to be enforced did not "constitute, within the meaning of the act, a rebate," and was not "a discrimination between shippers, toward which the provisions of the act are directed." Whereupon counsel for

plaintiff is emboldened to suggest, in conclusion, that:

"The passage of the Hepburn Act in 1906, with its all-reaching and farsearching provisions, makes impossible recurrence of litigation such as is involved in the case at bar. The Elkins Act is dead and interesting only as an experimental work in the complete structure—the present Interstate Commerce Act. The decision of this court in the case at bar can and will establish no precedent. The Uhlmann Case has established such precedent."

He who, possessing individual liberty of thought, follows a precedent merely because it is a precedent and in disregard of his own deliberate conclusions, writes himself down not only an intellectual slave, but an intellectual coward as well. A precedent lacking the binding force of authority may be considered because of its persuasiveness, but surely not because of its mere existence.

Judge Van Fleet was long an honored member of our state judiciary, for some time being an incumbent upon our supreme tribunal. My respect for him as a man and as a judge is profound, and has grown with the years of our acquaintance, and in a case involving doubt as to the true course to follow, I would readily yield to his judgment and act in deference to his matured conclusions. In the present instance, however, I cannot bring myself to believe that the contracts in question were not in contravention of the express prohibitions of the Interstate Commerce law as amended by the Elkins Act, and in consequence, loath as I am to differ with him in a matter respecting the proper judicial conclusion to be drawn from the admitted facts, since I cannot escape my individual responsibility in the premises, I am constrained to feel that I ought to assert my individual judgment.

[4] The contracts in question being, in my judgment, contrary to express provisions of law, and opposed to public policy, as the same is declared by the supreme legislative authority of the land, they cannot be enforced in any court. L. & N. Railroad Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671.

[5] With respect to the unperformed features of the contracts, the court will leave the parties where it finds them, and is compelled, in obedience to the positive mandate of the law, to send plaintiff's assignors forth the victims of their own indiscretion and indulgence. True it is the defendant has money in its hands which it promised to pay over to plaintiff's assignors and which promise, because of motives of obvious propriety on its part, it now stands ready to fulfill if this court will by its protective judgment so decree. But to adjudge plaintiff entitled to recover would be to enforce a contract which the court holds unlawful and unenforceable. The whole spirit and purpose of the Interstate Commerce Act is directed to the end that all shippers shall stand upon an equality in the matter of rates. He who seeks to deviate therefrom does so at his own risk and cannot expect the courts to recoup him any losses he may sustain thereby.

Judgment will be entered in favor of defendant.

DEXTER HORTON TRUST & SAVINGS BANK v. CLEARWATER COUNTY et al.

(District Court, D. Idaho, C. D. July 29, 1916.)

1. Counties \$\infty\$167\to Warrants\to Effect of Transfer.

County warrants are not negotiable paper, in the sense that a transferee for value is protected from a defense available against the original payee. [Ed. Note.—For other cases, see Counties, Cent. Dig. § 249; Dec. Dig. \$\infty\$=167.]

2. COUNTIES €=57—COUNTY BOARDS—POWERS AND FUNCTIONS—CONCLUSIVENESS OF ACTION.

Where county commissioners have in good faith acted on a matter within their jurisdiction, and no appeal is taken as provided for by statute, their order becomes final, and is not subject to collateral attack.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 74, 75; Dec. Dig. ⇔57.]

3. Counties 113(6)—Contracts—Powers of County Board.

Const. Idaho, art. 18, § 6, provides for the election biennially of a county assessor, whose duty it shall be to value all property in the county for purposes of taxation. Rev. Codes Idaho, § 2119, as amended by Sess. Laws 1913, c. 127, authorizes the board of county commissioners, on application by the assessor and after a hearing on 30 days' public notice, to empower the assessor to appoint such deputies and clerks as the business of his office may require and to fix their compensation. Held, that under such provisions, while the board is also charged with the duty of equalizing assessments, it is without authority to enter into a contract with an outsider to cruise the taxable timber lands of the county at a large expense, and to make reports which would not have any official or legal status, and could not properly be followed as authentic, either by the assessor or the board, and that such a contract is invalid.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 180; Dec. Dig. \$\infty 113(6).]

4. Counties ← 152—Contracts—Powers of County Board—Constitutional Restrictions.

Such a contract, creating a liability of the county greater than its entire income for the year, and for the discharge of which no revenue was provided, is also void under article 8, § 3, of the Idaho Constitution, which provides as follows: "No county * * * shall incur any indebtedness or liability, in any manner or for any purpose exceeding in that year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose. * * * Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general law of the state."

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 215–217; Dec. Dig. 🖘 152.]

 Counties = 150(2)—Limitation of Indebtedness—"Ordinary Expense" —"Necessary Expense."

Within the meaning of Const. Idaho, art. 8, § 3, prohibiting counties from incurring indebtedness or liability in any year exceeding the income and revenue provided for such year, unless certain designated conditions are complied with relative to authorization of the debt and provision made for its payment, but providing that the restriction shall not apply to "the ordinary and necessary expenses authorized by the general law of the state," an expense is "ordinary" if it is in an ordinary class, if in the ordinary course of the transaction of municipal business or the maintenance of municipal property it may and is likely to become necessary; and it will be assumed that if by law a specific duty is imposed, and the mode of performance is prescribed, so that no discretion is left with the officer, the expense necessarily incurred in discharging the duty is a "necessary expense."

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 165, 166, 216; Dec. Dig. \$\infty\$=\frac{150}{2}.

For other definitions, see Words and Phrases, First and Second Series, Ordinary Expenses; Necessary Expenses.]

6. Counties &=149—Fiscal Management—"Voluntary Indebtedness"—"Involuntary Indebtedness."

A "voluntary indebtedness" of a county is one which it is at liberty to evade or postpone until means are provided for the payment of the expenses incident thereto; while an "involuntary indebtedness" is a lia-

bility imposed upon a county by law, and which it is not privileged to evade or postpone.

For other definitions, see Words and Phrases, Second Series, Voluntary Indebtedness.

In Equity. Suit by the Dexter Horton Trust & Savings Bank against the County of Clearwater, Idaho, and Oren D. Crockett, Treasurer of said County. Decree for defendants.

Geo. W. Tannahill, of Lewiston, Idaho, Peters & Powell, of Seattle, Wash., and H. B. Beckett, of Portland, Or., for plaintiff.

Fred E. Butler, of Lewiston, Idaho, and John R. Becker, of Orofino, Idaho, for defendants.

DIETRICH, District Judge. The plaintiff holds by assignment warrants of the defendant county in the principal sum of \$44,072.69, which were issued in 1914 to one M. G. Nease in final payment of a contract dated April 15, 1914, for the cruising of its timber lands for taxation purposes. Altogether Nease cruised 503,997 acres, at the contract price of 12½ cents per acre. The first warrants issued were paid in due course, and all those now outstanding are here involved. The county treasurer, questioning their validity, declined payment, and threatened to divert to the discharge of later warrants all the funds in his hands, whereupon the plaintiff brought this suit for an injunction to restrain him from carrying out his purpose, and requiring him to recognize and pay all warrants in the order of their issuance. Several defenses are interposed. It is charged: (1) That the contract was the result of a collusive and corrupt agreement between Nease and the county commissioners; (2) that the claims upon which the warrants were issued were, pursuant to such fraudulent and collusive understanding, wrongfully allowed; (3) that the contract was improvidently entered into by the board, and the price agreed to be paid was excessive; (4) that the contract was never substantially performed by Nease; (5) that in part the warrants cover claims for the cruising of lands which were not within the terms of the contract; (6) that under the laws of the state of Idaho the subject-matter of the contract is not within the jurisdiction of the board of county commissioners; (7) that the action of the board in letting the contract is violative of section 3 of article 8 of the Constitution of the state, in that the expense is greatly in excess of the revenues provided in the year for which it was incurred, and it was not authorized by a vote of the electors of the county, and was not an ordinary and necessary expense; (8) that upon their face the warrants are so defective in form that the treasurer is not bound to recognize them; and (9) that the treasurer is without authority to pay them, because the claims for which they were issued have never been certified as required by law.

I do not attempt to review the evidence upon the issue of collusion or conspiracy. It is necessarily circumstantial, and, as is usually the case, it takes a wide range and is voluminous. Though the view may be entertained that the commissioners acted improvidently and were wanting in vigilance and care, I am convinced that they were not ac-

tuated by corrupt motives. The inculpatory circumstances surrounding the letting of the contract may all reasonably be referred to their inexperience in public affairs, and their real, even though somewhat grotesque, fear of the so-called "timber companies"; and likewise their want of vigilance in requiring strict performance and their complacence in allowing the claims as presented may very well be explained by their confidence in and reliance upon the assessor's approval, and their apparent assumption, so generally indulged by the unsophisticated, that the sworn verification of a claim against the public is a sufficient guaranty of its correctness.

There is a measure of interdependence between the next two defenses that makes it desirable to consider them together. The defendants contend that the agreed rate of $12\frac{1}{2}$ cents per acre was an excessive price to pay for cruising, and that in material respects the contractor failed to render the service called for by the terms of the agreement. I am inclined to think that one contention or the other, if not both, must be sustained, for the record leaves no doubt in my mind that $12\frac{1}{2}$ cents per acre is greatly in excess of a reasonable compensation for that which was actually done.

From an examination of the record made by the board of commissioners at the time the contract was let, and a consideration of the manner in which it was gotten up, it is clear that the board expected a thorough and accurate cruise, and that Nease convinced them that that was the kind of cruise he would make. In his written offer, which was accepted, he proposed to make "a very careful" cruise, and the contract calls for "a careful, complete, and thorough" cruise. Can we say that the requirement of thoroughness was met by a cruise made through the employment of the cheapest and least thorough of all recognized methods, or that the requirements of carefulness and completeness were satisfied when the areas daily covered by the cruisers were of unusual, if not extraordinary, extent? question is suggestive of but one answer. When we consider that for a fairly reliable cruise the double run system is most commonly employed, and that the spring cruise here was generally made in that manner, and when we further consider the fact that the topographic notations were so placed upon the maps as to signify that a double run was in fact made, and further that the price paid was, to say the least, adequate fully to pay for such a cruise, it is difficult to escape the conclusion that at the time the contract was entered into both parties contemplated a double run. It is of no avail to say that upon averaging up large areas the cruise made will give a fair approximation of the aggregate. It may also be true that a rough estimate of most of the lands would, in a general average, approximate the result of a single run cruise, and it may be that either would enable the assessor to make as fair a valuation of the timber lands as is commonly made upon other classes of property. But that is not what the county contracted for. It could have gotten a rough estimate or a hasty single run cruise for a fraction of what it agreed to pay, and whether the action of the board be deemed to be prudent or imprudent in contracting and agreeing to pay for details and a degree of accuracy the value of which is

more apparent than real, the county is entitled to receive what it is asked to pay for.

[1] The question still remains whether the defendants can now avail themselves of this defense, and in considering it we shall assume that, while the plaintiff purchased the warrants in the open market for value, it holds them subject to all the defenses which would be available against the original payee. Abbott's Public Securities, § 450; City of Nashville v. Ray, 86 U. S. 468, 22 L. Ed. 164; Wall v. County of Monroe, 103 U. S. 74, 26 L. Ed. 430. There is no charge in the answer that the county commissioners were deceived, or that they were fraudulently induced to audit and allow the claims and order the issuance of the warrants. Upon the other hand, it is expressly alleged that, notwithstanding complete knowledge of the inadequacy of the cruise and its inaccuracies, the board deliberately allowed the claims. While I do not think this averment of complete knowledge is substantiated by the evidence, and while there are certain circumstances, especially that of the misleading "elevation notations," tending to show a purpose on the part of the contractor to deceive, plainly in the face of the express charge of the possession of full knowledge by the board we are not now at liberty to find that the issuance of the warrants was induced The fact that the board did not exact strict performance is not conclusive. If they had the power to make the contract, they also had the power to waive some of its provisions.

[2] In the absence of fraud or collusion, the courts cannot, in an action of this character, revise the discretion of the board touching matters within their jurisdiction. Against the improvidence and folly of county commissioners the taxpayer's remedy is by way of appeal to the courts as provided by statute, and that remedy is simple, inexpensive, and ordinarily adequate. Such an appeal was here taken by Lew-Doubtless feeling the strain at this point, the defendants allege that by a collusive understanding between Nease and the county commissioners and Lewis that suit was fraudulently kept alive until the time for other taxpayers to appeal had expired, and then was dismissed, all for the purpose of deceiving the other taxpayers and inducing them to remain inactive. But this contention cannot be sustained. There never was an understanding on the part of either Nease or the commissioners that the appeal should be taken, or that it should be maintained after it was taken. Doubtless the board desired that it be dismissed, and in that there was no impropriety. Administrative discretion must be lodged somewhere, and after a board of county commissioners has in good faith acted upon a matter within its jurisdiction, though carelessly and improvidently, and no appeal is taken, the order becomes final, and is not subject to collateral attack.

The fifth defense is that in part the warrants cover claims for the cruising of lands which are not within the terms of the contract. The facts under this head are simple, and practically undisputed. The contract calls for the cruising of the patented timber lands of the county. Upon the plats returned by Nease it is shown that his claims covered, and warrants were issued for, a little more than 110,000 acres of untimbered lands. In this total acreage it is found that there

are legal subdivisions, wholly devoid of timber, aggregating 35,762 acres. It is also shown that the allowed claims covered 7,680 acres of untimbered government lands (these are embraced in the 35,762 item), and 26,706 acres of timbered government lands, none of which were taxable prior to January 1, 1915, and to most of which no private claim of any kind had been initiated. It is also shown that included within the total amount for which charge was made there were approximately 4,400 acres of lands belonging to the state of Idaho, which were entirely free from any private claim and were nontaxable.

As to this last group, the plaintiff concedes that the contractor should not have been paid therefor, and the only explanation offered is that the lands were cruised and included, and the claims presented, through inadvertence.

As to the 26,700 acres of government land, it appears that some time after the contract was executed, in an informal manner, some, and possibly all, the members of the board of county commissioners assented to a suggestion that in the course of the cruise isolated tracts of government land might be included. No record was ever made of such understanding, but at the time the bills were allowed the board understood that they covered some government lands, though it is doubtful whether they were conscious of the magnitude of the aggregate amount. The 110,000 acres of untimbered lands are scattered throughout the timbered section of the county, ranging from a very small acreage to tracts now and then exceeding a section in extent. Inasmuch as the condition of these lands is disclosed by the plats and reports made by Nease, it must be assumed that the commissioners had knowledge thereof, and with such knowledge allowed the claims. While, therefore, we may dissent from the judgment of the board in paying at the rate of 12½ cents an acre for a report upon such lands, the allowance of the bills with knowledge of the facts must be deemed to be conclusive upon the county, unless, in view of principles later to be discussed, it is held that such action was ultra vires. The government land and state land warrants are subject to similar considerations, and their status also will later receive attention.

The other four defenses are largely concerned with questions of law, and involve no controverted facts other than those already discussed. The defendants first contend that the matter of valuing property for assessment purposes is by the Constitution and the statutes of the state vested exclusively in the assessor, and that a way is provided by which he can have the assistance of such deputies and clerical service as will enable him properly to perform the duties of his office, and that it is the function of the board of commissioners to prescribe and provide the compensation to be paid for such assistance. It is pointed out that in the present case the contractor and his cruisers were nonresidents of the state, and that none of them ever qualified or was entitled to qualify as an officer of the county, and that the cruise has no legal status and cannot be accepted as a valuation for assessment purposes, and is binding upon neither the assessor nor the taxpayer. It is argued that the Constitution and statutes having imposed upon a certain officer the duty of making the assessment, and having prescribed the method in which the duty is to be performed, and provided the means by which the officer charged with the duty can secure the requisite assistance, such method and means should be held to be exclusive. Blomquist v. Board, 25 Idaho, 284, 137 Pac. 174.

[3] With certain qualifications I am inclined to think that the position must be sustained. The county commissioners also sit as a board of equalization, and as such board it is their duty to equalize valuations in their county, to the end that every kind of property shall bear its just burden of taxation. When we consider this important function, and their further general duty as a board of commissioners to exercise supervision over the county's interests, it will be going too far, I think, to hold that they are wholly without authority to incur expense in securing information which will enable them intelligently to perform these functions. But upon consideration I have been constrained to the conclusion that this power does not extend so far as to warrant them in having the assessor's work done in any way other than that prescribed by law. The record here leaves no doubt that the primary purpose for which the cruise was made was for the assessor's use. The Constitution of the state (section 6 of article 18) provides for the election biennially of a county assessor, whose duty it is to value all property in the county for assessment purposes. Section 2119 of the Revised Codes, as amended in 1913 (Session Laws, p. 474), authorizes the board of county commissioners to empower the assessor to appoint such clerical assistance and such deputies as the business of the office may require, and to fix their compensation. It is further provided, however, that such power may be exercised only upon the application of the assessor after 30 days' public notice. If, after such notice, upon a hearing, at which any taxpayer may appear in opposition, the board finds an existing necessity, it may grant the application.

Now, what reason can be assigned for ignoring this method, and, by resorting to the one here employed, depriving the taxpayers of the statutory right to be heard? Admittedly no sudden emergency had arisen. Assuming that a cruise was needed, why could it not as well have been made under the direction of the assessor, by qualified deputies appointed for that purpose? Possibly the assessor was not himself an experienced cruiser; but neither was Nease. Presumably, in appointing his deputies and clerks, the assessor selects persons qualified for the particular duties to which they are assigned. One man may be expert in the matter of valuing farm lands, and another may have had experience exclusively with values of city property. The assessor in this particular case was an intelligent business man, a banker, and, so far as appears, was qualified to select competent clerical assistance, and experienced cruisers as deputies. There would thus have been no motive for slighting the work, and no occasion for conferences with the large taxpayers as it progressed. And when it was completed the result would have had the sanction of law and a legal Whether it could or could not thus have been done more cheaply is perhaps immaterial to the present inquiry, but I have no doubt that a great saving could have been made. And of what value will this contract cruise be to the county? What use can be made of it?

Technically, it is true, it does not constitute an assessment, and in form it is therefore not obnoxious to the objection that it was unofficially made: but when we consider the substance rather than the form, does it not in effect constitute the assessment? In order to sustain the validity of the warrants against attack upon a different ground, the plaintiff has uniformly contended, and now contends, that the cruise is indispensable to the assessor. He cannot, so it is claimed, place a valuation upon the timbered lands without it; it is practically his only source of information. If this be true, manifestly these unsworn, unofficial, nonresident cruisers have, in effect, if not in form, fixed the value of this vast acreage of timbered land for assessment purposes. The assessor sits in his office, and, imputing verity to the information thus furnished him, values the land accordingly. He can exercise no judgment or discretion, for by hypothesis his office knows no facts other than those disclosed by these reports. The assessment comes to be a matter of making certain computations and entering the result thereof upon the assessment book, merely a clerical function. Plainly, therefore, by this contract the interests both of the public and of the taxpayers were in effect committed to nonresident cruisers, unofficially employed, without official responsibility, and exempt from official direction or control.

It is not suggested by the plaintiff that the reports would constitute competent evidence in any statutory proceeding or judicial hearing. That being so, the board of equalization could not properly weigh them as against a proper showing made by a taxpayer in his effort to reduce or prevent the increase of a proposed valuation of his property. It would seem, therefore, that the reports could be legitimately used only for the purpose of suggesting the possible need of investigation; that is, if they differ materially from the valuations which the assessor has been or is placing upon certain lands, the discrepancy may justify the board of equalization in making an investigation for the purpose of ascertaining the facts. Thus indirectly the cruise, if found to be reasonably accurate, would be of some assistance to the commissioners in the performance of their duties. But it is not thought that this indefinite benefit, small as compared with that of a cruise made through official channels, can be accepted as the basis upon which to rest the validity of the contract. Had the work been carried on by the assessor and his deputies, the commissioners might very well have been justified in employing a reasonable number of cruisers to check up the estimates. They would thus have been performing their duty of supervising and correcting, but would not have been doing, the work of the assessor.

[4, 5] We now come to a consideration of the question of the seventh defense; that is, that the contract was entered into in violation of section 3 of article 8 of the Idaho Constitution. That section is as follows:

"No county, city, town, township, board of education, or school district, or other subdivision of the state shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified

electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state."

It is admitted that the contract created a liability for the discharge of which no revenue at all was provided during the year 1914, and that it was never authorized by the qualified electors of the county, and further that no provision was ever made for the annual payment of interest or for a sinking fund. In short, the plaintiff concedes that unless the expense thus incurred is an "ordinary and necessary" one, and hence falls within the proviso of section 3, the entire transaction, including the warrants, was and is void. The one question for consideration, therefore, is whether it was an ordinary and necessary expense. Unfortunately this phrase does not yield itself to a comprehensive, general definition, and each case must be adjudged in the light of its own facts. The uncertainty in which this view leaves the fundamental law is to be deplored, but the courts cannot be expected to make specific that which the constitutional convention found it necessary to leave general.

That some of the work for which the warrants were issued was not "necessary" in any reasonable sense in which that word may be used is hardly open to argument. Even were we to accept the plaintiff's view, that a cruise was required to enable the county officers to make an assessment of timbered lands, some of the lands reported were not assessable in 1914, and some of them were not timbered, and, however liberally we may construe the constitutional phrase, manifestly there was no present necessity in 1914 for incurring the expense of cruising such lands. To say that some of the 26,706 acres of government land might or probably would become taxable in the future is aside from the point. There was no present necessity, and the constitutional proviso contemplates present necessities, and not future possible economies. And why cruise an untimbered section-or. for that matter, an untimbered 40—unless the position be taken that it was necessary to send timber cruisers out over all of the lands of the county? It was quite immaterial that an untimbered section was surrounded by timbered sections. The contractor was sent out to cruise the timbered lands, and it was thus his duty to locate by legal subdivisions all the timbered lands, but not those which were untimbered. What need had he for reporting that a certain section had no timber upon it? If, in compliance with his instructions, he faithfully performed his contract, and cruised and returned reports to cover all timber lands in a given township, nothing more was required. The county officers were then advised by implication that the other lands of the township not so reported were untimbered, and the assessor, already having their description, could value them as he valued other untimbered lands in the county. Surely it was not necessary for the contractor to survey the untimbered lands to find out where the timber was; he could see the timber, and, seeing it, it was his duty to cruise it and report the amount thereof, and further to report where it was, and not where it was not. The mere fact that in running the lines of the timbered lands he incidentally and necessarily ran some of the lines of the nontimbered lands did not warrant him in claiming a cruise of the latter, and, even were there no constitutional limitation, the allowance of such a claim constitutes gross extravagance. It follows that, the expense being unnecessary, and there being no funds applicable to its payment, the board was clearly without the power under the Constitution either to incur or to pay it, and in so far, therefore, as they cover payment for the cruising of these three groups of land, aggregating 141,106 acres, the warrants would seem to be void in any rational view that may be taken of the scope of the constitutional proviso.

The status of the balance of the claim is not so free from doubt. The plaintiff's position in substance is that the phrase "ordinary and necessary" must be given a liberal construction; that it is the duty of the county commissioners, as well as the assessor, to classify and assess all lands in their county at their actual cash value (Laws Idaho 1913, c. 58, §§ 34, 37, 38, 39, 48, 49, 56, 57, 58, 64, 65, 66, 68); and that, such duty being imposed, the expense reasonably incurred in its performance must be deemed to be an ordinary and necessary It will be assumed that an expense is not necessarily extraordinary because the necessity therefor does not arise frequently and at regular intervals. Hickey v. Nampa, 22 Idaho, 41, 124 Pac. 280. An expense is ordinary if it is in an ordinary class, if in the ordinary course of the transaction of municipal business, or the maintenance of municipal property, it may and is likely to become necessary. It will further be assumed that if by law a specific duty is imposed, and the mode of performance is prescribed, so that no discretion is left with the officer, the expense necessarily incurred in discharging the duty is a "necessary expense."

Referring to these principles, the plaintiff contends that the officers of the defendant county could not perform the duties imposed upon them of classifying and valuing the timbered lands without a cruise. It is true that the statutes do require of the assessor that in assessing the property of the county he "shall actually determine, as near as practicable, the full cash value of each tract or piece of real property assessed." It is also required that for assessment purposes all lands shall be classified as agricultural, timbered, cut-over, mineral, grazing, and waste land. It is also made the duty of the county commissioners, sitting as a board of equalization, to consider all assessments made by the assessor, and to so increase or reduce his valuations that they will conform to the actual cash value of the property. Likewise it is their duty to acquire correct classifications of the lands. It is further provided that, if a county commissioner "knowingly permits" a valuation to remain too high or too low, he is guilty of a misdemeanor and of malfeasance in office. It is still further provided that:

"Any assessor who shall willfully or knowingly enter, or suffer to be entered, any untrue or incorrect classification of lands or other property upon the assessment roll; or any member of any board of county commissioners who shall knowingly permit any such untrue or incorrect classification of property to stand; or any county auditor who knowingly make an untrue or incorrect classification of the property, as entered upon the assessment roll, in his abstract of the assessment, or fail to transmit his abstract of the assessment within the time prescribed therefor in the preceding section, shall forfeit the sum of one thousand dollars, to be recovered upon his official bond for the use of the state."

Now it must be manifest that to construe these several requirements as imposing upon the officers the duty of absolute accuracy in the classification and valuation of lands is to ignore certain qualifying phrases, and is to make compliance with the law wholly impossible. An entirely just or correct valuation of all the property in the county, if not a mere dream, is an unattainable ideal. The difficulty with the plaintiff's argument is that it goes too far. If the expense of the cruise is to be deemed to be a necessary expense only because the officers must assess with absolute accuracy and the cruise will enable them to perform this duty, the answer is that the cruise is without such efficacy. Admittedly it is inaccurate, and as to any given legal subdivision the report furnished the county may not even approximate the truth. The most that can be said is that the work will give some measure of assistance, and that valuations made upon the basis of the cruise will, on the whole, be less inaccurate than one made without such a cruise.

Enough has been said in this regard to illustrate the point. Obviously it is not a case where there has been imposed a definite, specific duty which is susceptible of perfect performance, and which is to be discharged in a mode particularly pointed out. The assessor is to determine "as near as practicable" the full cash value. If an officer shall "knowingly or willfully" assess or permit to be assessed property at more or less than its cash value, he shall be punished. Such is the purport of the law. In short, the officers are to do the best they can, with the means at their disposal, to approximate as nearly as may be the unattainable ideal.

The point may further be illustrated by reference to conditions of which we may take judicial knowledge, as well as facts disclosed by the evidence. The act of 1913 did not establish a new system. It has always been the duty of the officers to assess real property under a uniform rule of valuation, and, except for a short period, at its full cash value. The principle has always been the same, and the duties of the assessor and of the board of equalization have always been substantially the same. Yet notwithstanding 25 years of statehood only three or four counties have ever had cruises made, and none until the last 4 or 5 years. Now, will it be contended that every assessor and every county commissioner in ever county for these many years has been guilty of a misdemeanor and of malfeasance in office because he has valued, and equalized the valuations of, property as best he could without such cruises? Or would any one say that the assessor of the defendant county and the commissioners were likewise guilty

because the very year this obligation was incurred they valued these identical timber lands, and equalized the valuation thereof, and levied taxes, without this or any other cruise? As a matter of fact, the duty of assessing timber lands according to their actual cash value does not differ in kind from that of assessing other classes of lands. In any case the task is attended with difficulty, and at most the difference is one of degree and not of kind. The same reasons which are urged in support of a cruise of timber lands may be urged with but little less force in favor of a detailed survey of agricultural lands, with a report upon the topography thereof, the soil conditions, the irrigating systems, water supply, location with reference to market, schools, roads, etc., all of which and other conditions are taken into consideration when it comes to determining the actual market or cash value of such lands. But will any one say that assessors and their deputies possess or use such detailed information? Could not an experienced timber man, acting as deputy assessor, go through the woods, with a compassman to locate the legal subdivisions, and, without a detailed cruise, but upon a general survey and estimate, appraise the value of timber lands quite as accurately as the ordinary deputy assesses agricultural lands? And will any one assert that the three county commissioners, sitting as a board of equalization, have any detailed or personal knowledge of the conditions which must be taken into consideration in determining the actual cash value of the majority of the agricultural lands in their county? Could any one of them qualify as an opinion witness touching the value of ten per cent, of such lands, if called to the stand in a proceeding in eminent domain? If they are honest, they do the best they can with the means at their disposal, and thus they discharge their duty, not because the result is accurate, but because they determine the "full cash value" "as nearly as practicable," and neither knowingly nor willfully assess or permit to be assessed property for more or less than its actual cash value. That is the statutory measure of their official duty, and they cannot, in the face of the express prohibition of the fundamental law, defend the creation of an indebtedness, exceeding in itself the total revenues of the county for the year, upon the ground that thereby they will be enabled to perform this duty a little more efficiently.

The Idaho Constitution is imbued with the spirit of economy, and in so far as possible it imposes upon the political subdivisions of the state a pay-as-you-go system of finance. The rule is that, without the express assent of the qualified electors, municipal officers are not to incur debts for which they have not the funds to pay. Such policy entails a measure of crudity and inefficiency in local government, but doubtless the men who drafted the Constitution, having in mind disastrous examples of optimism and extravagance on the part of public officials, thought best to sacrifice a measure of efficiency for a degree of safety. The careful, thrifty citizen sometimes gets along with a crude instrumentality until he is able to purchase and pay for something better. And likewise, under the Constitution, county officers must use the means they have for making fair and equitable assessments until they are able to pay for something more efficient, or obtain the consent of those in whose interests they are supposed to act.

It must be assumed that, in prescribing the duties of the assessor and the commissioners, the Legislature was cognizant of the conditions under which these duties must be performed, and that it was not intended to require either impossibilities or a violation of the Constitution. If it was the purpose to impose upon the counties having timber lands the burden of causing them to be cruised, is it not reasonable to suppose that such an intent would have been expressed? Every member of the Legislature of 1913 doubtless knew the manner in which such lands, as well as all other property in the state, had always been assessed, and hence knew that a cruise had never been made. the current practice had become a public scandal, or was generally understood to be inequitable, and if, therefore, it was thought to be high time that a different method should be employed, it is strange that one was not prescribed and the means provided for carrying it into effect. For example, the Legislature did see fit (Act 1913, § 34) to impose upon the assessor the duty of having prepared a plat book of his county. It also prescribed the form of such book and its contents, and authorized the payment of expense thus necessarily incurred. If a detailed cruise of timber lands was deemed to be essential, why was it not also required, with proper provision for uniform reports thereof? If cruises are to be made, it is not only important that they have the sanction of law, but that they be required of all counties, and be made and reported according to some uniform system, so that they may also serve as the basis of state equalization as well as for local purposes.

The discussion need not be further prolonged. Enough has been said to make it clear that the Legislature has not imposed upon the counties the absolute duty of cruising their timber lands, or of incurring indebtedness for that purpose. The county officers are required only to determine the full cash value of property, including timber lands, as nearly as may be practicable with the means they have. They are not obligated, nor have they the right, to overstep the constitutional limitation for the purpose merely of possibly increasing the efficiency of their service. And the county commissioners have no authority to substitute for the statutory mode of valuing property a method of their own. It follows that, the premises upon which the plaintiff rests its entire contention touching the constitutionality of the contract not being well founded, its argument falls, and the contract must be held to be void. In any other view the constitutional prohibition would in practice prove to be a mere thing of straw. If this contract can be sustained, by parity of reasoning another of like character, for a second cruise, can be made at any time. Of necessity, conditions change from year to year. Some trees are growing, and others are being cut down or otherwise destroyed, and still others are deteriorating in value. Another cruise would doubtless be of some value.

Again: It is the duty of the county commissioners to provide buildings and other facilities for the transaction of county business. Temporary quarters may be cheaply built, or rooms may be rented, and thus the county may keep within its revenues. But such provision is not so well adapted to the public need as a permanent courthouse.

Doubtless a modern building, constructed according to approved plans, would answer the purpose better, and would be more efficient than a temporary structure or rented quarters. But may the county commissioners, therefore, without asking the assent of the electors, proceed to erect such a structure, and thus impose upon the county a large indebtedness? See Bannock County v. C. Bunting & Co., 4 Idaho, 156, 37 Pac. 277; Dunbar v. Board of Co. Com., 5 Idaho, 407, 49 Pac. 409.

[6] I have not overlooked the case of Wingate v. Clatsop County, 71 Or. 94, 142 Pac. 561, nor shall I attempt to distinguish it upon unimportant differences, either of fact or of constitutional or statutory phraseology. It is to be conceded that the limitation there involved, under the construction placed upon the Oregon Constitution, is the equivalent of section 3, article 8, of the Idaho Constitution. Furthermore, as has already been made plain, I accept the view:

"That a voluntary indebtedness is one which a county is at liberty to evade or postpone until means are provided for the payment of the expenses incident thereto, while an involuntary indebtedness is a liability imposed upon a county by law, and which it is not privileged to evade or postpone."

But, with all due respect for the court, the reasoning by which the conclusion is reached that the cruising of its timber lands constituted a duty which the defendant county could not postpone, I have been wholly unable to appreciate. It seems to me to entirely break down the protection which the constitutional provision was intended to vouchsafe. The statutes of Oregon may in some respects differ from those of Idaho; I have not undertaken to analyze them. But, however that may be, to say that under the Idaho statutes the duty of cruising its timber lands is one which a county must immediately perform, and cannot postpone, would, it is thought, be contrary to both reason and Though legislature after legislature has convened, the experience. members of which have had knowledge of a contrary practice, not exceptional, but universal, and though the revenue laws have often been the subject of public discussion, and have frequently been revised and amended, and new provisions have been added imposing specific duties upon the county officers with a view to a more complete and uniform valuation, the statute books have always been, and are, silent upon the subject of cruising. If it is absolutely obligatory upon the county to incur the indebtedness for cruising its timber lands, and if the obligation is thus involuntary, and must be discharged without evasion or delay, then as a matter of course a writ of mandate should issue to the board of county commissioners of every county in the state where there is timber land, requiring an immediate cruise to be made. And yet, in so far as I am advised, no executive or administrative officer or private citizen has ever applied for such a writ. For a generation the legislative and executive departments of the government and the public at large have acquiesced in the view that there is neither constitutional nor statutory duty to incur such indebtedness. If in a county having a total revenue of less than \$55,000, with ordinary and necessary expenses aggregating approximately \$60,000, an additional item of expense of \$63,000, incurred by the commissioners

for something which, under like conditions and similar laws, had never before been deemed to be necessary, and without which other counties, similarly situated, had gotten along for a quarter of a century, can be held to be an "ordinary and necessary expense," the citizen may very well ask what is an extraordinary or unnecessary expense, and against what sort of a transaction does the Constitution afford him protection.

The view which I have taken of the constitutional question being decisive of the case, it is unnecessary to discuss the other two defenses,

which are of a technical nature.

The bill will be dismissed, with costs to the defendants.

YEE GEE v. CITY AND COUNTY OF SAN FRANCISCO et al.

(District Court, N. D. California, Second Division. July 20, 1916.)

No. 228.

1. Injunction © 105(2)—Protection of Property Rights—Restraining Enforcement of Unconstitutional Statute or Ordinance.

While ordinarily a court of equity will not interfere to restrain a criminal prosecution instituted or threatened for violation of an unconstitutional statute or ordinance, it may enjoin the enforcement of an act which will involve a direct invasion of property rights, notwithstanding such enforcement is through a criminal prosecution.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 179; Dec. Dig. ≡ 105(2).]

2. Constitutional Law = 70(3) - Ordinances - Validity - Motives for Enactment.

Where a legislative act is fair upon its face and capable of impartial application to all who come within its terms, the mere motive actuating its enactment cannot be inquired into as a ground for holding it invalid.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. \$70(3).]

3. MUNICIPAL CORPORATIONS \$\igcup 121\to Ordinances\to Proceedings to Determine Validity.

One who has not been injured thereby has no standing to attack the validity of an ordinance on the ground that it vests an arbitrary power in a board to grant or refuse licenses.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 257; Dec. Dig. ⇐ 121.]

A municipality duly authorized by the Constitution and statutes of the state may, in the exercise of the police power, regulate the conduct of any business in any respect as to which it may involve the public health, safety, or welfare, provided the regulation is reasonably adapted to their protection; but it may not, under the guise of a police regulation, interfere with the constitutional right of a citizen to carry on a legitimate business, harmless in itself, beyond a point reasonably required for the protection of the public.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1321, 1322, 1325, 1354; Dec. Dig. ⇐⇒595, 597.]

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

5. MUNICIPAL CORPORATIONS \$\iff 63(2)\$—VALIDITY OF ORDINANCES—QUESTIONS FOR JUDICIAL DETERMINATION.

While every intendment is to be indulged in favor of the validity of an ordinance within the general power of the municipality the question of the reasonableness of a regulatory measure, in view of the apparent end sought, is one for judicial determination.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 155, 1378; Dec. Dig. ⊗⇒63(2),]

A mere legislative declaration that a business or occupation, harmless and innocuous in itself, is inimical to the public interest, cannot make it so, nor render a restrictive ordinance valid, unless by reason of surrounding conditions the declaration can be said to accord with the fact, as based upon common observation and human experience.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 155, 1879; Dec. Dig. \$\sim 63(1).]

7. MUNICIPAL CORPORATIONS \$\iiii625\$—ORDINANCE REGULATING LAUNDRIES—CONSTITUTIONALITY.

A provision of an ordinance of the city and county of San Francisco that "no person or persons owning or employed in the public laundries or public wash houses * * * shall wash, mangle, starch, iron, or do any other work on clothes between the hours of 6 o'clock p. m. and 7 o'clock a. m.," applying as it does throughout the entire city, without regard to surrounding conditions, and to employers and employés alike, is void, as an unreasonable interference with the liberty of the citizen in the prosecution of a legitimate occupation, and as having no real or substantial relation to the purpose ostensibly sought to be accomplished.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1378, 1379; Dec. Dig. 625.]

In Equity. Suit by Yee Gee against the City and County of San Francisco and James Rolph, Jr., Mayor of said City and County. On motion to dismiss bill. Motion denied, and decree for complainant.

Godwin B. Swift, of San Francisco, Cal., for plaintiff.

Percy V. Long, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, Cal., for defendants.

VAN FLEET, District Judge. This is a bill by plaintiff, a native-born citizen of the United States, of the Chinese or Mongolian race, now and for many years owning and conducting a public laundry in the city of San Francisco, to restrain the enforcement of an ordinance (No. 3300 N. S.) of its board of supervisors, approved June 27, 1915, regulating laundries therein, and particularly of certain provisions thereof, on the ground that the same violates the Fourteenth Amendment of the Constitution, and that its enforcement will deny to plaintiff the equal protection of the law, and deprive him of his property and property rights without due process.

The general assignment of invalidity, involving the operation of the ordinance as a whole, is that it is unreasonably and arbitrarily discriminatory; it being alleged that it was passed and adopted for the sole purpose of interfering with and injuring the laundry business as carried on by persons of the plaintiff's race, of which a large number are alleged to be engaged in the business in said city, and in effect to drive them out of the business. The special features assailed are:

(1) Certain provisions which it is claimed commit to the board of supervisors the arbitrary discretion to grant or refuse licenses to carry on the laundry business, and make it unlawful to engage therein without first securing a special permit from said board, which provisions it is claimed are in excess of the power of said board; and

(2) A provision limiting and restricting the hours of the day within which such business may be carried on and laundry work performed, in a manner and to an extent which, it is asserted, render such restriction wholly unreasonable and void as an exercise of the police power or otherwise.

The defendants have interposed a motion to dismiss the bill for want of equity, and the questions accordingly arise on the face of the

pleadings.

[1] 1. The first ground urged in support of the motion to dismiss is that plaintiff is seeking to enjoin the enforcement of a penal ordinance; and that such relief is not within the province of equity. This is based upon the fact that the ordinance makes any violation of its provisions a misdemeanor, to be punished "by a fine of not more than \$500, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment," and provides no other mode for its enforcement.

It is quite true that ordinarily a court of equity will not interfere to restrain a criminal prosecution instituted or threatened against one violating the provisions of an unconstitutional statute or ordinance (Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778); the remedy being at law, either by a defense in the criminal courts, where the question of the validity of the act may be as effectually availed of as in a court of equity (Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535), or by proceedings on habeas corpus. But this is not universally true. If the enforcement or threatened enforcement of the act involves or will involve a direct invasion of property rights, equity will interfere to restrain the perpetration of the wrong, notwithstanding the enforcement is through a criminal prosecution. Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169, and cases there cited.

The present case, I think, falls within this exception. The right to labor or earn one's livelihood in any legitimate field of industry or business is a right of property, and any unlawful or unreasonable interference with or abridgment of such right is an invasion thereof, and a restriction of the liberty of the citizen as guaranteed by the Constitution. Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133. That the industry here involved is in its essential nature a perfectly harmless, legitimate, and even necessary one, as viewed in its relation to our domestic and social economy, no question is or can be made. In re Hong Wah (D. C.) 82 Fed. 623; In re Quong Woo (C. C.) 13 Fed. 231; In re Tie Loy (C. C.) 26 Fed. 611; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. If, therefore, the ordinance as a whole, or in either of the particular features attacked, be in contravention of plaintiff's rights under the Constitution, its enforcement as to him in such obnoxious respect would in legal contemplation constitute an unauthorized invasion of his property.

In this aspect the case is to be distinguished from that of Moss v. McCarthy (C. C.) 191 Fed. 202, decided in this court, relied upon by defendants. The ordinance there attacked was not directed against a legitimate business, but the maintenance of "bucket shops," something regarded as offensive to the public morals and welfare, and in the maintenance of which, therefore, no right of property could legitimately inhere, and it was held that the threatened raiding of plaintiff's place of business by the police, and the arrest and prosecution of the plaintiff and his associates, would not constitute an injury to his property rights within the exception above noted; the court saying:

"The threatened invasion or injury to property rights must be an injury which will naturally and necessarily follow the threatened enforcement of the obnoxious ordinance; not a loss, damage, or detriment flowing merely incidentally or consequentially therefrom, through the arrest and prosecution of the party threatened, however irksome or expensive such action may prove."

See Wiseman v. Tanner (D. C.) 221 Fed. 694.

- [2] 2. The first two assignments against the ordinance may be briefly disposed of. The defendants' objection to the sufficiency of the averments of the bill to disclose invalidity by reason of the alleged purpose of the supervisors in passing it to discriminate against plaintiff's race is well taken. The mere allegation of an improper motive of a legislative body in adopting a measure is not, standing alone, sufficient to disclose invalidity. So long as the act is fair upon its face, and capable of even-handed and impartial application to all who come within its terms, the mere motive actuating its enactment cannot be inquired into as a ground for avoiding it. Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; Fletcher v. Peck, 6 Cranch, 87, 131, 3 L. Ed. 162; United States v. Des Moines, etc., Co., 142 U. S. 510, 545, 12 Sup. Ct. 308, 35 L. Ed. 1099; Doyle v. Insurance Co., 94 U. S. 535, 24 L. Ed. 148; Ex parte McCardle, 7 Wall. 506, 514, 19 L. Ed. 264. It is not alleged that the ordinance has received any partial or discriminating enforcement, and there is therefore nothing which, if proved, would bring the case within the doctrine of Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.
- [3] 3. As to the provisions asserted to have the effect to vest arbitrary power in the supervisors to grant or reject permits to engage in the business, their validity need not be inquired into, since plaintiff does not show himself injured thereby. It is not alleged that he has ever applied for or been denied a permit under this ordinance, and he is not, therefore, in a position to attack it on this ground, assuming it to be subject to the vice alleged. Gundling v. Chicago, 177 U. S. 183, 186, 20 Sup. Ct. 633, 44 L. Ed. 725; Kissinger v. Hay, 52 Tex. Civ. App. 295, 113 S. W. 1005; Johnson Exp. Co. v. Chicago, 136 Ill. App. 368, 375.

4. This leaves for consideration but the second special point of attack against the ordinance—that involving the provision prescribing the hours of the day in which the work of a laundry may not be car-That provision is this:

"Sec. 9. No person or persons owning or employed in the public laundries or public wash houses provided for in section 1 of this ordinance shall wash, mangle, starch, iron, or do any other work on clothes between the hours of 6:00 o'clock p. m. and 7:00 o'clock a. m., nor upon any portion of that day known as Sunday."

Section 1 embraces within its terms all public laundries or wash houses "within the limits of the city and county of San Francisco." It will thus be seen that the terms of section 9 apply to all laundries maintained in the entire territory embraced within the city limits, without regard to differing conditions existing in different sections or districts thereof, the density of population or character of buildings, or the situation or relation of the laundry to other structures or premises, as calculated to cause danger of fires, or other objectionable considerations.

It is claimed that this sweeping and all-inclusive nature of the restriction, with its limitation on the number of hours prescribed for carrying on the business, having regard to its intrinsic nature, renders the provision subject to the objection that it constitutes an undue and unreasonable restraint upon plaintiff's right to pursue his occupation, and as such is in violation of his rights under the Constitution. The defendants contend, on the other hand, that it is a perfectly reasonable and proper police regulation, and one within the power of the board of supervisors to enact; and in support of this contention they place their reliance upon the cases of Barbier v. Connolly, 113 U. S. 29, 5 Sup. Ct. 357, 28 L. Ed. 923, Soon Hing v. Crowley, 113 U. S. 707, 5 Sup. Ct. 730, 28 L. Ed. 1145, and In re Wong Wing, 167 Cal. 109, 138 Pac. 695, 51 L. R. A. (N. S.) 361.

The first two cases involved provisions couched in precisely similar terms in two different laundry ordinances of the city and county of San Francisco, whereby, within certain prescribed limits of the city, the washing and ironing of clothes in public laundries was prohibited between the hours of 10 o'clock at night and 6 o'clock in the morning. The court in Barbier v. Connolly held that the provision was not unreasonable or discriminatory, but was "purely a police regulation, within the competency of any municipality possessed of the ordinary powers belonging to such bodies." And in Soon Hing v. Crowley, referring to its previous ruling in the Barbier Case, repeated substantially the language above quoted and added:

"And it is of the utmost consequence in a city subject, as San Francisco is the greater part of the year, to high winds, and composed principally within the limits designated of wooden buildings, that regulations of a strict character should be adopted to prevent the possibility of fires. That occupations in which continuous fires are necessary should cease at certain hours would seem to be, under such circumstances, a reasonable regulation as a measure of protection. At any rate, of its necessity for the purpose designated the municipal authorities are the appropriate judges. Their regulations in this matter are not subject to any interference by the federal tribunals, unless they are made the occasion for invading the substantive rights of persons, and no such invasion is caused by the regulation in question."

In re Wong Wing involved a provision in the then-existing ordinance of San Francisco practically identical in its terms with the limitation under consideration in the present case. In response to the objection of unreasonableness here urged, its validity was sustained; the court in a comparatively brief opinion, after stating the question, saying:

"This court and the Supreme Court of the United States have declared constitutional an ordinance very similar to the one before us, where the restriction upon the hours of labor required the cessation of work in public laundries between the hours of 10 o'clock p. m. and 6 o'clock a. m. Ex parte Moynier, 65 Cal. 34, 2 Pac. 728; Barbier v. Connolly, 113 U. S. 29 [5 Sup. Ct. 357, 28 L. Ed. 923]; Soon Hing v. Crowley, 113 U. S. 707 [5 Sup. Ct. 730, 28 L. Ed. 1145]. The principles announced in those cases have been so frequently upheld, and the authorities themselves have been so often cited, that extended discussion of the opinions is quite unnecessary."

And, after stating the principles there announced, it is concluded: "We are therefore to determine whether the limitation of the time of labor in public laundries to 11 hours each day is a restriction so unreasonable that it invades the constitutional rights of persons engaged in the laundry business. We cannot say that it does. Very many, perhaps a majority, of occupations, employments, and forms of business in San Francisco are conducted during less than 11 working hours a day."

It will thus be seen that the Supreme Court of California rested its ruling largely, if not entirely, upon the authority of the Barbier and Soon Hing Cases, under the assumption that the principles there announced had equal application to the regulation before them. With the greatest respect for the views of that court, I think its opinion fails to take note of the very material difference between the two measures. In the one instance, the regulation was restricted in its application to certain specified and defined districts of the city, and prescribed a period of cessation from labor well within the acceptation of what would at once be regarded as having reasonable relation to the object sought, that of the protection of the public from the danger of uncontrolled fires. In the other, the regulation is made to apply to the entire limits of a great city, embracing a territory some 10 miles wide by 15 miles long, without regard to differing physical conditions obtaining therein, and with a limitation of the hours of labor to a period which, to say the least, having regard to the nature of the business, at once gives rise to a question in the mind whether it bears any reasonable relation to any conceivable necessity for protection to the public from such dangers. It seems to me that this radical difference between the two regulations may not be ignored. That the Supreme Court of the United States did not ignore it will at once appear from their discussion of the subject. They repeatedly refer to the fact that in the cases before them the regulation as to hours of labor applied only to certain specified limits within the city, and they construe its purpose to have reference to the special conditions existing in those districts.

[4] It is, of course, not questioned that the municipality, under the powers conferred upon it by the Constitution and statutes of the state, has the right to regulate the business of a laundry and the manner in which it shall be carried on in all respects as to which it may be said to in any wise involve the public health, safety, or welfare, and this the present ordinance very fully undertakes to do. Thus, among other features, it is provided (section 2):

"No permit shall be granted except upon report from the health officer of said city and county or other satisfactory evidence that the premises are properly and sufficiently drained and that all proper arrangements for carrying on the business without injury to the sanitary condition of the neighborhood have been compiled with, and particularly that the provisions of all orders and ordinances pertaining thereto have been compiled with, and a report from the fire marshal of the city and county of San Francisco or other satisfactory evidence that the stoves, chimneys, machinery, equipment, washing and drying apparatus, and the appliances for heating smoothingirons are in good condition, and that their use is not dangerous to the surrounding property from fire, and that all proper precautions have been taken to comply with the provisions of the ordinances defining the fire limits of the city and county of San Francisco and regulating the erection and use of buildings in said city and county, and of the general orders and ordinances."

And it is further provided (section 8) that it shall be unlawful to carry on the business—

"in any building or any portion thereof, or in any annex or outhouse thereto or other premises that shall be occupied or used either directly or indirectly as a public hall or store, or that is frequented by persons likely to spread infectious, contagious or loathsome diseases, or that is occupied or used or frequented directly or indirectly for any immoral or unlawful purpose."

As to all these features it may at once be said that the regulations are such as to give rise to no question as to their propriety as having obvious relation to the public health, welfare, and safety, and as thus falling well within the regulative power. And, as we have seen, there is likewise no question as to the power to restrain the prosecution of such a business during certain hours of the 24, where by reason of the nature of the business, the instrumentalities employed, and the surrounding conditions its prosecution during those hours is calculated to endanger the public safety. So far there is no controversy. But the question here presented is whether, without regard to the existence of such conditions, a municipality may impose a general limitation or restriction upon the citizen as to the hours within which he may prosecute his chosen industry—a respect as to which, independently of particular conditions, there is obviously no natural or inherent menace to the public-without trenching upon that degree of freedom and liberty of action guaranteed him by the Constitution.

[5] Is such a regulation within the rule of reason which must govern the courts in determining its validity? For that neither a municipality nor the Legislature of a state may competently interfere under the guise of a police regulation with the liberty of the citizen in the conduct of his business—legitimate and harmless in its essential character—beyond a point reasonably required for the protection of the public, is too thoroughly settled to call for any extended citation of authority in its support. And while at an earlier period the question

of the reasonableness of regulatory measures was deemed more largely a legislative than a judicial one (Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77), the more modern doctrine is that, while every intendment is to be indulged in favor of the validity of an act of the Legislature of a state or of a city ordinance within the general power of the municipality to adopt, after all the question of the reasonableness of a regulatory measure in view of the apparent end sought is one for the courts to determine (Dobbins v. Los Angeles, supra, and cases there cited; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205). And the Supreme Court of California has fully recognized this principle. In Ex parte Whitwell, 98 Cal. 78, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152, in discussing the power of the courts in such cases, that court said:

"But it is not true that when this power is exerted for the purpose of regulating a business or occupation, which in itself is recognized as innocent and useful to the community, the Legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue such business or profession."

[6] Another principle involved in the exercise of the police power, which it is hardly necessary to state, is that a mere legislative declaration that a business or occupation, harmless and innocuous in itself, is inimical to the public interest, either as a whole or as to some feature of its conduct, cannot make it so, unless by reason of surrounding conditions the declaration can be said to accord with the fact as based upon common observation and human experience. The Legislature cannot by its mere ipse dixit make that a guilty thing which is intrinsically an innocent one. It would be idle, for instance, for the Legislature to declare that the occupation of farming or the work of the horticulturist was in its nature inimical to the public interest, and to undertake to regulate the hours of the day in which the work of those great industries should be prosecuted. Such an attempt would, under existing conditions, at least, be treated only with derision, as falling wholly without the bounds of reason, and as involving a mere arbitrary attempt to interfere with the liberty of the citizen. In other words, any attempt at police regulation which interferes with the individual in the conduct of an innocent and legitimate business must have an appreciable relation to some public evil justly to be apprehended, and be reasonably calculated to avoid such evil. Beyond that the Legislature may not go. Speaking of these limitations, in Lochner v. New York, supra, the Supreme Court said:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the Legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the state, to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is

concerned and where the protection of the federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?

* * The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

And in Dobbins v. Los Angeles, supra, the court say with reference to this power:

"It is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments, undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

And see Lawton v. Steele, 152 U. S. 133, 137, 14 Sup. Ct. 499, 38 L. Ed. 385.

These general principles have been applied in the concrete to large numbers of cases involving the validity of municipal ordinances, many of them regulating laundries, presenting considerations more or less closely allied to the present; and wherever they have been found to have been violated the courts have not hesitated to declare the ordinance beyond the power of the municipality to enforce. Ex parte Sing Lee, 96 Cal. 354, 31 Pac. 245, 24 L. R. A. 195, 31 Am. St. Rep. 218; The Laundry Case (C. C.) 13 Fed. 229, 7 Sawy. 528; In re Hong Wah (D. C.) 82 Fed. 623; Stockton Laundry Case (C. C.) 26 Fed. 611; In re Sam Kee (C. C.) 31 Fed. 681; Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152. While none of these cases involved the precise objection or phase of the question arising under the present ordinance, they are nevertheless valuable and instructive as illustrating the application in cases of this impression of the important limitations above stated, which must be kept in view in determining the validity of any measure involving an exertion of that comprehensive and elastic, but to some extent indefinable, right left in the states, called the "police power," and the application of which must by a process of analogy aid us in determining the present controversy.

While the provision in question is put in the guise of a laundry regulation, it would seem to partake more nearly of the nature of a labor law, since it undertakes to restrict and limit the hours which may be devoted to the work of the laundry, not only by the employés, but by the employer as well. In this aspect it is closely akin in the considerations to which it gives rise to the statute involved in Lochner v. New York, supra. That was a statute attempting to limit the hours of labor in bakeries. The court, in construing the act, said:

"It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer, permitting, under any circumstances, more than 10 hours' work to be done in his establishment."

It was held that the act could not be sustained, either as a labor law or as a regulation for the protection of the health of those employed in the class of labor involved; the court saying:

"The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. * * * The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker."

And after a consideration of the act in that aspect it is said:

"We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law, to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, sui juris, as employer or employe, to make contracts for the labor of the latter under the protection of the provisions of the federal Constitution, there would seem to be no length to which legislation of this nature might not go."

And answering the argument of the state that it was in its interest that its population should be strong and robust, and that legislation tending to that end must be valid as a health regulation, it is said:

"If this be a valid argument, and a justification for this kind of legislation, it follows that the protection of the federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the Legislature. Not only the hours of employers but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise lest the fighting strength of the state be impaired."

And finally it is said:

"It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employé as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employés (all being men, sui juris), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employés. Under such circumstances the freedom of master and employé to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the federal Constitution."

These considerations would seem to have close application to the regulation here sought to be enforced, and it is not readily to be perceived why the principles there stated should not be given controlling effect to render it void.

[7] But, accepting the provision strictly at its face value, as an act to protect the public against the dangers threatened from the maintenance of laundries, I think that it must be held void as an unreasonable interference with the liberty of the citizen in the prosecution of his occupation, and as having no real or substantial relation to the purpose sought to be accomplished; for it cannot be ignored that it has to do with a perfectly legitimate, harmless, and necessary business, one of which the late Justice Field, in In re Quong Woo, supra, aptly said:

"But the business of a laundry—that is, the washing of clothing and clothes of various kinds, and ironing or pressing them to a condition to be used—is not of itself against good morals, or contrary to public order or decency. It is not offensive to the senses, or disturbing to the neighborhood where conducted, nor is it dangerous to the public safety or health. It would be absurd to affirm that it is."

Obviously, in view of the other features of the ordinance quoted above, the only menace intended to be met by this particular regulation is danger from fires. But to say that to obviate that danger it is reasonably necessary that the hours of labor in such an industry be curtailed to the narrow limits prescribed, and the business necessarily closed down, and that throughout the entire territory within the corporate limits of a city as large as San Francisco, with its not infrequent districts of partially or wholly unoccupied blocks and lots, where the maintenance of a laundry could give rise to no conceivable danger to the public from such source, is, on the face of it, to state an absurdity. It would be quite as reasonable to enact that by reason of the same danger all factories and industries within the city limits employing fires in their operation should be subjected to the same restrictions. Indeed, we might go further, and say that with as much reason the maintenance of fires in restaurants, eating houses, and hotels, in the kitchens and dwellings of the artisan and the laborer and of the inhabitants generally, should be limited to the hours between 7 o'clock in the morning and 6 o'clock in the evening. Such restrictions would at once be recognized as absurd and unreasonable; yet not only fire statistics, but common observation, teach us that in the life of a large city the difference in the degree of danger from fire to be apprehended from any one of these sources, as compared with another, is negligible. These things are to be regarded in determining the reasonableness of a regulation in its relation to the ostensible objects sought to be accomplished. If it has no such reasonable application to the conditions sought to be met, it will not stand, but will be recognized as an unauthorized interference with the liberty of the individual in the prosecution of the business or occupation affected. In this respect the suggestion in In re Wong Wing, that "many, perhaps a majority, of occupations, employments, and forms of business in San Francisco are conducted during less than 11 working hours a day," would seem to be a wholly immaterial consideration—a "milestone on the Dover road." It is not a question of comparison. The only pertinent consideration in such a case is whether the respect in which the particular business is interfered with is justified by the interests of the public. If it is not, the interference is unauthorized, no matter how other and different kinds of business may be conducted. Very clearly, if this provision of the ordinance be a valid exercise of the police power, it is difficult to foresee the point at which we should be enabled to say that the limit of the legislative power of the municipality has been reached. If such a restriction upon the right of the individual to prosecute a legitimate industry be reasonable under the facts disclosed in this bill, could it be said that a further restriction to 10, 8, or even a less number of hours would be less so? And the history of laundry regulation in San Francisco, as disclosed in the numerous cases arising therefrom, renders this no idle question. It is perhaps no exaggeration to say that this business has afforded a greater field for so-called police regulation than all other classes of business combined, and apparently with a progressive tendency to constantly impose increased restrictions thereon. From an original requirement forbidding work in laundries during the period of 8 hours in the nighttime in certain limited districts, we find the period later increased to 11 hours, and it is now, by the present measure, sought to further increase this period of enforced idleness to 13 hours throughout the entire city, upon the theory that the public good demands it. I think we may aptly quote the language of the Supreme Court in Lochner v. New York, supra, where, with reference to the kindred regulation there under consideration, it is said:

"It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power, for the purpose of protecting the public health or welfare, are in reality passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law."

And I am of opinion, as there said, that "the limit of the police power has been reached and passed in this case," that the regulation under consideration has no such just or reasonable relation to the ostensible purpose for which it was put forth as will sustain it, and that it must therefore be held void. I have reached this conclusion with great reluctance, in deference to the contrary views expressed by the Supreme Court of the state in In re Wong Wing, supra, as to the validity of the similar provision there involved; but, these courts being clothed with concurrent jurisdiction with those of the state in the adjudication of questions involving the enforcement of rights guaranteed by the federal Constitution, I have nevertheless felt constrained, by the considerations stated above, to adhere to my own ultimate convictions.

It may be suggested that this conclusion will not affect the validity of the ordinance as a whole, nor the clause of section 9 relating to Sunday, which is not attacked. Not only is the provision here held void entirely separable in its effect from the other provisions of the ordinance, but the latter contains a section (11) which reads:

"The board of supervisors hereby declares that it would have passed this ordinance, and each section, subsection, subdivision, sentence, clause, and phrase thereof, irrespective of the fact that any one or more sections, subsec-

tions, subdivisions, sentences, clauses, or phrases is declared unconstitutional or invalid for any reason."

The motion to dismiss will accordingly be denied, and a decree may be entered herein declaring void and enjoining the enforcement of section 9 of the ordinance, excepting as to the Sunday clause, and that the plaintiff recover his costs.

HANLEY V. FEDERAL MINING & SMELTING CO.

(District Court, D. Idaho, N. D. July 22, 1916.)

1. Tenancy in Common € 20(1)—Mutual Rights of Cotenants—Acquisition of Tax Title.

The rule which prohibits one tenant in common from acquiring adversely the interest of a cotenant through a tax sale does not apply to a case where the interests of the cotenants were separately taxed, and the interest of one was sold for taxes, and the title thereto acquired by a third person, to prevent another cotenant from afterward purchasing such interest.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 60; Dec. Dig. \$\infty 20(1).]

2. Tenancy in Common ⇐⇒20(2)—Acquisition of Tax Title by One Tenant
—Time for Redemption by Cotenant.

A tenant in common, who acquires title to the joint property through a tax sale, holds such title to the interest of a delinquent cotenant subject only to the right of the latter to redeem within a reasonable time, which depends on the circumstances of the case. In general, where mining property is involved, greater diligence is required than in other cases, because of the fluctuating value of the property.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 61; Dec. Dig. € 20(2).]

3. TAXATION \$\infty 796(2)\$\to Validity of Tax Title—Irregularity in Procedure—Waiver,

An owner of real property, who permits it to be sold for taxes, and the purchaser to take possession and pay taxes thereon for a number of years, is not in a position to attack the validity of the sale because of mere irregularities in procedure, where the law has been substantially followed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1579; Dec. Dig. \$796(2).]

TAXATION €
 —S9
 —SEPARATE ASSESSMENT OF INTERESTS OF COTENANTS
 —IDAHO STATUTE.

Under Rev. Codes Idaho, §§ 1752, 1872, the interests of tenants in common in mining property may be separately assessed and separately sold for delinquent taxes.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. €=89.]

5. TAXATION €=327—ASSESSMENT OF MINING PROPERTY—LEGALITY OF METH-OD—IDAHO STATUTE.

The method of taxing mining property prescribed by Rev. Codes Idaho, §§ 1863-1872, the distinctive feature of which is that, instead of assessing the ore bodies, the net proceeds of operation for the preceding year is taxed, in addition to the value of the surface and improvements, is not in violation of Const. Idaho, art. 7, §§ 2, 3, 5, 8, which require all taxes to

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes $235 \, \mathrm{F.} - 49$

be levied in proportion to value, and to be uniform upon the same class of subjects.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 550; Dec. Dig. ♦ 327.]

In Equity. Suit by Kennedy J. Hanley against the Federal Mining & Smelting Company. Decree for defendant.

John P. Gray, of Cœur D'Alene, Idaho, Cullen Lee & Matthews, of Spokane, Wash., and W. F. McNaughton, of Cœur D'Alene, Idaho, for plaintiff.

Featherstone & Fox, of Wallace, Idaho, and James E. Babb, of Lewiston, Idaho, for defendant.

DIETRICH, District Judge. The litigation relates to the Skookum mining claim, in Shoshone county, Idaho. In a suit between the plaintiff and the defendant's predecessor, terminating in the year 1907, it was adjudged that the plaintiff was the owner of an undivided oneeighth interest, and that the defendant's predecessor was the owner of the other seven-eighths interest, and upon an accounting plaintiff was awarded a large sum. It is alleged that in 1906 the defendant abandoned the extraction of ores, although there was an understanding between it and the plaintiff that it might continue to operate the entire claim and account to him for his share of the net proceeds; that in July, 1906, the plaintiff's one-eighth interest was sold to Shoshone county for the taxes of 1905, and in July, 1907, it was again sold to the county for the taxes of 1906; that thereafter negotiations were entered into between the defendant and the county for the purchase by the former of the latter's tax title, and that in 1911 this sale was consummated. It is further charged that as a matter of fact the defendant company agreed to operate the claim, and to pay the taxes and other expenses, and to account to the plaintiff for the profits upon the one-eighth interest, but in violation of the promise it willfully permitted the property to lie idle, and made default in the payment of the taxes, for the purpose of wrongfully depriving the plaintiff of his title, by permitting a sale to be made for delinquent taxes, and procuring the title from the purchaser at such sale. The prayer, in substance, is that the plaintiff be adjudged to be the owner of the one-eighth interest, and that defendant be required to account for the profits of operation.

I shall not attempt in detail to review the evidence upon the issues of fact. In the main I am unable to sustain the plaintiff's contentions. It is not thought that the evidence is sufficient to warrant a finding of a fraudulent purpose or intent on the part of the defendant. Furthermore, I am unable to find that it ever agreed to pay the taxes upon the plaintiff's interest. It is to be noted that the conversations which the plaintiff testifies he had with the defendant's manager, evidencing, as it is claimed, some sort of an understanding that the defendant would take care of the taxes, did not occur until after the tax sale in 1906, and probably not until after the tax sale in 1907. Whatever might be said as to the reasonableness of the plaintiff's assumption that the taxes thereafter were to be paid out

of the proceeds of the operation of the mine, if the defendant company was expected to discharge taxes which had become delinquent, especially where sales had already taken place, some reference would doubtless have been made thereto in the conversations or correspondence between the parties. The testimony is not at all satisfactory as to the alleged letter of February 10, 1909, from the plaintiff to the defendant's manager. It is difficult to see why such a letter should have been written just at that time, but aside from that consideration there are circumstances which convince me that it was prepared at a later date. The plaintiff testifies that both it and the one of January 30, 1909, were dictated to and written by Miss Wilson, a public stenographer at the Spokane Hotel. Her direct testimony is corroborative of this claim, but it is inherently improbable that she would have retained any distinct recollection of the writing of such letter. Besides, she testified that she used only one typewriter, and the evidence is conclusive that the two letters were not written upon the same machine. She further testified that she uniformly used a certain kind of paper for carbon copies, but when confronted with the fact that these two sheets are entirely different in color and texture she hesitated to say that both are carbon copies. But if it be assumed that the earlier letter as introduced in evidence is the original, and if we thus account for the difference in paper, we have the further fact that apparently the signatures to the two letters were not made at approximately the same time. It is possible, of course, to explain the discrepancy in this respect; but in the absence of such explanation the inference is natural, if not unavoidable, that the signature to the letter of February 10th is of a later date. It indicates great feebleness on the part of the writer, and is suggestive of the malady from which the plaintiff was suffering at the time his deposition was taken. Without going further into details, I am satisfied that the letter of which the exhibit dated February 10, 1909, purports to be a copy, was never received by the defendant.

In the second amended complaint, verified by the plaintiff, he alleges that about the fall of 1909 the defendant entered into negotiations with the county, without first consulting him, to procure from it such title as it had acquired by reason of the tax sales of 1906 and 1907, from which no redemption had been made, and that thereupon he made objection, as a result of which the defendant was at the time unsuccessful in its efforts, but that thereafter, namely, in 1911, it acquired the county's interest. Inconsistently, I think, it is now his contention that he did not concern himself with the taxes, because he understood it was the duty of the defendant company to pay them, and further because that company, through its officers, had expressly agreed so to do. Upon having his attention called to the fact that he was aware that, upon the expiration of the period of redemption, the county was advertising for sale the title which it claimed to his one-eighth interest, he admitted that he may have had actual notice of such advertisement and contemplated sale; but, as he says, it was all right (with him) for the defendant to buy it, because it was protecting him in the matter, and he depended on it,

and further that it did not bother him if the company did buy the county's title, because it was doing that for his protection, according to the agreement which he had with Mr. Miller, its manager. And still he protested against the defendant's acquisition of the title. this connection it may be significant that one Bacon had recovered a judgment against the plaintiff in June, 1909, for over \$50,000, and a levy had been made on execution of the judgment against the plaintiff's interest in the claim. This judgment has never been satisfied, and it is to be inferred from the testimony of Mr. Cullen, who was attorney for Bacon, and who is also one of the attorneys for the plaintiff in this case, that the present action is in reality brought in the plaintiff's name for the use and benefit of Bacon. that the plaintiff was in 1909 being pursued by a large creditor may. in a measure at least, account for his apparent apathy in the matter of the tax proceedings. It is not improbable that he thought that if he rescued his interest from the county it would at once be seized and sold by the execution creditor; whereas, if he permitted title to accrue to the county, and if thereupon the defendant purchased it. he might, through a voluntary conveyance from the company, again acquire title, or he might succeed in one of the contentions which he here makes, namely, that the tax is invalid, or that the defendant, being a co-owner, could not, by purchasing the outstanding interest, deprive him thereof.

There is an apparent contention, though not very clearly defined, that, having in its hands funds of the plaintiff arising from the operation of the mine, the defendant used the same to buy in the outstanding tax title, and therefore, under a familiar principle of equity, it necessarily holds such title in trust for the benefit of the plaintiff. There is no attempt to trace any specific fund belonging to the plaintiff into the purchase price of the property. It is claimed only that upon a fair accounting it would appear that the defendant did not from time to time turn over to the plaintiff the entire one-eighth of the net proceeds of operation, and this unaccounted for balance was in excess of the amount paid for the tax title. But, passing the consideration that such fund, if it existed, is not identified with the purchase price, let us analyze the claim that the defendant at any time had in its hands moneys belonging to the plaintiff. In the suit already referred to, involving the question of the plaintiff's ownership of the oneeighth interest, an accounting was ordered and had, as a result of which the defendant made payments to the plaintiff aggregating several hundred thousand dollars, the last payment being made in 1907, at which time the controversy was finally closed and fully settled. From time to time in the course of the hearings in the present suit a question has incidentally arisen as to the fairness of that accounting, and it is to be conceded that certain testimony offered tends to show error; but such a question is wholly beyond the present issue, and at this juncture the accounting had in the former suit and the settlement made pursuant thereto must be regarded as conclusive upon both parties.

It is further shown that the defendant extracted no ores from the Skookum claim from 1906 up to the fall of 1909; the property was idle; it is so alleged in the bill. Manifestly, therefore, the defendant had no funds belonging to the plaintiff with which to pay taxes prior to the fall of 1909. It follows that no good purpose would be accomplished by taking an account to cover the operations intervening between the fall of 1909 and the time in 1911 when the defendant acquired the tax title from the county, for, if the county acquired title at all, it vested prior to the commencement of mining operations in 1909, on account of the tax sale in July, 1906, and hence the proceeds of subsequent operation would be payable to the county and not to the plaintiff. If, on the other hand, the county did not acquire the title, owing to the invalidity of the tax proceedings, an accounting after 1909 would at this time be useless, for upon that assumption the title is still in the plaintiff, whatever may have been the net result of the mining operations. I am aware that this reasoning does not apply to claims of title resting on sales made subsequently to 1906. But, as I understand, these later sales may be ignored, for, if the sale of 1906 was valid, the others are of no moment, and, if it was void, so were all of them. There is some contention of a double assessment, and of unfairness on the part of the defendant's manager in answering inquiries of the assessor touching the output for certain years; but it was clearly the intention of the county officers to assess the plaintiff's interest separately, and it was so assessed. If the assessment was too high, that is a matter we cannot now inquire into or remedy; the fact does not affect the jurisdiction of the assessing officers. The plaintiff never paid any taxes at all, and has never even offered to pay that which in any view was equitably due from him. And while the record touching the assessment upon which the defendant paid its taxes is somewhat ambiguous and uncertain, there is really little room for doubt that the county officers intended such assessment to extend only to the seven-eighths interest, and that the defendant company understood that it was so limited.

[1] It is argued that, if it be assumed that the title passed to the county and then to the defendant, still the defendant must be held to be a trustee for the plaintiff, under the general rule by which one tenant in common is prohibited from purchasing an interest in the property against his cotenant. But if it be held that the defendant acted in good faith and was under no obligation, either of law or contract, to pay the taxes, and further that it did not buy in the title with funds belonging to the plaintiff, the contention is thought to be with-The plaintiff's interest was separately assessed, and was sold to the county; the county thus becoming the absolute owner thereof. The rule relied upon does not extend to such a case. Bennett v. North Colorado Springs Land & Improvement Co., 23 Colo, 470, 48 Pac. 812, 58 Am. St. Rep. 281; McCready v. Fredericksen, 41 Utah, 388, 126 Pac. 316; Westergreen v. Beer (Cal. App.) 145 Pac. 543; Starkweather v. Jenner, 216 U. S. 524, 30 Sup. Ct. 382, 54 L. Ed. 602, 17 Ann. Cas. 1167. See also Black on Tax Titles, § 282; Blackwell on Tax Titles, sections 566 to 578. One cotenant has no reason to complain if his co-owner purchases the interest of a third cotenant, and the plaintiff's interest here having been separately assessed and sold, and the county having become the owner thereof, it was competent for the defendant to buy in such interest for itself. Reinboth v. Zerbe Run Improvement Co., 29 Pa. St. 139; Kirkpatrick v. Mathiot, 4 Watts & S. (Pa.) 251; Keele v. Cunningham, 2 Heisk. (49 Tenn.) 288; Watkins v. Eaton, 30 Me. 529, 50 Am. Dec. 637; Lewis v. Robinson, 9 N. M. 170, 10 Watts (Pa.) 354. See also Bissell v. Foss, 114 U. S. 252, 5 Sup. Ct. 851, 29 L. Ed. 126, where it is said:

"It is true that one of two or more tenants in common holding by common title, cannot purchase an outstanding title or incumbrance upon the joint estate for his own benefit. Such a purchase inures to the benefit of all, because there is an obligation between them, resulting from their joint claim and community of interest, that one of them shall not affect the claim to the prejudice of the other. * * * But this rule cannot apply to Hunter and Foss. They purchased no outstanding title or incumbrance to the prejudice of the other tenant in common. They did what any tenant in common with entire good faith might do, namely, purchased the interest of some of their cotenants without consulting the others."

- [2] Moreover, notwithstanding the rule invoked by the plaintiff, the title passes to the purchaser, here the defendant, subject only to the right of the delinquent cotenant, here the plaintiff, to redeem within a reasonable time. Wilson v. Linder, 21 Idaho, 576, 123 Pac. 487, 42 L. R. A. (N. S.) 242, Ann. Cas. 1913E, 148; Starkweather v. Jenner, 216 U. S. 524, 30 Sup. Ct. 382, 54 L. Ed. 602, 17 Ann. Cas. 1167. As to what is a reasonable length of time depends upon the circumstances of the case, but generally speaking it may be said that, where mining property is involved, greater diligence is required than in other cases. The real value of such property is generally unknown, and is subject to great and sudden fluctuations. See Olympian Mining & Milling Co. v. Kerns, 24 Idaho, 506, 135 Pac. 255, together with cases and texts therein cited. This suit was not commenced until February, 1914, and there is no averment of an effort or an offer on the part of the plaintiff to redeem. In the amended complaint there is only a general offer "to do equity" and to "abide any such just or proper charges against his interest or the profits of the said ore as to the court may seem meet and proper." There is no specific or unqualified offer to reimburse the defendant for what it has paid out to acquire the title. Suppose that in an accounting it should turn out that this one-eighth interest is entitled to no credit from the operation of the mine; the plaintiff has not bound himself or offered absolutely to take over the title to the one-eighth interest, regardless of its value. and to fully reimburse the defendant for what it has paid on account thereof. For approximately five years prior to the commencement of the suit he knew of the condition of the title, and of the claim that he had been divested thereof by reason of the tax proceedings. We need not consider what would be a high degree of diligence, for no diligence at all has been shown. Sunny Brook Zinc & Lead Co. v. Metzler (D. C.) 231 Fed. 304.
- [3] Coming now to the alleged defects in the tax title, the point that the sale was void because the property was sold to the county on the

first day of the sale is fully answered in Bacon v. Rice, 14 Idaho, 114, 93 Pac. 511. This court will, of course, follow the Supreme Court of the state in the construction of a state statute.

[4] The next contention is that, under the system prevailing in Idaho, an undivided interest cannot be separately assessed for taxation purposes, but that the valuation must be placed upon the property as a whole. Section 1752 of the Revised Codes of Idaho provides that:

"If the owner or possessor [of the property] does not, then the collector may, designate it, and the person who will take the least quantity of the land, or in case an undivided interest is assessed, then the smallest portion of the interest, and pay the taxes, penalties and costs due, including fifty cents to the collector for the duplicate certificate of sale, is the purchaser.'

Manifestly there is here an express recognition of the right to assess an undivided interest. If we consider the objection as limited to mining property, which is valued in a peculiar way for assessment purposes, we find that in case of the failure of the owner of the mine to pay his taxes, under section 1872 of the Revised Codes, the collector is authorized and required to enforce the payment by following the course prescribed for the enforcement of taxes against other property, including the directions contained in section 1752 already quoted. It would seem to be clear, therefore, that the assessor is authorized to value for assessment purposes separately the several interests of part owners of a mining property and their several interests in the proceeds of the operation thereof. Tong v. Maher, 45 Mont. 142, 122 Pac. 279.

[5] The next, and perhaps the most serious, contention is that the method of taxing mining property as followed in this case, and as prescribed in sections 1863 to 1872, inclusive of the Revised Codes of Idaho, is in violation of the Constitution, in that it is inconsistent with sections 2, 3, 5, and 8 of article 7 thereof. These sections are as follows:

"Sec. 2. The Legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property, except as in this article herein otherwise provided. The Legislature may also impose a license tax (both upon natural persons and upon corporations, other than municipal, doing business in this State); also a per capita tax: Provided, the Legislature may exempt a limited amount of improvements upon land from taxation.

"Sec. 3. The word 'property' as herein used shall be defined and classified

by law."
"Sec. 5. All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal: Provided, that the Legislature may allow such exemptions from time to time as shall seem necessary and just, and all existing exemptions provided by the laws of the territory, shall continue until changed by the Legislature of the state: Provided, further, that duplicate taxation of property for the same purpose during the same year, is hereby prohibited."

"Sec. 8. The power to tax corporations or corporate property, both real and personal, shall never be relinquished or suspended, and all corporations in this state or doing business therein, shall be subject to taxation for state, county, school, municipal, and other purposes, on real or personal property

owned or used by them, and not by this constitution exempted from taxation within the territorial limits of the authority levying the tax."

It is not questioned that the assessor pursued the course pointed out by the statutes; that is, he valued the surface of the claims at the government price for mineral lands, and all other property and surface improvements, including machinery and structures of all kinds, at their cash value, and added thereto the net annual proceeds of operation for the preceding year. Instead of directly assessing the ore bodies, which usually constitute the chief actual value of the property, the statute contemplates the assessment only of the net output, and this is its most distinctive feature. It may very well be that the system is highly discriminative in favor of mining property. With that question, however, we are only incidentally concerned. Responsibility for the system rests with the Legislature, not with the courts. There is here no question of the legislative intent. Our consideration, therefore, extends only to the question of legislative power. What are its constitutional limitations? The validity of the tax here, in so far as it relates to machinery and buildings, is, of course, not subject to the objection under discussion. That being true, it may very well be doubted whether the plaintiff is in a position to assail the tax title, even were it conceded that in other respects the tax was invalid. It may further be doubted whether he can be heard to complain of the valuation which, assuming his views of the law to be correct, is manifestly too low; he has no real grievance. But, putting aside these questions, is the net income method of mine assessment obnoxious to the constitutional provisions above quoted? The meaning of these provisions is not entirely clear, and, were we to consider the phraseology alone, I should be very much inclined to sustain the plaintiff's view. That would be the more natural import of the language, and the inherent reasons for excepting mining property from the general ad valorem system of assessment do not greatly impress me. But, when we give consideration to the circumstances surrounding the drafting and adoption of the Constitution, I am constrained to a different conclusion. There can be no question that at that time there was a prevalent sentiment in favor of stimulating and fostering the development of mineral lands by relieving such property from the burden of taxation. The territorial statutes wholly exempted "mining claims," and while more recently it has been held by a majority of the Supreme Court of the state (in Salisbury v. Lane, 7 Idaho, 370, 63 Pac. 383) that the exemption did not extend to patented "mining claims," still it is thought that prior to the rendition of this decision the view maintained in the able dissenting opinion was generally accepted. But, be that as it may, even though limited in its application to unpatented claims, the statute would in that early day operate to exempt most mining property, for there was no great advantage, especially in the case of an operating mine, in having a patent. The sentiment in favor of the generous treatment of mining property is clearly reflected in the debates in the constitutional convention upon the subject of taxation, and I have little doubt that, while the disposition of the convention was in favor of the method here assailed,

it was not expressly provided for in the Constitution, out of deference to the desire of many to leave the whole matter to the discretion of the Legislature. And article 7 was finally adopted, I think, with the understanding that the matter was so left to the discretion of the Legislature. The clause "uniform upon the same class of subjects" seems to have been borrowed from the Colorado Constitution, and in April, 1889, a few months before the convention, the Supreme Court of Colorado, in People ex rel. Iron, etc., M. Co. v. Henderson, 12 Colo. 369, 21 Pac. 144, held valid revenue statutes very similar to those presently involved. The decision was published in April, 1889, and it is not unreasonable to assume that it attracted general attention in Idaho, where like conditions were to be found, and especially where preparation was being made for statehood. It must have been known to the convention, having, as it did, among its members many who were eminent at the bar, and surely, if it was intended to prohibit the Idaho Legislature from doing the very thing which the Colorado Legislature had done, and which the Supreme Court of that state had held to be not violative of the Constitution, the language of that Constitution would not have been borrowed without some express provision denying to the Legislature the power to do the objectionable thing. Admittedly, as was said in Salisbury v. Lane, supra, it was intended to confer on the Legislature the power to exempt mining property entirely from taxation, and, as we have seen, the people were living under a system where it was in fact largely, if not entirely, exempt. We cannot, therefore, by now assuming the unreasonableness or the inequality of the income method, draw an inference against the intention of either the convention or the people to leave the matter to the discretion of the Legislature. In view of conditions as they then actually existed, it is quite probable that, if the proposed Constitution had expressly imposed the system later established by the Legislature, it would have been adopted without any general opposition. See, also, Achenbach v. Kincaid, 25 Idaho, 780, 140 Pac. 529; In re Gross Production Tax of Wolverine Oil Co. (Okl.) 154 Pac. 362.

It may be, as suggested, that in some respects the conduct of the defendant following the termination of the former suit is subject to criticism; but we are here concerned with its shortcomings only in so far as they are actionable. It is not seeking equitable relief, and hence is not subject to the conditions upon which such relief is granted or withheld. Upon the other hand, what is to be said of the complainant's conduct? In the most favorable view I have been able to take of the record, he is chargeable with gross neligence. He was not ignorant of the possibility of a separate assessment upon his one-eighth interest. In 1903 he waged a suit against the county officers to enjoin the enforcement of such a tax. When his long and bitter contest with the defendant's predecessor was finally determined in his favor, he certainly had no reason to assume that it, the defeated party, would go out of its way to advance the taxes upon an interest in the property which it had lost in the litigation. It is to be borne in mind that plaintiff does not claim to have had any amicable

understanding with the defendant for the operation of the property or the "protection" of his interest until 1907. Prior to that time, who did he suppose was "protecting" his interest against the taxes for 1905 and 1906? While now enfeebled by disease, so far as the record shows he was then a vigorous man, and had recently come into possession of what generally would be regarded as a large fortune. There was no reason why he should not, and every reason why he should, himself take care of his interest and protect it against taxes, if they were unjust, and pay them, if they were just. Whatever view may now be taken of the matter, he then had no reason to believe, and he did not believe, that the defendant owed him anything. He had just had a complete accounting, with which he was apparently satisfied, and pursuant to the orders of the court he had been paid. and he had accepted, the entire amount found due. That he knew his property had been assessed can hardly be open to doubt. What did he expect? Certainly not that the defendant was going to pay the taxes. He could not assume that its feelings were friendly. It had none of his money with which to make payment. He gave no directions and made no request touching the taxes of 1905 or 1906, and not even in the conversations had with the defendant's manager in 1907 did he specifically refer to these taxes, or express any wish relative thereto. He had contested an earlier tax, and did he think that the corporation would, without any request or authorization, take of its own money and gratuitously pay a tax which he was probably unwilling to pay, and the validity of which was not free from doubt? It is to be noted that, while he is here contending that it was the defendant's duty to pay the tax, he is with equal force assailing the validity thereof. Having in mind such an attitude, what would have been the defendant's plight, had it voluntarily made payment? Would it not thus have put itself in jeopardy? Upon an accounting, or upon a demand for reimbursement, would it not have been met with the contention that it had gratuitously paid an invalid claim, and was therefore not entitled to reimbursement?

The truth probably is that the plaintiff believed the tax to be invalid, and perhaps also thinking that the property had been mined out and was of doubtful value, he was indisposed to pay the claim. This theory is corroborated by his attitude in 1909, when, knowing of the county's claim, instead of satisfying it, he only protested against the sale to a third party, and did not offer to pay any part of the tax.

Upon the whole, I am inclined to think that no ground for equitable relief has been shown, and the bill will therefore be dismissed.

In re OPAVA.

(District Court, N. D. Iowa, E. D. October 5, 1916.)

1. EXEMPTIONS \$\ightharpoonup 21-"Head of Family"—Who Are—Priests—"Family."

A "family" is a collection of persons living under one roof, having one head or manager; and the "head of a family" is one who controls, supervises, and manages the affairs of the household. Therefore, a priest of the Roman Catholic Church who induced his sister to come from a foreign country and live with him, agreeing to pay over to her all his income outside of his personal expenses, the sister to maintain the household and have any amount saved, is a "head of a family" within Code Iowa 1897, \\$ 4008, making exemptions to the heads of families.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 19, 23; Dec. Dig. ⊗ 21.

For other definitions, see Words and Phrases, First and Second Series, Family; Head of Family.]

2. Bankruptcy \$\infty 413(4)\$—Discharge—Objections—Sufficiency.

A specification of objections to the discharge of a bankrupt on the ground that he had concealed property is insufficient, unless it charge the concealment was knowingly and fraudulently done.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 713, 714; Dec. Dig. —413(4).]

3. Bankruptcy \$\sim 408(3)\$—Discharge—Refusal.

As Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, provides that the bankrupt shall be discharged unless he has committed an offense punishable by imprisonment as provided, a bankrupt's discharge will not be denied on the ground that he knowingly and fraudulently concealed a typewriter, because he did not include such article in his schedule, where the typewriter, which was of small value, was never concealed but kept in the usual place in the bankrupt's library.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 735, 736; Dec. Dig. \$\sim 408(3).]

4. Bankruptcy €==413(4)—Discharge—Specification of Objections.

Specification of objections to a bankrupt's discharge that he had concealed certain property which had previously been transferred to his sister, and in which he had a beneficial interest, is insufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 713, 714; Dec. Dig. € 413(4).]

5. MASTER AND SERVANT \$\sim 3(1)\$—Contracts—Validity.

A brother agreed that if his sister would live with him and manage his household he would deliver to her all his income beyond his personal expenses. The sister agreed to pay out of such income the household expenses, the expenses of illness and of the brother's funeral; it being understood that she was to have any sum saved. *Held*, that the contract was lawful.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 2; Dec. Dig. ⊕ 3(1).]

6. Bankruptcy €= 408(4)—Discharge—Concealment of Assets.

Where pursuant to contract a bankrupt paid his sister to manage his household his entire income beyond that necessary for his personal expenses, it being agreed the sister should have all savings, the bankrupt, who did not include in his schedules money saved by the sister, will not be denied a discharge on the ground of knowingly and fraudulently concealing assets, it appearing that on his first examination he fully disclosed his financial relations with his sister, for the bankrupt was justified in

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

proceeding on the theory that the contract was lawful and that he had no interest in the sister's savings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 733-735; Dec. Dig. \$\sim 408(4).1

7. Bankruptcy \$\sim 408(1)\$—Discharge—False Oath.

Where a bankrupt, believing that under a contract he was not entitled to certain funds, did not include such funds in his schedules, he cannot, though he verified the schedules, be denied discharge on the ground of making false oath, as he was entitled to assume, if in good faith, that the contract was lawful and that he had no interest in the funds, and to make the schedules on that theory.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 732; Dec. Dig. 6 = 408(1).1

8. Fraudulent Conveyances 51(2)—Exempt Property.

A debtor, the head of a family, whose wages are exempt by statute, may use his wages as he desires, the creditors having no right to object, though he gives them away or spends them foolishly.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 115; Dec. Dig. €=51(2),1

9. Bankruptcy \$\infty 409(1)\$—Discharge—Denial.

Where the bankrupt had never kept books, his failure to keep books after incurring indebtedness is no ground for denying a discharge on the theory that he failed to keep books to conceal his true financial condition; it appearing that the bankrupt was a priest who received a small income and had no necessity for books.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 752-757; Dec. Dig. € 409(1).]

In Bankruptcy. In the matter of the bankruptcy of Vincent Opava. Petition to review the action of the referee and denying claim to exemptions, together with objections to the discharge of the bankrupt. Order of referee declining to set apart exempt property reversed, and bankrupt ordered discharged.

Reed & Pergler, of Cresco, Iowa, for bankrupt. Ramsey & Blackstone, of Garner, Iowa, for opposing creditor.

WADE. District Judge. The bankrupt is a priest of the Catholic Church, who filed a voluntary petition in bankruptcy, and now asks his discharge.

The debts owing by him, so far as indicated by the record before me, is \$1,000, upon a note executed for some stock in an insolvent cor-

poration and \$65 to the publishers of "Americana."

Two questions are here presented. Early in the proceedings, the bankrupt claimed, as exempt to him as head of a family, his small library and typewriter. This claim was denied by the referee, and, by stipulation, a petition for review of the action of the referee is presented with the objections of the Farmers' National Bank of Garner to the discharge of the bankrupt.

First. As to the question of exemptions:

[1] The sole question here is whether or not the bankrupt is the head of a family within the meaning of Code of Iowa 1897, § 4008.

The claims made by the bankrupt that he is the head of a family is based upon the fact, which appears to be undisputed, that some 15 or 16 years ago the bankrupt, who had been ordained some 4 years, and who seems to have been a shining mark for promoters of corporations, with glowing prospects, but no assets, sent for his sister to Bohemia, and induced her to come and live with him, and, as inducement, made an agreement with her that he would turn over to her all his income outside of his expenses, for clothing, etc.; that she would maintain the household, and whatever was saved from his income should be her property, except that she was to furnish therefrom expenses of illness, and funeral expenses upon his death; all the balance she could save, was to belong to her.

Under this agreement, she came to him, and has lived with him some 15 years. His income, outside of small gifts, averaged about \$750 per year. She has occupied the position of housekeeper and manager of household affairs, and under the contract the bankrupt is under obligation to continue this arrangement throughout his life. The bankrupt is performing the ordinary duties of his profession, and maintains a home at whatever place he is assigned to perform the

duties of his ministry.

Under these circumstances, it is contended that the bankrupt is the head of a family within the meaning of the Code of Iowa, and, if so, there is no question but what he is entitled to the exemptions claimed.

Exemption statutes are liberally construed.

"In every court the administration of an exemption law should comport with the beneficent spirit that prompted its enactment. A court of equity * * * should not attempt to defeat an exemption by niceties in practice. It should be helpful to those whose condition requires them to invoke it." Smith v. Thompson (8th Cir.) 213 Fed. 335, 129 C. C. A. 637.

A most comprehensive definition of a "family" is that by Judge Deemer in Blair v. Fritz, 162 Iowa, 716, 144 N. W. 611.

"A 'family' is a collection of persons living under one roof, having one head or management; and the 'head of a family' is the one who controls, supervises, and manages the affairs of the household. Fullerton v. Sherrill, 114 Iowa, 511, 87 N. W. 419; Emerson v. Leonard, 96 Iowa, 311, 65 N. W. 153, 59 Am. St. Rep. 372; Tyson v. Reynolds, 52 Iowa, 431, 3 N. W. 469. The relation existing among the group must be of a permanent and domestic character."

"A family 'is a collective body of persons who live in one house, and under one head or manager.'" Arnold v. Waltz, 53 Iowa, 706, 6 N. W. 40, 36 Am.

Rep. 248.

"The number of persons thus living together is not at all important, except that there must be more than one, as it is quite certain that two persons may constitute a family." Moyer v. Drummond, 32 S. C. 165, 10 S. E. 952, L. R. A. 747, 17 Am. St. Rep. 850.

In Parsons v. Livingston, 11 Iowa, 104, 77 Am. Dec. 135, a widower having his mother living with him, and supported by him, was held to be the head of a family.

A man who has living with him his widowed sister and her children is the head of a family. Wade v. Jones, 20 Mo. 75, 61 Am. Dec. 584.

A man who has living with him his invalid sister, and who supports her, though his sister owns the property on which they live, is the head of a family. Moyer v. Drummond, supra.

A bachelor living on a farm, with whom a widowed sister lives, having her furniture there, and paying no board, is the head of a family. Bailey v. Comings, 2 Fed. Cas. 367.

A man who has living with him his invalid brother and his wife is the head of a family. Webster v. McGauvran, 8 N. D. 274, 78

N. W. 80.

A man who keeps house, and "has living with him, and is supporting, some persons whom it is either his legal or moral duty to support," is the head of a family. In re Morrison (D. C.) 110 Fed. 734.

An unmarried woman having living with her an invalid sister dependent upon her is the head of a family. Chamberlain v. Brown, 33

S. C. 597, 11 S. E. 439.

An unmarried woman having living with her two children of a deceased sister is the head of a family. Arnold v. Waltz, supra.

An unmarried woman supporting relatives whom she is under moral obligation to care for is the head of a family. American National Bank v. Cruger, 31 Tex. Civ. App. 17, 71 S. W. 784.

A man is head of a family "if he contributes in part to the support of those who have a moral, though not a legal claim on him, or if he controls, supervises, and manages the affairs of the household." Forbes v. Groves, 134 Mo. App. 729, 115 S. W. 451.

Numerous other illustrations might be presented, but they are all summed up in the statement that a "family" is a collection of persons, two or more, living under one roof, having one head, or management, and that the "head of a family" is the one who controls, supervises, and manages the affairs of the household. As Judge Deemer says, the existence of "the group must be of a permanent and domestic character."

Applying this test, and the rules announced in the foregoing cases, to the facts in the record in this case, there can be no question but that the bankrupt is the head of a family. He maintains a home; he is the wage-earner, so to speak; he is the manager, so far as the maintenance of the home is concerned; he is under moral obligation to his sister; he is under a legal obligation to her by virtue of the contract which he made to maintain her during her life. There is no question but what she could enforce this obligation in case of his failure. If she became an invalid, and unable to work, it would be his duty, morally and legally, to support her. The relations of himself and sister are permanent. It is her home now and in the future.

The purpose behind the enactment of exemption laws is to secure some measure of protection to those to whom a man may owe a legal or moral obligation to furnish a living, in case misfortune or insolvency should come; and, within the spirit and purpose of this law, the bankrupt herein is clearly entitled to the benefits which the law provides.

So that the order of the referee, declining to set apart exempt prop-

erty to the bankrupt, is reversed.

Now, as to the objections to the discharge of bankrupt:

[2] The first objection is that the bankrupt concealed from the trustee a certain typewriter, alleged to be of the value of \$50, but which, the record discloses, cost originally about \$45. This objection is clearly

insufficiently stated. It is nowhere charged that such concealment was "knowingly and fraudulently" done, and, under the statute, a specification of objection to discharge upon this ground which does not charge that it was knowingly and fraudulently done is insufficient. In re Taplin (D. C.) 135 Fed. 861. The second specification against the bankrupt in opposition to discharge is that the bankrupt concealed from his trustee "certain property and money, the exact amount of which" cannot be stated. This specification is clearly insufficient for the same reason; there is no suggestion that it was done knowingly and fraudulently.

The next specification is that the "bankrupt made a false oath in relation to the said proceedings in bankruptcy." But this fails to charge that the same was knowingly or fraudulently done, and is clearly

insufficient.

The final specification is that the bankrupt, "with intent to conceal his financial condition, failed to keep books of account," etc.

While the specifications are almost entirely insufficient to comply with the statute, a consideration of the same, if properly pleaded, could lead to but one result.

[3] As to the typewriter: The only indication of an attempt to conceal it was the failure to enter it in the schedules; but the law does not punish a mere failure to enter property in the schedules. The statute is specific that:

"The judge shall discharge the applicant unless he has committed an offense punishable by imprisonment as herein provided."

And unless the evidence is such as to convince the court that the bankrupt was guilty of a crime for which he should be imprisoned, the charge cannot be sustained. There is not a scintilla of evidence to indicate that the bankrupt "knowingly and fraudulently" concealed this typewriter. The evidence shows it cost \$45, some time ago. It is probably not worth more than half that now, and it would take strong evidence to convince a court that a man had the fraudulent purpose which would warrant a penitentiary sentence, simply because he failed to put it in the schedule.

Experience in these bankruptcy matters shows that, in many cases, small articles are omitted in making up schedules. This typewriter was never concealed; it was right there in the library where it always had been, and no attempt was made to prevent the trustee or the attorney from seeing it. There is nothing in this to justify a refusal to discharge. In re McCann (D. C.) 179 Fed. 575; In re Doyle (D. C.) 199 Fed. 247; In re De Mauriac (D. C.) 206 Fed. 358; In re Stafford (D. C.) 226 Fed. 127.

- [4] As to the specifications that the bankrupt concealed certain property, which before that time had been transferred to his sister "in which he had a beneficial interest," it is clearly insufficient, but, if sufficient, is not sustained by the evidence.
- [5, 6] On his first examination the bankrupt fully disclosed his financial relations with his sister. He states a contract which he had a right to make, by which he agreed to, and under which he did, turn

over to his sister his income, from which the household expenses were to be paid, and the balance of which was to belong to her, outside of funeral expenses. If this contract was made, it was his duty to turn over this money, and, whether he did or not, it belonged to her in equity.

The proceeding before me does not involve any question of fraud against creditors, or anything of that kind; it is not even necessary that the court should determine the absolute legality of the transaction. In order to defeat a discharge as above stated, the concealment must be knowingly and fraudulently made. If a man in good faith believes that under a certain transaction he has lost all interest in the property which was formerly his, he has the right to stand upon that belief in making his schedules, and his failure to enter the transaction cannot be held to be a fraudulent concealment. No court would hold that under such circumstances he, within the language of the statute, "has committed an offense punishable by imprisonment."

It is true that the evidence shows that the sister had saved \$4,000 or \$5,000 out of the income, but, if the contract made with her is a valid contract, it belongs to her; and, whether a valid contract or not, the bankrupt had a right, if he did so in good faith, to proceed upon the theory that it was a valid contract, and that she was the legal owner of such accumulations.

[7,8] The further specification against discharge, that the bankrupt made false oath, because he verified the petition in bankruptcy and schedules without including the property given to his sister as aforesaid, comes within the same rules.

In Re Hennebry (D. C.) 207 Fed. 882, Judge Reed of this district says:

"The evidence as to the alleged fraudulent transfer of property by the bankrupt in fraud of creditors is alone that given by him in his examination at the first meeting of creditors. That examination fails to disclose any attempt upon his part to evade any question as to such transfers, or to conceal from his creditors or the trustee any of the property alleged to have been so transferred, and his statements in regard thereto seem to be full and frank. It cannot therefore rightly be said that there was any concealment of the property so transferred, other than the fact that it was not listed in his schedules, and the trustee and his creditors were then advised by him of the property so transferred, when and how he acquired the same, the purpose of the transfer, and the consideration he received therefor; so that, if it was in fact a fraudulent transfer, the trustee and creditors were then given full information by him in regard thereto, which would enable the trustee to recover the same if he, at his own instance, or at the instance of the creditors, felt disposed to make the attempt.

"The omission of the property from the bankrupt's schedules alleged to have been so transferred may, in connection with other evidence of a fraudulent concealment of such property, be considered in determining whether or not there has been an intentional fraudulent concealment by the bankrupt of property to hinder, delay, and defraud his creditors; but the omission alone from the schedules of such property, especially when transferred more than four months before the bankruptcy, is not, it seems to me, the offense contemplated by section 29b(1) or 29b(2) of the Bankruptcy Act; but the offenses so denounced are concealments of property within the four months preceding the bankruptcy and false oaths in bankruptcy proceedings, other than mere omissions of such property from the schedules, and contemplate the concealment of property by some other act or acts upon the part of the bankrupt than merely

omitting it from the schedules, and affirmative false statements of some material fact or facts by the bankrupt in a proceeding in bankruptey, willfully and intentionally made by him, knowing the same to be false."

Judge Reed further says, in this case:

"Nor is the verification by the bankrupt of the schedules from which property so transferred is omitted the making of a false oath within the meaning of the bankruptcy act; for, as before stated, the bankrupt is not the owner of, has no interest in, and is not entitled in his own name or right to recover, such property. The provision of the bankruptcy act that the trustee may recover such property, if in fact it has been so transferred, has the effect of restoring it to the bankrupt estate for the benefit of the creditors, and this seems to be all that is contemplated by Congress as to property so transferred in fraud of creditors."

In Re Buchanan, 219 Fed. 492, 135 C. C. A. 204, the Court of Appeals of the Second Circuit says:

"As to the first of these objections, there is nothing as yet to show what the amount of the alleged surplus is, or indeed that there is any surplus. Moreover, as stated above, it is still an open question whether or not such surplus, if there be one, passed to the trustee. Presumably the bankrupt was advised by his counsel that it did not so pass, and a majority of the creditors in number and amount, also presumably advised by counsel, have reached the conclusion that the chance of an affirmative answer to the question was too uncertain to risk spending the funds of the estate in securing a judicial answer to it. Under these circumstances, it would be a very harsh construction of the bankruptcy act to refuse discharge because the bankrupt did not include this trust income in his schedules."

The record does not disclose whether the trustee or the creditors have sufficient faith in the contention that the bankrupt has an interest in the property held by his sister, to bring action against her to have the matter determined. In any event, there was nothing done by the bankrupt to impede such a proceeding, and, if he in good faith believed that she could defend her title in court in a proper proceeding, he had a right to make his schedules on that belief. He could justly have proceeded upon the theory announced in Sternberg v. Levy, 159 Mo. 617, 60 S. W. 1114, 53 L. R. A. 438; that, being the head of a family, he had a right to do as he pleased with his income, at least such of it as accumulated within 90 days—it would be exempt to him.

In this case it is said, relating to the question of exemptions:

"This contention is based upon the theory that it is not the duty of a brother to support his widowed sister and her children; but, while it is not his duty, he has a right to do so, and, if he resides with them and provides for them, he is the head of a family and entitled to the same exemptions as if he had a wife living with him. * * * But if a man is entitled to his salary and certain exemptions as the head of a family which his creditors cannot touch, and if he chooses to spend a part of his salary in premiums for life insurance for the benefit of his family after he is gone, his creditors are not thereby defrauded, for he has withdrawn no part of his property which his creditors could touch. * * * Hence it is no fraud for a brother who is the head of a family, composed of himself and his sister and her children, to apply his wages or his exempt property to the procuring of insurance for her benefit; for his creditors cannot touch the wages or property and have no right to complain if he uses it thus providently and properly instead of wasting it."

The court further says:

"What is said in the plaintiff's interplea as to the amount contributed by Joseph Levy to his sister being \$5,500 in excess of what he could have procured similar board for elsewhere is of no consequence. The laws of our country give no court power to determine how much a man may spend for board, nor to inquire whether he paid too much or too little therefor."

The rule announced in this case is supported by other authorities to the effect that, where a man is the head of a family, his creditors have no interest in his wages (except under the Iowa Code accumulations of earnings of more than 90 days next preceding the levy), and that he can do with them as he pleases, buy gifts if he chooses, and that no charge of attempt to defraud creditors can be based thereon. However this may be, the transactions of the bankrupt with his sister were such that he would have a right in good faith to proceed in this bankruptcy proceeding upon the theory that he had no interest in the accumulations of his sister, and leave the trustee and creditors to take such steps as they might deem advisable to test the matter in the proper court where his sister would be a party.

[9] The specification, charging failure to keep books from which his true financial condition might be ascertained, is without merit. No

law requires a man to keep books.

"It is a matter of common knowledge that a large proportion of the people do not keep books at all; for example, farmers, clerks, and mechanics. But this is either because they see no need for it, or else cannot do it satisfactorily." In re Brockman (D. C.) 168 Fed. 1015; In re Hindin (D. C.) 219 Fed. 605.

And the failure to keep books does not bar discharge; it is only when the failure to keep books is with the specific intent thereby to conceal his financial condition that a discharge can be denied.

"The intent must be shown to the satisfaction of the court to bring the case within the statute, and it would be a harsh and unjust construction to say that the intent must, as a matter of law, be presumed from mere bad bookkeeping or from a mere failure to keep books. If that were the law, probably nine out of every ten country people, and a very large proportion of plain people everywhere, would be refused discharges if applied for, inasmuch as few of them can keep books which are intelligible to anybody except themselves." In re Brockman, supra.

The bankrupt in this case was not in any position which required the keeping of books. There is no claim that he ever kept books, and there was no occasion, so far as the record discloses, to conceal his financial transactions—certainly none until the execution of the Colby note for \$1,000, which is practically all his indebtedness. This note appears to have been executed but a comparatively short time previous to the bankruptcy, and there is nothing to show any change in the methods of the bankrupt with reference to bookkeeping from what his usual course had been throughout his whole professional life.

The objections to the discharge are overruled, and the bankrupt

will be discharged as prayed.

Counsel for bankrupt will prepare the record entry, and submit to counsel for trustee, who will have ten days in which to file objections to the form thereof; said decree to reserve proper exceptions.

UNITED STATES v. RINTELEN et al.

(District Court, S. D. New York, September 14, 1916.)

1. CRIMINAL LAW \$= 280(2)-PLEAS IN ABATEMENT.

An indictment is not subject to plea in abatement because incompetent testimony was presented to the grand jury, unless competent evidence sufficient to justify the indictment was not presented; the technical rules as to evidence not applying to the investigations of the grand jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 647, 648; Dec. Dig. 280(2),]

2. Criminal Law 5 279-Abatement-Plea in-Time for Filing.

A plea in abatement is a dilatory plea, and must be interposed promptly, usually at the time of arraignment; therefore a plea in abatement, filed after answer and motion to quash, on grounds which accused might have discovered before, comes too late.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 643, 644; Dec. Dig. 6—279.]

3. CRIMINAL LAW 280(2)—ABATEMENT—PREJUDICE OF GRAND JURY.

An indictment is not subject to attack where founded on sufficient evidence, because the grand jurors from reading newspapers had acquired strong opinions, and even bias against accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 647, 648; Dec. Dig. \$\sime 280(2).]

4. CRIMINAL LAW \$\iff 280(2)\$—PLEA IN ABATEMENT—DISCUSSION OF INDICTMENT.

Where the evidence was clear and conclusive, the fact that the grand jury returned the indictment without discussion, on the prosecutor summing up the evidence and informing them of the law, is no ground for plea in abatement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 647, 648; Dec. Dig. \$\sime 280(2).]

5. CRIMINAL LAW \$\infty 280(2)\$—ABATEMENT—MISCONDUCT OF PROSECUTING ATTORNEY.

As grand jurors may well need guidance as to the law and the weight of the evidence, the district attorney may place the evidence before them, sum it up, and charge them as to the law, but he cannot dominate the grand jury or control its findings. Therefore an indictment is not subject to objection because the district attorney informed the grand jury as to the law, summarized the evidence, and in conclusion stated that he desired an indictment, it appearing that the grand jury, though they returned the indictment without discussion, were not coerced, and that the district attorney's presentation was fair, unbiased and judicial in its character; the request for an indictment being no more than informing the grand jury of his purpose in presenting the evidence to them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 647, 648; Dec. Dig. \rightleftharpoons 280(2).]

6. CRIMINAL LAW 280(2)—ABATEMENT—MISCONDUCT OF PROSECUTOR.

Though the district attorney was guilty of misconduct before the grand jury, in attempting to influence them to return an indictment, the indictment is not open to attack, unless it appears that the rights of accused were prejudiced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 647, 648; Dec. Dig. \$\sime 280(2).]

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Franz Rintelen and others were indicted for criminal conspiracy, and F. S. Monnett and another of the defendants filed a plea in abatement. Plea overruled.

See, also, 233 Fed. 793.

John Lord O'Brien and Isaac R. Oeland, both of New York City, for the United States.

Pugh & Pugh, of Columbus, Ohio, for F. S. Monnett.

AUGUSTUS N. HAND, District Judge. This is a motion to strike out the pleas in abatement of F. S. Monnett and Jacob C. Taylor to an indictment charging these persons and others with conspiring to foment strikes in munition factories for the purpose of restraining the export of munitions to foreign countries. To this indictment a plea in abatement has been interposed upon six separate grounds:

(1) The district attorney and his assistant: (a) Expressed to the grand jury their opinions on the questions of law and fact involved; (b) asked that an indictment be found; (c) handed the grand jury a list of the defendants; (d) the grand jury found an indictment without a discussion of the evidence and without changing the names on the list.

(2) While a witness was testifying there was a stenographer in the

grand jury room.

(3) The government caused the office of Martin and Fowler, two of the defendants, to be opened without their consent, and caused Catherine Foley to carry away her stenographic notes of their letters, and caused her to read these notes to the grand jury as part of the evidence on which the indictment was found.

(4) The government subpænaed the National Metropolitan Bank of Washington to produce the checks and deposit slips of the defendant

Martin, and offered them in evidence before the grand jury.

(5) The stenographic notes and checks and deposit slips were not

returned to Martin and Fowler.

(6) The grand jurors were actuated by a strong temper and prejudice against the defendants as the result of false statements and vicious

newspaper publications.

[1] The defendants have long since entered pleas of not guilty, and thereafter moved to quash the indictment upon grounds embraced in 2, 3, and 4 of this plea. This motion was denied in an opinion filed by Judge Wolverton in which I concur, and which I should, in any event, follow, according to the custom in this district. Pleas in abatement were first used in cases of a misnomer, thereafter to attack the regularity of drawing and convening grand jurors, and still later to determine whether an indictment had been found on incompetent evidence. United States v. Swift, 186 Fed. 1002. It has been held, however, that in order to invalidate an indictment it is not sufficient to show that incompetent evidence was presented to the grand jury, but it must be shown that competent evidence which might justify an indictment was not presented. Nor is this in any sense technical. It must be remembered that indictments are in no sense trials, but exparte investigations, resulting in a complaint indicating only that the

grand jury has found that there is sufficient ground to justify charges and a trial of the accused. It is most important that these accusations should be based upon proper evidence, but equally important that a violation of technical rules of evidence should not result in nullifying the findings of grand juries, based upon competent and sufficient proof. It is to prevent delay as well as to protect the grand juriors from a criticism which is likely to impede their efficiency, and to prevent persons charged with crime from knowing the testimony which the government expects to produce against them, that the sessions of the grand jury have been held secret and inviolate, and that motions to inspect the minutes have been denied in the federal courts.

[2] Moreover, pleas in abatement are dilatory pleas which must, under the decisions, be interposed promptly, usually at the time of arraignment. The defendant Monnett, in his motion to quash the indictment, annexed extracts from the testimony of the congressional committee hereafter alluded to. If, therefore, he did not know, he probably might have long ago ascertained the grounds urged in paragraph 1 of this indictment, which is the only ground of importance upon which he attacks it. I think it is reasonably urged, therefore, that this plea in abatement comes too late. Agnew v. United States, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; United States v. American Tobacco Co., 177 Fed. 774. The court has, however, already allowed this plea to be interposed, and as both parties desire a ruling upon the merits on the first and sixth subdivisions, I shall proceed to give it.

[3] Before taking up the first subdivision, I shall refer to the sixth, which avers that the—

"grand jurors in finding the said indictment against the defendant were actuated by a strong temper and prejudice against the defendant, as the result of false statements and vicious newspaper publications."

These allegations contain no statement of ultimate facts. An intelligent grand juror can hardly be found who has not decided opinions derived from his general knowledge as to any case of public notoriety. He may have even passionate feelings on the subject, which in general affect and actuate him. The question is not what his feelings were, but whether he voted for an indictment honestly and upon competent evidence. That an indictment can be quashed because the grand jurors had personal prejudices, even ill-founded ones, would leave every indictment in an important case, irrespective of the evidence on which it was found, open to attack. In this case the plea does not allege that any grand juror would not have voted in the same way as he did, irrespective of his feelings or of the articles in the newspapers. I know of no case in which such a plea has been sustained or argument made, and am of the opinion that it cannot stand. United States v. American Tobacco Co., 177 Fed. 774; United States v. Mitchell (C. C.) 136 Fed. 896.

[4, 5] Coming to the first clause of the plea, it is based upon the accompanying excerpts from the evidence taken before the subcommittee of the House of Representatives engaged in an investigation of the office of the district attorney for this District in the course of im-

peachment proceedings sought to be instituted by Congressman Buchanan, one of the defendants in this action. This evidence included testimony of grand jurors subpœnaed by the congressional subcommittee who were required to testify before that committee as to proceedings before the grand jury. Whether this testimony was absolutely privileged and the extraction of it was an invasion of the privileges, not only of the grand jurors called, but of other grand jurors, whose privileges these witnesses could not waive, is not, I think, material here, for the testimony was taken, is now before the court, and I cannot regard it as unavailable to the defendant Monnett, if his plea is to be considered on the merits. This testimony I will summarize. When reduced to narrative form the substance was as follows: The foreman,

After all the testimony was in, and it was a cause that had taken quite some time, the district attorney presented to us the law in the case on which he asked our consideration and made a partial resume of some of the testimony as bearing upon the law, absolutely in a judicial capacity. He simply resumed the testimony that had taken place and its possible bearing, laying no stress and no weight; questions were asked him for certain things we applied in certain conditions, and he advised "yes" or "no," as the case might have been. That was immediately before we found the indictment. There was no other case that we sat on that he made a resume on.

Grand Juror Joel B. Barber:

I considered the law and followed it as the district attorney gave it to me. I did not get the impression that he desired a true bill, but that he was making a very earnest effort, and a very thorough effort, to get at the bottom of anything that broke the law. I gathered that the evidence was such that I should vote for an indictment on the law that he read me directly from the book. He commented upon the law only to make it clear. It was very clear, a very short paragraph relating to this particular section. I would not say that he commented upon it to make it clear. If I did, I was only saying that in reading this paragraph, he did not then put the book down and say nothing. Very likely he made some comments. Either Mr. Marshall or his assistant answered a question relative to just what constituted conspiracy. We wanted to be very clear on it. We voted for these men all in a bunch. They were presented by the assistant district attorney.

Grand Juror Frederick W. Stevens:

I think the district attorney must have read off the names. We did not indict anybody. He did not read at that time. I do not remember particularly the district attorney making a statement at the conclusion of the evidence which was submitted to me, except that here was the evidence, and asked for our vote on it. I should have said that Mr. Sarfarty (the assistant district attorney), after we got through with the evidence, made a statement, telling us briefly what the evidence was, and what was the law. I should say, because I think it always is done, the district attorney says, "Here is the evidence and we want an indictment on these people." When these names were handed to us we never added a name to the number, nor subtracted a name from the number. We took it just as the district attorney handed it to us. We did not take him into account, we took the evidence. Mr. Marshall I should think addressed the grand jury many times. He did not discuss the weight of the evidence that I recollect.

Grand Juror Arthur Wade:

Mr. Marshall read the law to us, Mr. Sarfarty reviewed the evidence. He read the law in regard to the Sherman Act, and Mr. Sarfarty read the evi-

dence. We asked him to. After we had his evidence, he asked for the indictment of a certain group of names. We were largely guided by the district attorney, because we had evidence on this matter from various witnesses, and we could not get away from it. He read the law to the grand jury just before we found the indictment. He did not say anything except to read the law from a law book, and some questions were asked him in regard to the law. We took the law from him as he read it. Statements that Mr. Marshall made to the grand jury did not aid me in coming to the conclusion I did. There had been no discussion of who was to be indicted. We just ratified the list that he gave the jury. We were satisfied of their guilt, and found the indictment. The giving of evidence was ended when he read the Sherman law.

Grand Juror William A. Witherill:

Sarfarty spoke after Marshall, who commenced reading the law, and Sarfarty finished up. I should judge it was a typewritten statement Sarfarty read from. I should imagine it was something better than an hour. Mr. Marshall said, before he sat down, that Mr. Sarfarty would review the testimony. There was not sufficient evidence to return an indictment against Mr. Kramer, the treasurer of the National Peace Council. It may be we were not asked to return an indictment against him. In this particular case we returned an indictment against every man that we were asked to return an indictment against. In other cases, we did not.

It will hardly be contended, I think, that the district attorney, or his assistant, exhibited any passion at the sessions of the grand jury, and I cannot perceive the slightest ground for believing that either of them in any way attempted to dominate or control that body in the finding of the indictment. Without regard to the questions of legality, which I shall presently discuss, all that was done was a presentation of the case in a perfectly temperate way by these prosecuting officers. As a matter of fairness and decorum, there can be no question that these men met every obligation. The only matters for discussion are whether they exceeded their rights in reading the law, reading some of the minutes at the request of the grand jurors, summarizing the evidence, asking for the indictment, and giving to the grand jury a list of the defendants.

Assuming that a grand jury were simply supplied with the witnesses and nothing more, and a prosecuting officer who had prepared the case and was familiar with the law and evidence was not allowed to be present, what sort of an investigation would be had, or intelligent consideration secured, in a difficult or complicated matter? The mere statement of this assumption to any one familiar with such matters causes a conviction of the impracticability of such procedure. The moment the district attorney is of any real aid he does more than this, and if he does more, he does no less than was done in this case. If he does not give the grand jurors the statute, they will usually not know what the investigation is for. If in a complicated case he were not allowed to show the grand jurors the bearing of the evidence upon the alleged violation of the statute, they would certainly be confused as to the entire situation. Even a trained judge is often unable to understand the bearing of relevant testimony without the aid of counsel. Asking the grand jury to find an indictment is but putting in words what every act of the government, and its representatives, means and is well known to mean. What reasonable objection can be urged

against allowing the man who has prepared the case to refresh the recollection of the grand jurors by summarizing the evidence taken, perhaps, over weeks or months, and reading from the minutes and giving them a list of the names of the persons charged with the crime? Any objection is really, if not ostensibly, based on the supposition that grand juries are devoid of all independence and prosecuting officers are either tyrannical or dishonest. No such suppositions should be indulged in, unless proved, and no proof appears from the testimony of the grand jurors accompanying the plea in abatement. Unless, therefore, I am controlled by prior adjudications, I think it clear that the conduct of the district attorney, which seems to have been entirely fair and reasonable, was equally lawful. As for the objection that the grand jury found the indictment without discussion, an absence of discussion might tend to corroborate other evidence of coercion by the district attorney; but, as there is no showing of coercion, the absence of discussion becomes quite immaterial. Grand jurors are not obliged to discuss and argue if they do not need to do so. If the evidence seems conclusive, they may vote at once, as they doubtless many times do. This objection shows but one of the many evil results of making public the deliberations of a grand jury.

The case relied upon by the defendants is United States v. Wells, 163 Fed. 313. There the district attorney not only gave the grand jury a list of the defendants and commented on the weight of the evidence, but before the indictment was signed was requested to leave the room by one of the jurors, so that there could be discussion, and refused to go, said that no discussion could be had until the indictment was signed, directed the foreman to sign the indictment without permitting further consideration or reading of the indictment, and withheld various documents from the inspection of the grand jury, the contents of which they were obliged to take from the statements of the district attorney only. It is manifest that the facts of that case were utterly different from those of the case at bar. The indictment there was evidently controlled by the district attorney, was not the finding of the grand jury, and consequently the plea in abatement was there properly sustained. I am referred to no other decision than United States v. Wells, supra, where an indictment has been held bad by reason of the conduct of a district attorney before the grand jury.

In the case of United States v. Mitchell (C. C.) 136 Fed. 896, Judge Bellinger said:

"The district attorney may explain both his case and his law to the jury.

* * * If he went beyond this, his acts may constitute an irregularity; but the case must be extreme before the court will try the district attorney or the grand jury, * * * in order to determine whether it will try a defendant."

In United States v. Cobban (C. C.) 127 Fed. 713, Judge Beatty said:

"The testimony, all fairly considered, I think shows that he stated the facts he expected to establish and explained the law applicable. I think from the testimony of Curtis he was over zealous, but his testimony is much modified by that of the other witnesses. * * * I believe it is said by some courts that the jury must get its advice on the law only from the court. Undoubtedly a jury may call on the court whenever it desires, but to march

in on the court whenever a question of law is suggested is a practice not to be encouraged. The prosecuting officer is supposed to be learned in the law"

Mr. Justice Field, in his charge to the grand jury, reported in 2 Sawy. 667, Fed. Cas. No. 18,255, said:

"The district attorney has a right to be present at the taking of testimony before you for the purpose of giving information or advice touching any matter cognizable by you, and may interrogate witnesses before you, but he has no right to be present pending your deliberations on the evidence. When your vote is taken upon the question whether an indictment shall be found or a presentment made, no person besides yourselves should be present."

Another statement of the duties of a district attorney was given by Judge Emmons, and reported in Fed. Cas. No. 3,925 under the title of In re District Attorney. He said:

"It is not unfrequent for the court to require much explanation from the district attorney, in reference to the meaning and connections of such laws, before it is able intelligently to suffer him to proceed with evidence before the trial jury. We do not understand how it is possible for the grand jury to perform its duty with less, or how, without constant explanation, it can determine the proper application of the facts to the law. * * * The limit of the district attorney's duties is reached when he has explained the meaning of the laws, laid before you all evidence in his hands officially, and aided in the examination of the witnesses. He should take no part whatever in your discussions as to guilt. The weight and credibility of the testimony is wholly for you, without even a suggestion from him. * * * His opinion as to the sufficiency of the evidence to prove guilty should never be given, even if asked by the jury. His opinion in reference to the meaning of the law should never be withheld. Whether the facts are proved, he has no right to suggest even."

In these remarks by Judge Emmons we have a statement of the strictest and most careful rule in regard to the conduct of the prosecuting officer before the grand jury. I think no well-considered decision where the point was at issue has held that the district attorney should not advise as to the law, and section 263 of the New York Code of Criminal Procedure expressly provides that on request of the grand jury the district attorney shall attend for the purpose "of giving them advice upon any legal matter." It is often impossible to do this in a practical and helpful way without discussing the facts, as every lawyer knows. As Judge Emmons said, supra:

*We do not understand how it is possible for the grand jury to perform its duty with less, or how, without constant explanation, it can determine the proper application of the facts to the law."

What was aimed at by Judge Emmons' instructions was to insure two things: (1) That the jury should have assistance as to the law and in interpreting the relation of the law to the facts; (2) that the district attorney should not dominate the grand jury or control its findings.

The purpose of these instructions was to secure a fair independent investigation by the grand jury, and not to establish rigid and technical rules. Such an investigation may be helped if the district attorney does not discuss the credibility of witnesses, but is not necessarily or probably helped if he does not review the evidence at all. I do not

think the district attorney in the case at bar transgressed the spirit, or even the letter, of these rules by giving a résumé of the evidence. Nor do I think the mere statement: "Here is the evidence. We want an indictment"—which the Juror Stevens quoted, of much moment. The juror evidently had little, if any, recollection of such a statement. He was asked whether the district attorney's office presented names, and said, "We want these men indicted;" and he replied:

"Although I do not remember the action of that, I should say that was done, because I think that is always done; that is, the district attorney says: 'Here is the evidence, and we want an indictment on these people.'"

In other words, the juror, doubting his recollection of the specific case, said in effect:

"The district attorney always does that. That is what he is there for."

Every member of the grand jury knows the prosecuting officer would not be offering evidence if he did not deem the case a proper one for an indictment. The words are the mere interpretation of all his actions, and in no case indicate an insistent demand for an indictment. I think the request for an indictment testified to by Wade and Witherill amounted to nothing more than a formal indication of the government's position. The list of names was but a means of giving the jurors a correct statement of the men under investigation. They were neither required, nor urged, to indict them.

There is undoubtedly some conflict of authority as to the limits of what a district attorney is permitted to do before the grand jury. I think the true rule is that he may question the witnesses, advise as to the law, and explain the relation of the testimony to the law of the case. In doing this, he may review the evidence. He must refrain from the slightest coercion of the grand jury and take every pains to have a fair inquest. I do not think it appears that the district attorney overstepped these limits. Independence and freedom from coercion are the things aimed at, and the expressions of different judges as to what may or may not be done by the district attorney are all, I think, attempts to define what is necessary to secure these conditions.

[6] If, however, I am incorrect, and some of the acts of the district attorney passed the bounds of the letter of the law, I can find no allegation or proof from the excerpts of testimony that the defendants have been prejudiced. Some rules are held to be vital, and the transgression of them sufficient to vitiate the entire proceeding. For example, the presence of an unauthorized person in the grand jury room was held by Judge Hough to require the dismissal of the indictment. United States v. Heinze (C. C.) 177 Fed. 770. See, also, United States v. Edgerton, 80 Fed. 374. If, however, a comment by the district attorney, on the testimony were held in itself to invalidate an indictment, the opportunity for technical motions and dilatory pleas in criminal cases would be greatly enlarged. A plea based on the conduct of the district attorney before the grand jury should be adjudged insufficient unless it clearly shows prejudice to the defendant and indicates that the alleged irregularities affected the action of the grand jury. That this is the proper rule appears from various decisions. Agnew v. United States, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; United States v. American Tobacco Co., 177 Fed. 774; United States v. Nevin, 199 Fed. 833; United States v. Gradwell, 227 Fed. 243. The dictum in United States v. Wells, supra, so far as it is not in accord with the rule I have laid down, does not follow the weight of authority.

Under the circumstances of this case to embark upon a trial of the grand jury or the district attorney as to the conditions under which the indictment was found would be a most irregular and unjustifiable

proceeding.

Judge Hook, writing for the Circuit Court of Appeals for the Seventh Circuit, in the case of McKinney v. United States, 199 Fed. 29, 117 C. C. A. 407, well said:

"There is an unfortunate tendency in criminal jurisprudence to raise minor matters to the dignity of substantial rights. The plain safeguards against governmental and private oppression have become, by judicial action, so embedded in non-essential additions and technical refinements that their true limitations are not always clear, and it not infrequently happens that criminal trials become mere adroit contests, in which substance yields to form and the search for truth is diverted to and ends in collateral inquiries. * * * Of course fundamental safeguards should not be frittered away, but the growth of judicial construction should also be with due regard to the just rights of society and the practical conduct of trials."

My opinion on the whole case is that the motion to strike out the plea in abatement should be granted because no acts prejudicial to the legal rights of the defendants are set forth, nor any conduct of the district attorney shown which has prevented a fair consideration of their case by the grand jury.

THE MONARCH.

(District Court, N. D. Florida. July 15, 1916.)

1. TOWAGE \$\instruction 11(1)\$—LIABILITY OF TUG—CONSTRUCTION OF CONTRACT.

A towing contract, which provided that the tug should use every means for the safety and safe delivery of the tow, but should in no way be held responsible for same, left the tug under the duty imposed by law to exercise reasonable care, but without liability, except for negligence.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11, 14, 16, 21; Dec. Dig. € 11(1).]

2. Towage \$\infty 11(9)\to Tug-Liability for Loss of Tow.

Libelant hired a tug from respondent to tow its oil barges; the charter providing that the entire tow was under the orders and supervision of the charterer. The tug was sent from Port Arthur, Tex., with two loaded barges in tow for Frontera, Mexico, by way of Tampico. She had sufficient coal to reach Tampico with favorable weather, but libelant, which knew her coal capacity and consumption, placed an extra supply on the barges. The barges were overloaded, and in heavy weather became water-logged, which made the towing slow. When four days out the tug had only coal enough for 36 hours more, and because of heavy seas could not coal from the barges, and to save the tug and crew she abandoned the tow and proceeded to Galveston, which she reached with 4 tons of coal left in her bunkers. She reported for orders, but, receiving none, did not go in search of the barges. Held that, under the circumstances, she was

not liable for the loss of the barges, but that libelant, in sending her out as it did with the overloaded barges, assumed the risk of adverse weather conditions.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 22; Dec. Dig. €==11(9),]

In Admiralty. Suit by Eugene J. F. Coleman, assignee of the Clooney Construction & Towing Company, against the I. H. Aiken Towboat & Barge Company, owner of the steam tug Monarch. Decree for respondent.

Harry T. Smith & Caffey, of Mobile, Ala., for libelant. Blount & Blount & Carter and W. A. Blount, Jr., all of Pensacola, Fla., for respondent.

SHEPPARD, District Judge. This case involves the liability of a tug under a towage contract which limited the liability of the tug to "use every means for the safety and safe delivery" of the tows, by which the Clooney Construction Company was transporting oil by barge from Port Arthur, Tex., to Frontera, Mexico. It was understood "that the entire tow is under the orders and supervision of the Clooney Construction Company," but that the steam tug Monarch, hired from the I. H. Aiken Towboat & Barge Company, was to tow the barges between the points mentioned.

Two previous trips had been successfully accomplished, but on the third voyage the tug, on the fourth day out, owing to high winds and heavy seas, was unable to replenish her bunkers with coal from the barges, placed thereon by the charterers, and the master, after conference with crew, decided that with the progress the tow was making against adverse conditions it was impossible to reach Frontera, or any other point where fuel could be obtained, or where coaling from the barges would be possible, abandoned the tow at sea, and returned to Galveston, where charterers were notified, with request for orders, but none were given.

The record discloses the facts in the case to be: That about the 22d day of May, 1912, the steam tug Monarch (hereafter called the tug) left Pensacola, Fla., for Port Arthur, Tex., via Calcasieu Pass, La., with 45 tons in her bunkers and approximately 20 tons on deck. At an intermediate point the tug took in tow two unloaded barges of the Clooney Construction Company (hereafter referred to as the charterers). Arriving at Port Arthur, the tug exchanged these barges for two which were loaded with oil destined for Frontera, Mexico. This was the third voyage contemplated under the existing contract with the charterers. The duty of the tug under the contract is expressed in the following paragraph:

"It is understood that the entire tow is under the orders and supervision of the Clooney Construction Company, and in performing this work the I. H. Aiken Towboat Company shall use every means for the safety and safe delivery of each tow specified, but are in no way to be held responsible for same."

Prior to entering into the contract the tug owners advised the charterers of the speed, capacity, and coal consumption of the tug. With the approval of the charterers a mariner was employed for this voy-

age by the tug owners, who was acceptable to both parties as competent.

After clearing from Port Arthur with the tow, the master set the course of the tug for Frontera, Mexico, via Tampico. According to the evidence, to have made Tampico would have required about six days proceeding at normal speed with the tow. With the weather fair and everything favorable the tug had a sufficient supply of coal for the voyage to Tampico. She did not have enough coal on board for a voyage first to Frontera without a stop for recoaling. The charterers, knowing the capacity of the tug, accepted her and permitted her to go to sea with the loaded barges. With the co-operation of the respondent the charterers sought to overcome the lack of fuel capacity of the tug by placing an ample supply on the stern of each of the barges making up the tow.

On the voyage from Pensacola to Port Arthur the tug consumed a portion of the supply of 45 tons stored in her bunkers, which was in turn replenished from the 20 tons supply carried on deck. Arriving at Port Arthur, the tug took on deck from one of the barges about 20 tons of coal to replace that which had been taken from the deck supply to replenish her bunkers. With this and that remaining on the barges the tug put to sea.

The evidence shows that the barges were sent to sea heavy loaded. After the tow was at sea four days, a strong head wind and high sea arose on the 27th, which continued throughout the 28th, when about 1 p. m. the tow was set adrift. Of her original supply the tug had left coal for about 36 hours' steaming. Because of the insuperable difficulties of coaling from the barges at that time, the tug made for Galveston, arriving there about noon of the following day. Upon reaching Galveston it was ascertained the tug had left in her bunkers about 4 tons of coal. When the barges were abandoned the tug and tow had traversed about 250 miles, probably half the distance from Port Arthur to Tampico. At this time the tug was about 230 miles from Galveston and 136 miles from Aransas Pass, Tex. From Galveston the master of the tug notified the charterers of the loss of the tow and that she awaited orders. No orders were received, and the tug did not return to sea, and made no effort to recover the barges.

[1] The libelant contends that the owners of the tug are liable for the value of the barges, and bases his claim on substantially the following enumerated derelictions, viz.: (1) In leaving Port Arthur with a scant supply of coal for the voyage; (2) in failing to lay a course so that the tug, in case of necessity, could make a port of safety; (3) in not proceeding directly toward Frontera until the storm abated, coaling at sea when conditions permitted; (4) in not laying her course via Tampico, so that she might coal there; (5) in not making for Aransas Pass for a safe harbor and recoaling; and (6) in not making for Aransas Pass light, after the barges were released, there to recoal and return to the tow at sea.

On the other hand, the respondent contends: That the tug left Port Arthur fully coaled. That the charterers were advised of her coal capacity, speed, and coal consumption. That the charterers provided

means for coaling at sea in case of necessity, and in so doing, and accepting said tug with knowledge of her capacity, it assumed the risk of the tug's ability to coal at sea. That the barges were overloaded, and therefore more onerous and more liable to dangers of the sea, and what might have been anticipated actually occurred; i. e., the barges were water-logged at sea, thus materially diminishing the speed of the tow, requiring the normal consumption of coal without making the usual mileage. As a consequence of the water-logged condition it was impossible at that time and distance to carry the tow to a port of safety, in view of the shortage of fuel and the impossibility of obtaining any part of that on the barges. That to save the tug and the crew the master was justified in abandoning the tow and making for a port where it was certain that a new supply of coal could be had. That in the circumstances the tug was under no duty to return to sea in search of the barges.

From the course of the tug and tow as disclosed by the evidence it is not probable that they were making for Frontera direct. The weight of the testimony shows the tow was proceeding via Tampico, and I am constrained to regard the case as though the voyage was to be made that way. It may be granted that it was a hazardous thing to attempt the voyage with just sufficient coal on board to consummate the trip in fair weather with everything going well; but the charterers' engagement of the tug for the service and its voluntary efforts to enlarge the coal capacity of the tug contemplated but one thing, namely, that when the tug should need a new supply of coal that it should be taken from the barges at sea as the occasion required.

Allowing the barges to go to sea in this contingency, the charterers must be held to have assumed the risk of the tug's ability to coal at sea. While there are some inconsistencies urged in libelant's argument, it may be summed up to one proposition; i. e., whether or not the master of the tug was in the circumstances justified in willfully setting adrift the tow, and, if so, then was he negligent in not attempting to recover it at sea?

A clear preponderance of the evidence shows that the barges were overloaded, and this overloading has a material bearing upon the question as to the diminished speed of the tow, and in so far as it was a contributing cause to the water-logging of the barges, if in fact they were water-logged.

It must be admitted that the master of the tug knew at the time of departure that the barges were overloaded, and he knew as well as the charterers that in consequence the progress of the tow would be slow. He was aware of the difficulties of coaling from the barges at sea, as well. The charter provided, non constat that the "entire tow" was "under the orders and supervision of the Clooney Construction Company" and that the tug owners were "in no way to be held responsible for same," which of itself shows that the master of the tug owed no duty to the tow until it passed into his control and was subject to his direction, notwithstanding the contract provided that the tug "shall use every means for the safety and safe delivery of each tow."

The maritime law, in the absence of contract, requires that a master exercise the reasonable care, skill, and diligence, in everything relating to the work to be done, which a prudent and cautious navigator would employ in a similar service. Libelant contends that in the instant case the obligation of the tug was broadened and extended, and that the contract required the exercise of a higher degree of skill and diligence than that imposed by law in the absence of contract. I do not accede to this view, for, taking the contract as a whole, its limitation of liability for any cause, as well as the obligation of the tug to "use every means," resolves itself in the last analysis to a mere reiteration of the maritime law. This would throw no responsibility on the tug for injuries to the tow, save those due to its own negligence. The tug could not contract away its liability for negligence. Consequently, when the contract required the use of "every means," it necessarily must be held to describe that which is exacted by the maritime law, the exercise of every reasonable means available. have required the tug to stay in the storm with the tow, with the chances that her fuel would run out, placing her in a helpless condition, imperiling not only the safety of the tug, but that of the crew, would be beyond the pale of reason.

It appears that the main fault with the undertaking and the thing which defeated its accomplishment was overloading the barges. The charterers maintain that they were seaworthy, even though heavy loaded. The respondent insists in the first instance that they were not seagoing barges, and that to load them as they were loaded invited disaster, by making them peculiarly liable to water-logging and thus to be rendered unseaworthy. If they had been seagoing barges and had been properly loaded, there can be little doubt that they would have made faster speed and accomplished the voyage safely. It must be admitted that the overloading contributed in no small degree to the water-logging. Manifestly the tug cannot be held responsible for a condition due in the first instance to the carelessness of the charterers at a time when the tug had no control of the tow.

The master of the tug testified that at the time the barge masters came aboard each told him the barges were water-logged. The barge master who testified denied this statement, and swore that his barge was not water-logged. Under the circumstances, it is highly probable that the admissions made at the time are entitled to more credence. Even if the barge master's declarations were not true as to the condition of the barges, the situation confronting the master of the tug was such as to warrant his accepting it in determining in the circumstances the proper course to pursue.

It is the inevitable conclusion that the shortage of fuel caused the abandonment of the tow; it is equally certain that it was the imminent condition of the barges which prevented any attempt to make a port of safety with them, or either of them. The barge masters were the agents of the charterers, and their statements in extremis would bind their principal.

The master of the tug was under no duty in the circumstances to seek corroboration of their representations as to the condition of the barges. There was present no reason to doubt such statements, in view of the voyage thus far made; and in the absence of anything which would charge the master of the tug with knowledge of any incompetence on the part of the barge masters, he was under no duty

to go further in his investigation.

[2] Libelant's further contention that the tug should have made to the port of Aransas Pass with the tow is untenable in the circumstances, for there was not at the time sufficient coal on board the tug to warrant the attempt. It may be that the tug could have gone to Aransas Pass light, recoaled, and returned for the barges; but it is only in the realm of speculation that she would have recovered the tow. None of the crew of the Monarch, and no member of the crew of either barge, is it shown, had any definite knowledge of the harbor facilities at Aransas Pass. Admitting that the tug and tow, or the tug alone, could have refuged there, the master of the tug chose the nearest port he knew where it was certain that the needed coal supply could be had. For this lack of knowledge of the harbor facilities the master of the tug may not be charged with incompetence. The duty devolving upon the tug was reasonable caution and diligence. The burden is upon him who charges it to show neglience. Scrutiny into the conduct of the master after the event of disaster is not the test of negligence. The test is whether the course of the master was in accord with that which other prudent, skillful, and experienced navigators would have taken in the exigency as it appeared to the master at the time he was called upon to act, and not as they may appear to the court after a more careful scrutiny than the master could have given them. In the absence of any testimony as to what an experienced and skillful master would have done under the circumstances, I cannot conclude that the master of the tug should have acted otherwise. For aught that appears he acted with an honest intent to do his duty, and exercised the reasonable discretion of an experienced navigator, where the circumstances presented to him a choice of action. In the absence of evidence establishing any better criterion, I am of the opinion that the master's decision is conclusive, and that the tug should be exonerated.

A decree dismissing the libel should therefore be entered.

KEYSTONE WOOD CO. v. SUSQUEHANNA BOOM CO. (District Court, M. D. Pennsylvania. September 1, 1916.)

No. 823.

Corporations \$\iff 613(1)\$—Forfeiture of Franchise by Nonuser—Collateral Inquiry.

Whether a corporation authorized by its charter to maintain a dam has forfeited such right by reason of having ceased to conduct the business for which it was incorporated, where it continues to exercise its franchise as a corporation and to maintain the dam, is a question which can only be determined in a direct proceeding by the authority by which it was chartered, and cannot be raised collaterally by a private litigant. [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2431–2434; Dec. Dig. \$\sigma 613(1).]

At Law. Action by the Keystone Wood Company against the Susquehanna Boom Company. On demurrer to plaintiff's statement. Demurrer sustained.

M. C. Rhone and Ames & Hammond, all of Williamsport, Pa., for plaintiff.

Max L. Mitchell and Nicholas M. Edwards, both of Williamsport, Pa., for defendant.

WITMER, District Judge. The plaintiff by action of t spass is endeavoring to recover damage from defendant for a continued flooding of land of which it has since become the owner in fee. It appears from the statement of claim that the defendant company, having been incorporated by an act of assembly approved March 26, 1846 (P. L. 190), and supplements, was authorized to erect and maintain on the West branch of the river Susquehanna, between Williamsport and the Quineshehocque creek, such boom or booms, with piers, as may be necessary for the purpose of stopping and securing logs, masts, spars, and other lumber, floating upon said river, and erect such piers, side branch or shear booms, as may be necessary for that purpose; that by the provisions of an act of assembly approved December 11, 1866 (P. L. 1867, p. 1535), the company was authorized to erect a dam across the river between the mouths of Lycoming and Loyalsock creeks, not to exceed the rise of water over 9 feet, with the proviso that a good and sufficient bond be filed in the court of common pleas of Lycoming county conditioned to pay all damages, etc., and to indemnify the landholders adjacent to said dam against all losses or damage of any nature whatsoever that may occur to the land by reason of the construction of such dam; that the bond was filed as required, and the dam erected near the foot of Hepburn street, in the city of Williamsport, which dam is now in place, as it has been since the same was erected, whereby the plaintiff's land has been covered with water, as it also was covered when owned by its predecessors in title.

The plaintiff alleges:

"That on or about the 1st day of July, 1910, the Susquehanna Boom Company ceased to do business as a boom company, the purpose for which it was chartered, and abandoned said dam for the use and purpose for which it was authorized to erect it, whereby the plaintiff, being the owner in fee simple of all of the above-described tract of land, became entitled, as its predecessors in title were prior to the erection of said dam, to use and enjoy the fee in all of that part of the land which had been subjected to the servitude or easements acquired by said Boom Company as aforesaid; and the said Boom Company, its successors or assigns, thereby became divested of the right to thereafter lawfully flood any part of the land of the plaintiff, above mentioned, and said dam thereby became and is a nuisance, to the great damage of the plaintiff, a riparian owner of land along said West branch of the Susquehanna river.

Nevertheless, notwithstanding the action of the said Boom Company, above recited, and the abandonment and nonuser by it of said dam for boom

purposes, it has continued to maintain and is now maintaining said dam in said river, not for any public purpose, for which it alone had the right to erect and maintain said dam and flood the land with water above described, to a perpendicular height not to exceed nine (9) feet, but for purposes other

than the operation of a boom, to wit:

"It has for a long time, to wit, since the 1st day of July, 1910, unlawfully and to the great damage of the plaintiff, maintained said dam for the private purpose of furnishing water power to the Lycoming-Edison Company of Williamsport, which company has since said date operated a water wheel with water flowing through gates erected in said dam, which it could not do without the permission and assistance of said Boom Company and the maintenance of said dam by said Boom Company; and said Boom Company is now maintaining said dam for said purpose and for other private purposes, in no manner connected with the operation of a boom, and plaintiff avers that the said Susquehanna Boom Company has continuously for a long time, to wit, since July, 1910, maliciously, unlawfully, and with force and arms unlawfully maintained said dam whereby the land of the plaintiff above described is and had been flooded with water backed up by said dam, and is now preventing him from the use and enjoyment of said land by reason of the flooding thereof with water."

The defendant, availing itself of the provisions of the so-styled Practice and Procedure Act of Pennsylvania, approved May 14, 1915 (P. L. 483-486), without answering the averments of fact in the plaintiff's statement of claim, comes and insists that as a matter of law, upon the plaintiff's showing, the defendant is entitled to judgment, briefly stated, because of its admitted charter rights to erect and maintain said dam, and in continuing to exercise its franchise as a corporation, and that for acts of nonuser or misuser, or the violation in any other way of the terms of its charter, it may be held to account only to the commonwealth, and that, without the latter's consent, its corporate rights cannot be abridged, attacked, or called into question, as attempted in this collateral way by suit at the instance of this private plaintiff.

There can be no difficulty with the facts herein presented, since they must be accepted as they appear from the plaintiff's statement. It does, however, not follow that plaintiff's conclusion that "defendant company ceased to do business as a boom company, the purposes for which it was chartered, and abandoned said dam, for the use and purpose for which it was authorized to erect it," in the face of the actual facts recited, that defendant company is nevertheless attempting to exercise its franchise of incorporation, and is in the full and complete physical possession of the dam erected and the land appropriated for the purpose. The conclusion involves the abandonment or surrender of defendant's franchise, which is a legal question, to be determined only by a legal proceeding for a forfeiture of corporate rights against the corporation. But plaintiff insists that defendant company is using its franchises or the rights acquired by its incorporation in a manner other than as intended and expressed by its grant, and therefore the court is requested to adopt the suggestion of abandonment and declare the charter rights of the corporation forfeited. Whether the corporation has forfeited its existence or its essential franchises are matters not to be determined in this proceeding. Such cannot be accomplished by collateral inquiry. Monongahela Bridge Co. v. Traction Co., 196 Pa. 25, 46 Atl. 99, 79 Am. St. Rep. 685; Olyphant Sewerage Co. v. Olyphant Borough, 196 Pa. 553, 46 Atl. 896.

To a proper determination of the questions involved in matters of forfeiture of corporate franchises, either by nonuser or misuser, the commonwealth must be made party to a suit instituted in a proper tribunal for the purpose of directly determining the matters at issue, and hence cannot be availed of in a proceeding such as this. As was said by Mr. Justice Mitchell, in Western New York & Penna. R. Co. v. Ry. Co., 193 Pa. 127, 135, 44 Atl. 242:

"The commonwealth is the grantor of the franchise. Whether it has been forfeited by nonexercise or otherwise is a question between the commonwealth and her grantee. If the commonwealth does not choose to exercise her right to assert the forfeiture, the decisions, as we understand them, do not confer that right upon a private litigant. This doctrine is held by an unvarying line of cases by our Supreme Court from Irvine v. Lumberman's Bank, 2 Watts & S. 204, down to the case of the Petition of the Philadelphia & Merion Railway Company, to be found in 187 Pa. 123 [40 Atl. 967]."

This also has been the rule uniformly applied by the federal courts. In an action of ejectment for a parcel of land in the city of Washington sold for taxes, the plaintiff, the Chesapeake & Ohio Canal Company, proved a complete title to the land and continuous occupation to 1867, when defendant entered after a sale in 1864 for taxes. The company's land was exempt from taxes by act of Congress, but vendees offered to show that the land had not been used for canal purposes since 1830, and since then been rented to various persons, with a view of proving the company's forfeiture of their right to hold free from taxation. The court excluded the evidence, and on appeal Justice Miller (Mackall v. Chesapeake & Ohio Canal Co., 94 U. S. 310, 24 L. Ed. 161), said:

"We are of opinion that the question of such forfeiture could only be established by a direct proceeding on the part of the public authorities, and a decision to that effect in a proper tribunal, and cannot be made an issue for the first time in the trial of this question of private right between the present parties."

Without effort to multiply authorities, attention is called to Frost et al. v. Frostburg Coal Co., 24 How. 278, 283, 16 L. Ed. 637; Kanawha Coal Co. v. Kanawha & Ohio Coal Co., 7 Blatchf. 391, 406, Fed. Cas. No. 7,606; Utah N. & C. R. Co. v. Utah & C. Ry. Co. (C. C.) 110 Fed. 879, 889.

Counsel for plaintiff bases his argument upon assumption that, "possession having revested, the owner may maintain any action that is necessary to regain his rights or protect his property," and cites in support of his contention Pittsburgh Railroad Co. v. Bruce, 102 Pa. 23, 24, Ridge Turnpike Co. v. Stoever, 6 Watts & S. 379, Mifflin v. Railroad Co., 16 Pa. 182–194, and Jessup v. Loucks, 55 Pa. 350. The argument advanced is well supported, but it is based on the erroneous assumption that in the case at hand it was shown that possession of the land in suit had been abandoned, and thus revested to the original owners in fee. Quite the contrary appears from the plaintiff's statement. It is there admitted that the defendant company is in

full life, in the actual physical possession of the dam it has erected and maintained, and necessarily of the land it was authorized to subject to its easement. In this respect the case in hand is distinguished from the cases cited. In the latter there was either abandonment of physical possession or entry for purposes other than those authorized by the provisions of incorporation, practically resulting in want of possession under its charter.

It follows that this action cannot be sustained, and judgment will be entered for the defendant.

CHICAGO, B. & Q. R. CO. v. GILES.

(District Court, D. Colorado. October 12, 1916.)

No. 6552.

1. Commerce \$\sim 61(1)\$—Intoxicating Liquors—State Regulation.

Webb-Kenyon Act (Act March 1, 1913, c. 90, 37 Stat. 699 [Comp. St. 1913, \$8739]), prohibiting in substance the shipment in interstate commerce of intoxicating liquor into any state which is intended by any person interested therein to be received, possessed, sold, or in any manner used either in the original package or otherwise in violation of the law of the state, does not warrant Prohibition Act Colo. (Laws 1915, p. 275) § 10, declaring that it shall be unlawful for any person, association, or corporation, or for any carrier, to ship or knowingly carry any intoxicating liquor to any point in the state, or from one point to another within the state without marking conspicuously on the package the words, "This Package Contains Intoxicating Liquor"; the Webb-Kenyon Act merely prohibiting the shipment of intoxicants intended to be used in violation of the state law, but not allowing the states to regulate that branch of interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81, 89; Dec. Dig. \$\sim 61(1).]

2. Commerce \Leftrightarrow 14—Intoxicating Liquors—Shipment—Interstate Commerce—Power of States.

By Act March 4, 1909, c. 321, § 240, 35 Stat. 1137, now embodied in the Criminal Code (Comp. St. 1913, § 10410), making criminal the shipment in interstate commerce of intoxicating liquor unless the package be labeled so as to show the name of the consignee and the nature of the contents, Congress has expressly exercised its power to regulate interstate commerce shipments, and therefore state regulations such as that embodied in Prohibition Act Colo. § 10, as to the marking of such packages, are invalid.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 30, 92; Dec. Dig. \$\infty\$=14.]

3. COMMERCE \$\insigma 14\$—Interstate Commerce—Intoxicating Liquors—Exclusive Power of Congress.

In view of the exclusive power of Congress over interstate commerce, and the fact that the interstate commerce shipment of intoxicating liquors requires uniformity of regulation, the states are without power, as was attempted by Prohibition Act Colo. § 10, to regulate the marking of shipments of intoxicants.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 30, 92; Dec. Dig. ⊗ 14.]

At Law. Replevin by the Chicago, Burlington & Quincy Railroad Company, a corporation, against D. R. Giles. On demurrer to the complaint. Demurrer overruled.

T. M. Stuart, Jr., of Denver, Colo., for plaintiff. Wendell Stephens, Asst. Atty. Gen., for defendant.

LEWIS, District Judge. This action of replevin was brought to recover the possession of six interstate shipments of intoxicating liquor. The plaintiff is the common carrier that brought them into Colorado, and while it still held the packages containing the liquor for delivery to the consignees, the defendant seized them and took them away claiming the right to do so under the state Prohibition Act, Session Laws of Colorado 1915, p. 275. That act prohibits and makes penal the manufacture for sale or gift, the importation into this state for sale or gift and the keeping for sale, barter or trade of any intoxicating liquor, except for the restricted purposes named in the act. It also prohibits the carrier from making delivery until the consignee has subscribed and is sworn to the truthfulness of a prescribed form of statement, in which he is required to state whether the liquor is for personal, medicinal or sacramental use.

The particular part of the act which was not complied with and under which the defendant claimed the right to make the seizure is sec-

tion 10 as follows:

"It shall be unlawful for any person, association or corporation, or for any common or special carrier, to ship or knowingly carry any intoxicating liquor to any point in this state, or from one point to another within this state, without marking conspicuously on the package containing such liquor, where it can be plainly seen and read, the words "This Package Contains Intoxicating Liquor." Laws Colo. 1915, p. 278.

The complaint discloses that none of the packages was marked with the particular inscription; and for that reason alone a demurrer was lodged against it. The issue of law thus presented brings under consideration the interstate commerce clause of the Constitution as heretofore construed, the Webb-Kenyon Act, 37 Stat. 699, and section 240 of the Act of March 4, 1909, 35 Stat. 1088 at 1137.

[1] It would be a waste of effort to attempt to demonstrate, as has been so many times done, that all of the packages were beyond the reach of the power of the state at the time of the seizure; and for that purpose the interstate commerce clause and the uniform construction given to it would be all-sufficient, putting out of view for the time being the Webb-Kenyon Act. R. R. Co. v. Brewing Co., 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355. So the inquiry comes to the question: Did that act let in the power of the state at the time the defendant as its police officer assumed to assert and exercise it? That act in substance provides that the shipment in interstate commerce of intoxicating liquor into any state which is intended by any person interested therein to be received, possessed, sold, or in any manner used either in the original package or otherwise in violation of any law of such state, is prohibited. When the plain meaning of the act as evidenced by a fair reading of its words is kept in mind it seems impossible to

find a reasonable basis for the affirmative contention. The only argument made for that purpose was that the failure of the consignor to place on each package the particular inscription required by the state act evinced a purpose on the part of the consignee to receive the liquor in violation of the state act; and this moreover, in the face of an allegation in the complaint that none of the consignees or any person interested in the shipments intended to receive, possess, sell or in any manner use the liquor in violation of state law, but each would have used the same in compliance therewith.

The facts disclosed by the complaint are no stronger in support of the contention that the Webb-Kenyon Act applies than they were in Express Co. v. Kentucky, 238 U. S. 190, 35 Sup. Ct. 824, 59 L. Ed. 1267, L. R. A. 1916C, 273, Ann. Cas. 1915D, 1167, where it was expressly held that the shipment was not prohibited by that act. We therefore put that act to the side as having no application whatever to the issue raised by the demurrer.

The inquiry as to the validity of that act has not been raised or considered. We have assumed its constitutionality. When it comes in question it may be hard to find the grant of power from which it emanated. Certainly not from the commerce clause, because it is manifestly not a regulation of interstate commerce by Congress, nor does it exclude intoxicants from interstate traffic as inherently unfit, nor is it in effect a declaration that Congress declines to exercise its constitutional power and thus leave the subject for the time to the control of the states. It was written into the statute only after executive repudiation.

[2, 3] But there is a more serious objection to section 10 of the state Prohibition Act. Section 240 of the Act of March 4, 1909, supra, now embodied in the Criminal Code, prohibits and makes criminal the shipment in interstate commerce of intoxicating liquor "unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein," and further subjects such liquor to forfeiture to the United States. It is thus evident that in so far as markings and inscriptions are required on packages containing intoxicants, Congress has expressly exercised its power to regulate the interstate shipment, and has furthermore made forfeiture to the United States of the goods shipped a part of the penalty for non-compliance. In that respect it has occupied the whole field, and by necessary implication has excluded others therefrom; as much so as it could have done by express prohibition. The state act purports to make a failure to comply with any of its provisions a criminal offense, and provides a forfeiture and destruction of the liquor. Thus the same subject is completely covered and dealt with by the two jurisdictions, federal and state: and it would be difficult to conceive a condition of more certain antagonism. Each asserts the right to require and compel the marking of the package as it may direct and each imposes a forfeiture for non-compliance. The two cannot co-exist and the one possessing paramount authority over the subject matter must prevail and the other give way. At the time the state act was passed the field was not open for it to enter, as in Savage v. Jones, 225 U. S.

501, 32 Sup. Ct. 715, 56 L. Ed. 1182.

Furthermore, there are some subjects within the constitutional power granted to Congress which from their nature can only be regulated by it, and from which state action is excluded by reason of the purpose of the grant. Minnesota Rate Cases, 230 U. S. 352, 399, 33 Sup. Ct. 729, 57 L. Ed. 1151, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. Is the subject matter of shipment under consideration of such nature and general interest as to require uniformity of treatment by federal authority alone, and hence excluded by the constitutional grant from state power? In view of the necessary restrictions which Congress has placed on the handling and use of intoxicating liquor from an early day as a means to the exercise and execution of one of its powers, it may well be concluded that the subject was never one for state action. It is a question of power. If the power exist, the state is free to determine in what the marking on the package shall consist; which is but to concede a state right to confuse the execution of both federal powers.

The conclusion is two-fold: First, the subject dealt with required uniformity of regulation, and is therefore beyond the reach of state power; and, second, waiving the foregoing conclusion, section 240,

without more, excludes state action.

It follows that section 10 of the state act is void, and as it is the sole basis on which the demurrer is rested, the demurrer will be over-ruled.

It is so ordered.

In re WILKES-BARRE LIGHT CO.

(District Court, M. D. Pennsylvania. September 26, 1916.)

No. 2082.

1. BANKRUPTCY \$\infty 474\to Costs\to Receivership.

After the filing of a petition in bankruptcy against a light company and the appointment of a receiver, the company and creditors agreed that the receiver appointed should resign and all parties suggested the appointment of three other receivers for the purpose of harmonizing conflicting interests, promoting the business of the company and securing a full enjoyment of its franchise. The appointment was made and the receivers conducted the business of the company for over three years until the court, on motion of the creditors to dispose of the company's demurrer to the petition, found that the company was not subject to adjudication as a bankrupt. The petition was then dismissed, and the company objected to allowance of compensation to the receivers and fees to their counsel. Held, as the receivers were appointed at the joint request of the company and creditors and as the company long acquiesced in such appointment, the receivers who transacted a large volume of business, improving the company's plant, are entitled to compensation, and the company cannot avoid it because it was not subject to adjudication in bankruptcy, though such would have been the rule had it seasonably objected.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878–884; Dec. Dig. ← 474.]

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. BANKRUPTCY \$\instructure{11}_\text{Jurisdiction of Court_Subject-Matter.}

Though the company against which was filed an involuntary petition in bankruptcy was not subject to adjudication, a court of bankruptcy which entertained the petition and appointed a receiver had jurisdiction both over the parties and the subject-matter.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 14-25, 35-37; Dec. Dig. ⇐ 11.]

In Bankruptcy. In the matter of the Wilkes-Barre Light Company, an alleged bankrupt. On exceptions to receivers' account. Account modified and affirmed.

See, also, 224 Fed. 248.

W. I. Hibbs and M. J. Mulhall, both of Pittston, Pa., for bankrupt. A. Hourigan and E. G. Butler, both of Wilkes-Barre, Pa., for receivers.

WITMER, District Judge. Shortly after the appointment of a receiver in equity proceedings instituted in the Luzerne county courts, a petition was filed, January 17, 1912, by certain creditors against the Wilkes-Barre Light Company seeking to have the company adjudged a bankrupt. A few days thereafter, on proper showing, a receiver was appointed by this court. Appearances and answers were filed February 14, 1912, by certain creditors and others on behalf of the stockholders and bondholders, and the alleged bankrupt filed a demurrer denying the authority of the court to adjudicate the company a bankrupt. Three days thereafter the parties of record, including the light company, entered into a friendly arrangement or agreement in writing, which was by their request made a matter of record, whereby it was stipulated:

"That the proceedings in the case are suspended until such time as either the petitioning creditors, the alleged bankrupt or the appearing bondholders, stockholders and creditors shall give to each other ten days' notice of resumption of the proceedings."

It was also agreed the receiver, T. D. Shea, would resign as such receiver. The receiver having resigned on February 24, 1912, all of the parties in interest appearing of record, including the light company, appeared in court by petition, setting forth the facts in the proceeding, suggesting the resignation of the former receiver, and praying for the appointment of Guy W. Moore, Fred C. Kirkendall, and John A. Hourigan as receivers, alleging that:

"These proceedings are had for the purpose of harmonizing all conflicting interests and promoting the business of the company and securing a full enjoyment of its franchise."

The appointment was made as requested, and these receivers conducted the business of the company until the court, on motion of the alleged creditors to consider the matters raised by answer and demurrer, decided, May 23, 1915, that the light company was not subject to adjudication as a bankrupt, dismissing the petition. Following this decision, the receivers filed their account, and the light company now

objects to the allowance of compensation to the receivers and fees to their counsel.

[1, 2] The light company should undoubtedly not be visited with these costs were it not for its conduct as it has been made to appear. For more than three years the company has been content to lie by and accept the services of the persons whom it proposed to the court for appointment "to promote its business and secure a full enjoyment of its franchise." I am satisfied that the receivers succeeded in meeting the object which prompted their selection; at any rate, the company must have thought so, otherwise it would not have rested on its oars until others assumed the offensive. A large amount of business was transacted by the receivers; the company's plant was improved by the issuing of receiver's certificates; the business of the company was extended and its revenues increased, as appears by the receivers' account, resulting undoubtedly in enhancing the assets of the company and the enjoyment of municipal recognition, which was obtained for it during the receivership.

Under these circumstances, good sense and justice demands that the court's officers should not go empty-handed. The services of the receivers and their attorneys appear to have been beneficial to the company, and to that extent they should be compensated out of its assets. That the court is not without authority, having assumed jurisdiction over the parties and subject-matter, was recognized in Re T. E. Hill Co., 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 75, and authorities there cited.

The claim of the receivers appears fairly commensurate with their services and is approved.

The claim of attorneys' fees for services rendered, from what has been made to appear by the record and on oral argument of counsel, seems somewhat excessive, and the court will assume the responsibility of reducing the same and fixing it at \$2,500. With this modification, the exceptions to the account are overruled, and the account confirmed finally.

In re FARRAND et al.

(District Court, D. Maine. September 7, 1916.)

No. 333.

BANKRUPTCY \$\infty 181-Validity of Mortgage-Consideration.

A member of a bankrupt firm had two life insurance policies, issued by the same company, in which his wife was named as beneficiary, but which authorized him to change the beneficiary at will. He borrowed money from the company for the benefit of the firm, and his wife joined with him in assignments of the policies, which provided that unpaid interest should be added to the principal, and that, in case the indebtedness should at any time equal the surrender value, the policy should become void. The loans were not paid at the time of the bankruptcy. Held, that the wife had no vested interest in the policies, and that, as

her joining in the assignment created no obligation on her part, it constituted no consideration for a mortgage given her on the firm property. [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 271, 273, 274; Dec. Dig. \$\simes 181.]

In Bankruptcy. In the matter of Gardner L. Farrand and Edward B. Spear, bankrupts. On review of order of referee sustaining a mortgage to Helen Farrand. Reversed.

E. K. Gould, of Rockland, Me., for claimant. Arthur S. Littlefield, of Rockland, Me., for trustee.

HALE, District Judge. This case now comes before the court upon the petition of the trustee in bankruptcy and of the Rockland Trust Company, a creditor, to review the order of the referee that the claim of Helen Farrand be paid, with interest; the same being a valid claim.

The record shows that Gardner L. Farrand had upon his life two policies of insurance with the Northwestern Life Insurance Company; one for \$1,000, dated January 29, 1885, and one for \$2,000, dated February 1, 1889. In 1906 he caused his wife to be the beneficiary in these policies; each policy, however, contained the following privilege of changing the beneficiary, namely:

"The insured may, subject to the rights of any assignee, change the beneficiary, or beneficiaries, at any time during the continuance of this policy, by filing with the company a written request accompanied by this policy; such change to take effect upon the indorsement of the same on the policy by the company."

In August, 1913, Farrand obtained a loan upon each of these policies—\$540 on one, and \$1,440 on the other. This loan was paid by check of \$1,980, received by Farrand, Spear & Co. On December 27, 1913, Gardner L. Farrand and Edward B. Spear gave to Helen Farrand a note of \$2,015.31, and secured this note by a mortgage on their interests in the store property occupied by them. The amount of this mortgage was the amount of check for money borrowed of the Insurance Company, with the interest thereon. This property was sold by order of court, free from liens; the money is now held in the hands of the trustee in bankruptcy.

On August 26, 1913, an assignment, of which the following is a copy, was made upon the first policy, to wit:

"The Northwestern Mutual Life Insurance Company.

"\$540.00 Milwaukee, Wis., August 26, 1913.

"In consideration of the loan to the undersigned by the Northwestern Mutual Life Insurance Company on its policy No. 131981, of the sum of five hundred and forty dollars, payable at its office in the city of Milwaukee, Wis., with interest thereon from the date hereof until paid at the rate of 6 per cent. per annum, payable annually, and as security for the payment of the same, both principal and interest, the undersigned do hereby assign and set over to said the Northwestern Mutual Life Insurance Company, at Milwaukee, Wisconsin, said policy issued on the life of the undersigned Gardner L. Farrand and all dividend additions thereto.

"In case of the nonpayment of any interest on said loan when due, such interest shall be added to and become a part of the principal of said loan, and shall bear interest at the rate aforesaid. If and whenever on any day the amount of such principal together with the interest accruing upon the same shall equal the then cash surrender value of the said policy, and dividend

additions thereto, if any, the said policy and dividend additions shall thereupon become void without action on the part of said company, and be deemed

surrendered in consideration of the cancellation of said loan.

"If said policy shall become paid-up insurance, said loan will be continued under the terms hereinbefore provided; but, if said policy shall become extended term insurance, the existing indebtedness, under said loan, shall be adjusted as provided in said policy.

"This assignment may be terminated at any time upon payment in cash

of the principal and interest of said loan.

"Payment of this loan, or of any part not less than twenty (20) dollars,

may be made at any time.

"In witness whereof, the undersigned have executed these presents the 26th day of August, A. D., 1913. Gardner L. Farrand [Seal.] "Helen Farrand [Seal.]

"Signed in the presence of

"Berkley D. Winslow, Witness to G. L. F.
"Arthur W. Farrand, Witness to G. L. F."

The above is referred to by counsel as a note. It appears to be merely an assignment. Another assignment of like character was given upon the second policy. It will be seen that these assignments contained the provision that, in case of nonpayment of any interest on the loan, the interest should be added to and become a part of the principal, and:

"If and whenever, on any day, the amount of such principal, together with the interest accruing upon the same, shall equal the then cash surrender value of the said policy, and dividends in addition thereto, if any, the said policy and dividend additions shall thereupon become void without action on the part of said company, and be deemed surrendered in consideration of the cancellation of said loan."

It is claimed by Helen Farrand that, by thus joining in this assignment of the mortgage, a valid claim was created upon the property described in the mortgage, and that she is entitled to be paid the full amount due upon the mortgage and note out of the proceeds of the property sold by order of court.

After a careful examination of the testimony it does not appear that Helen Farrand's joining of the assignment in August, 1913, was a consideration for the mortgage given four months later. The testimony utterly fails to connect the transactions, or to show affirmatively that this joining in the assignment was in fact a consideration for the

mortgage.

Upon examination of the assignment itself, it appears that, by its provisions, a method of payment was provided under the clause which I have quoted. The record shows that Helen Farrand never had any vested interest in the policy. By its terms the beneficiary could be changed at any time during the continuance of the policy. Her signature to the assignment did not impose any liability upon her. There is no provision for transferring the property or any right in it to her, unless she paid the indebtedness. She has never paid the indebtedness; and, under the terms of the contract, she could never be held to pay the indebtedness. In re Coleman, 136 Fed. 818, 69 C. C. A. 496; In re Orear, 178 Fed. 632, 102 C. C. A. 78, 30 L. R. A. (N. S.) 990; Atlantic Mutual Life Insurance Company v. Gannon et al., 179 Mass. 291, 60 N. E. 933; In re Herr (D. C.) 182 Fed. 716.

Under the facts disclosed in the record, I am of the opinion that the note of Helen Farrand, and the mortgage to secure it, were without consideration, and that the proceeds of the property sold by order of court belong to the estate in bankruptcy.

The order of the referee is vacated.

In re MILLS TEA & BUTTER CO.

(District Court, D. Massachusetts. June 28, 1916.)

No. 23020.

1. Bankruptcy \$\infty 248-Appraiser-Duty of Appraisers.

Appraisers appointed to value the property of a bankrupt should make a reliable inventory, especially where the receivers are operating the business, and their fees should be paid on the basis of a careful and reliable inventory.

[Ed. Note.—For other cases see Bankruptcy, Dec. Dig. 248.]

2. BANKRUPTCY \$\infty 248-APPRAISERS-FEES-AMOUNT.

Three appraisers appointed to value the property of a bankrupt corporation which had 30 stores scattered through four states, arranged, one of the appraisers being already familiar with the properties, that at least one other of the appraisers should visit each of the stores. The plan was carried out, and the appraisals made on that basis. *Held* that an award of \$250 apiece was not clearly excessive.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. 248.]

In Bankruptcy. In the matter of the bankruptcy of the Mills Tea & Butter Company. Objections by the trustee to the allowance of appraisers' fees. Allowance of referee affirmed.

See, also, 235 Fed. 813, 815.

Edmund A. Whitman, of Boston, Mass., for creditors.

Edward A. Thurston, of Fall River, Mass., and Frank L. Brier, of Boston, Mass., appraisers, pro se.

MORTON, District Judge. [1] As to the "appraisers' fees": The record is exceedingly meager, containing substantially only the referee's certificate and the bills and schedules submitted by the appraisers. The first question is as to the nature of the receivership appraisal, the trustee contending that it should be little more than a formality and should be paid for on that basis. There are decisions which give support to this view. The point has never arisen in this district. It seems to me that when property is to be administered through the bankruptcy court, it is highly desirable to have a reliable inventory at the earliest possible date; and I think this is especially true where receivers are operating a business. An official inventory which is not to be relied on involves obvious possibilities of danger, and may be worse than useless. In assuming that they were to make a careful and accurate inventory, the appraisers were right; and they are to be paid on that basis.

[2] Even so, if the case were an ordinary one, I should agree with the trustee that the allowance was plainly excessive; but it is not an ordinary case. Here are some 30 stores scattered through four different states. Mr. Wall was already familiar with them. The two other appraisers arranged that one of them should visit each of the stores, so that at least two appraisers might have first-hand knowledge of every store. This plan was carried out; and each of the separate stores was examined by the appraisers sufficiently for them to form a general idea of the stock and business carried on there, and its value.

Although the amount allowed to the appraisers by the referee, \$250 apiece, seems large, I am unable, upon the record before me, to say that it is plainly excessive; and it is affirmed.

In re MILLS TEA & BUTTER CO.

(District Court, D. Massachusetts. July 6, 1916.)

No. 23020,

1. BANKRUPTCY \$\infty 484\to Receivers\to Compensation.

The compensation of receivers specified in Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544, is not intended as a fixed invariable amount to be awarded, but as the maximum to be allowed only in cases justifying it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 895, 896; Dec. Dig. ♦= 484.]

2. BANKBUPTCY \$\infty 484\to Receivers\to Compensation\to Objections.

Where there are objections to the referee's allowance of compensation to the receiver, the question before the court is not what the court would have allowed in the first instance, but what is the utmost compensation which the referee might properly have granted.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 895, 896; Dec. Dig. ← 484.]

3. BANKRUPTCY \$\infty 484\text{Receivers}\text{-Compensation.}

In view of Bankruptcy Act, § 48b (Comp. St. 1913, § 9632), relating to division of compensation of trustees, where there are several, the same rule applies as to receivers and though there is more than one receiver, the compensation cannot be increased, but the fees must be divided.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 895, 896; Dec. Dig. ६ 484.]

4. BANKRUPTCY \$\infty 484-Receivers-Compensation.

Receivers of a bankrupt company whose property was appraised at about \$40,000 were in office for 27 days, during which time they carried on the business by means of a manager, whom they hired and left in actual control. They signed some checks, and about \$66,000 passed through their hands, but they were not required to devote much time to the business, although they settled the general policy to be followed. Held, that an award of the maximum compensation of \$1,607 was in excess of the value of the services performed by the receivers; hence an

EmFor other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

allowance of one-half the maximum sum to one of the receivers was excessive, and should be reduced to \$600 and actual expenses.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 895, 896; Dec. Dig. \$\sim 484.]

In Bankruptcy. In the matter of the bankruptcy of the Mills Tea & Butter Company. Objections by the trustee to the allowance by the referee of compensation to the receiver. Receiver's allowance reduced.

See, also, 235 Fed. 812, 815.

Edmund A. Whitman, of Boston, Mass., for creditors. Clarence A. Barnes, of Boston, Mass., receiver, pro se.

MORTON, District Judge. As to the receivers' compensation: One of the receivers, for reasons not binding on his coreceiver, asked for and was allowed much less than the maximum fee. No question arises as to his compensation. The other receiver asked for and was allowed by the referee the maximum statutory compensation, \$803.90. The trustee objects thereto, contending that the case was not one warranting such an amount. There was a hearing before the

referee, and the evidence is reported.

[1] The receivers were in office 27 days, during which time they carried on the business. They hired a manager and left the actual control of the business almost entirely to him. They settled the general policy to be followed, kept a general oversight of things, carried the responsibility, signed about 160 checks, and attended to such incidental matters as would naturally arise. They were not required to be much away from their own offices on the business of the receivership, and it took no large proportion of their time. It does not appear that the services of the receiver whose compensation is objected to were specially valuable; he seems to have taken no leading part, perhaps no part, in the constructive work of reorganizing the company. The property was appraised for about \$40,000; and there passed through the receivers' hands while they were carrying on the business about \$66,000.

The compensation specified in the statute is clearly intended not as a fixed, invariable amount to be awarded in all cases, but as a maximum to be allowed only in cases justifying it. As a practical matter, in the great majority of cases the maximum compensation is so small that it is not even fair compensation for the work done; but in each case the question, nevertheless, is how much the services of the receivers were fairly worth.

[2,3] Considerable latitude is allowed to the judicial officer under whose immediate direction and control the work was done. The question before me is not what I think I myself would have allowed, but what is the utmost which the referee could properly have allowed in the facts shown. See Trustees, etc., v. Greenough, 105 U. S. 527, 537, 26 L. Ed. 1157; Weiss v. Haight & Freese Co., 165 Fed. 432, 91 C. C. A. 382 (C. C. A. 1st Cir.); In re Cash-Papworth, 210 Fed.

24, 126 C. C. A. 604. By the settled practice in this district, the total compensation to receivers is not to be increased by the fact that there is more than one receiver. See section 48b, relating to trustees.

[4] In this case it seems to me that the learned referee, in fixing the compensation which is objected to, gave too much weight to the amount of property involved and too little weight to the amount and value of the services rendered. The record before me clearly shows, in my opinion, that \$1,607.80 was more than the services of the receivers were fairly worth, and that in allowing one-half that sum to the receiver, who insisted on it, the learned referee was in error. The allowance objected to is reduced to \$600 and actual expenses.

In re MILLS TEA & BUTTER CO.

(District Court, D. Massachusetts. September 6, 1916.)

No. 23020.

1. BANKRUPTCY \$\infty 228-Fees of Referee-Mode of Questioning.

An objection to a referee's statement of his own fees in a composition case should be raised by review proceedings on the referee's report; but, suggestion having been made that an officer of court has charged fees on an erroneous basis, the question should be disposed of, though not properly raised.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. ⇐ 228.]

2. BANKRUPTCY \$\infty 223\text{--Referees--Office of--Computation.}

In a composition case, where the creditors were offered an option of 25 per cent. cash, or 100 per cent. in the stock at par in a new corporation formed to take over the bankrupt's business, the referee, though a number of the creditors elected to accept the cash, in computing his commissions figured the stock as worth par. There was no evidence of the value of the stock. Held, that the offer of 25 per cent. cash, and 100 per cent. in stock must be considered as equivalents, so that the referee's commissions must be computed as if only 25 per cent. in cash had been paid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 888-894; Dec. Dig. \$\infty 223.]

In Bankruptcy. In the matter of the bankruptcy of the Mills Tea & Butter Company. Motion for revision of referee's statement of his fees. Referee's fees ordered computed on different basis, with leave if desired to set down the matter for hearing.

See, also, 235 Fed. 812, 813.

Edmund A. Whitman, of Boston, Mass., for bankrupt. James M. Olmstead, of Boston, Mass., referee, pro se.

MORTON, District Judge. [1] This is a motion having for its object to secure a revision of the referee's statement of his own fees in a composition case. The objection should have been raised by review

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

proceedings on the referee's report, as was done in this case, with respect to the fees of the receiver; but, the suggestion having been made to the court that its officer has charged fees on an erroneous basis, the matter ought not, in view of the previous uncertainty as to the proper practice, to be dismissed without examination because in-

formally presented. See In re West (D. C.) 232 Fed. 903.

[2] The creditors were offered an option of 25 per cent. cash, or 100 per cent. in the stock at par of a new corporation formed to take over the assets and business of the bankrupt. The learned referee, in computing his commissions, figured the stock as worth par. No evidence was offered as to what its value really was. A substantial proportion of the creditors, viz. about one-half in number and one-quarter in amount, elected to take the cash instead of the stock, which would indicate that the alternatives offered were nearly equivalent. It may be doubted whether there is any presumption that stock in a new corporation is actually worth par. Certainly such a presumption would be much weaker than in the case of promissory notes which are absolute and certain obligations to pay money. Nevertheless in Re Batterman Co., 231 Fed. 699, — C. C. A. — (C. C. A. 2d Cir.), to which the learned referee has called my attention, where the bankrupt offered in composition 65 per cent. cash, and the creditors were given an option to take in lieu thereof 15 per cent. cash and 85 per cent. in the notes of another corporation, it was held by the Court of Appeals that the 15 per cent. cash and 85 per cent. notes was to be regarded as the equivalent of the 65 per cent. cash, and that the referee's commissions were to be computed as if 65 per cent, in cash had been paid.

It seems to me that the principle of that decision applies here. Upon the case as it stands, the 25 per cent. cash, and the 100 per cent. stock, are to be regarded as equivalents. The referee's commissions are to be computed on the basis of a 25 per cent. cash disbursement, unless he has reason to believe that the stock is worth more than the cash, and desires to present evidence on that point, in which case the matter

1 (a) A section of the section of the

may be set down for hearing before me.

MITCHELL WAGON CO. v. POOLE et al.

In re WEST.

(Circuit Court of Appeals, Sixth Circuit. October 6, 1916.) No. 2793.

1. SALES \$\infty\$ 464—Conditional Sales—Validity.

A conditional sale, whereby the seller reserves title, is invalid under Tennessee laws.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1352; Dec. Dig. 464.]

2. Sales \$\infty 304\text{-Reservation of Title-Validity.}

Where on absolute sale the seller reserves a lien, the lien is of no avail unless recorded.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 869; Dec. Dig. \$204.]

3. SALES \$\infty\$-\Sale Distinguished from Contracts of Agency.

That a contract contemplated and provided for a purchase by one appointed an agent for sale does not prevent it being an agency to sell until such purchase.

4. Sales @==7-Sale Distinguished from Agency for Sale-Construction. A contract recited that petitioner appointed the bankrupt its agent for the sale of its farm wagons, declaring that petitioner should furnish wagons at fixed prices, and provided that wagons sold during each month following the date of shipment should be settled for the first day of the following month for cash, or by the bankrupt's note due in four months, and a discount of 5 per cent. on all wagons settled for in cash within 12 months from date of shipment was allowed. It was agreed that the bankrupt should store and pay the freight on all wagons, etc., and, in event of failure to sell wagons shipped, should at the expiration of 12 months from the date of shipment settle therefor either by paying for the wagons or giving a note for the purchase price or storing them for petitioner. Held that, despite further provisions contemplating payment for wagons shipped in case the bankrupt should dispose of his business and the agency should not be transferred to his successor, and authorizing the petitioner in case of violations to require transfer of all wagous in the bankrupt's possession, free from claim for reimbursement for freight, the contract, though it contemplated an ultimate sale to the bankrupt in certain contingencies, was one of agency and not of sale, so that a reservation for title in the petitioner is binding and on the agent's bankruptcy may be asserted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 16, 17; Dec. Dig.

CORPORATIONS \$\infty\$ 642(1)—Foreign Corporations—"Doing Business" Within State.

For a foreign corporation to appoint an agent for sale, as a factor, does not constitute "doing business" within the state so as to preclude reliance on the contract, though the charter of the corporation was not registered so as to entitle the corporation to do business in the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520, 2521; Dec. Dig. ♦ 642(1).

For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes $235 \; \mathrm{F.}{-}52$

In the matter of the bankruptcy of J. B. West, doing business as J. B. West & Co. Intervening petition by the Mitchell Wagon Company against George H. Poole and E. E. Houck, trustees in bankruptcy. From a decree denying the petition, petitioners appeal. Reversed, with directions.

A. W. Ketchum, of Memphis, Tenn., for appellant. Frank S. Elgin, of Memphis, Tenn., for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and COCH-RAN, District Judge.

COCHRAN, District Judge. This is an appeal from a decree of the lower court denying the intervening petition filed by the appellant the Mitchell Wagon Company, a Wisconsin corporation, in the bankruptcy proceeding of J. B. West, doing business under the name of J. B. West & Co. at Memphis, Tenn., begun December 1, 1914, in which it set up a claim to certain wagons shipped by the appellant to the bankrupt under a contract dated May 25, 1914, a copy of which is set forth in the margin, and in his hands at the time the bankruptcy proceeding

1 Agent's Commission Agreement.

This agreement, made and entered into in duplicate this 18th day of May, 1914, by and between Mitchell Wagon Company of the city of Racine, and state of Wisconsin, party of the first part, and J. B. West & Co., of Memphis, county of Shelby, state of Tennessee, party of the second part, witnesseth:

That the said Mitchell Wagon Company, for and in consideration of the covenants and agreements hereinafter named, do hereby appoint said party of the second part their agent for the sale of their farm wagons, from the date hereof until July 1, 1915, in and for the following territory, to wit, Memphis and vicinity, in the state of Tennessee, and in no other place or places except as herein provided, without special permission in writing.

The said Mitchell Wagon Company agree to furnish the said party of the second part on board cars at Racine, Wis., the wagons this day ordered as described on order blank hereto attached, at the following prices:

Farm wagons, extras for repairs, 37½ per cent. discount from their list prices in price list applying to catalog No. —; 2¾ wagons with beds to be 37½ and 5 per cent. All wagons f. o. b. Memphis, Tennessee.

In lieu of discount from list prices, all wagons are to be settled for at net prices named on order blank hereto attached or such prices as are named on other side of this sheet.

The same to be sold and accounted for to the said Mitchell Wagon Com-

pany in cash or notes as follows:

All wagons sold during each month following date of shipment to be settled for the first day of each month following date of sale, in cash or by said second parties' note due in four months, drawing interest at the rate of six per cent. per annum from date, payable at the nearest bank on with exchange on Chicago or New York. All such settlements to be accompanied by a statement showing wagons on hand unsold.

Cash discount of five per cent. will be allowed on all wagons, settled for in cash within twelve months from date of shipment, no cash discount to be allowed on settlement in cash after twelve months from date of shipment. It is agreed that after the first shipment under this contract, the prices

was brought. By an indorsement on the margin of the contract it was provided that settlements for wagons sold should be made quarterly, instead of monthly, except that the first settlement should be made

on all future shipments of wagons shall be subject to such changes as may be occasioned by the advance or decline in material or labor.

The said Mitchell Wagon Company warrant all their wagons as per print-

ed form of warranty in catalog.

The said party of the second part agrees to receive, store, pay freight, and keep under cover, in good condition and fully insured at their own expense, all wagons sent them until sold or ordered away by the party of the first part as herein provided; to pay all taxes on wagons on hand, should any assessment be made; to make all reasonable efforts to sell such wagons and not sell or assist in the sale of any other wagon or wagons, except those furnished by the party of the first part under this contract.

The party of the second part further agrees to sell all wagons shipped them under the within agreement within twelve months from date of shipment, and in case of any failure or neglect to do so, agrees to settle at the expiration of that time, or at any time thereafter when called upon to do so for all wagons and parts of wagons remaining on hand unsold at prices hereinbefore stated in the following manner, to wit: At the option of Mitchell Wagon Company to either pay the cash for said wagons or to give their note due in four months with six per cent. interest from date, payable to Mitchell Wagon Company or order, or to store said wagons in good order, free of charge, subject to the order of said Mitchell Wagon Company.

If the said party of the second part at any time during the continuance of the within contract, sell or close out their business they agree to purchase all wagons remaining on hand unsold, paying cash therefor, or transfer same to their successors on such terms as will be satisfactory to the

party of the first part without cost to said party of the first part.

If the terms of contract are complied with and the said party of the first part should order one or more or the whole of said wagons reshipped or turned over to other parties, the party of the second part will be entitled to the actual freight and drayage only that they may have been paid out on each of said wagons, which is to be in full of all charges; but if from any violation of the contract the said party of the first part conclude they want possession of such wagons and parts of wagons as are on hand with the said party of the second part, it is agreed that all such wagons and parts of wagons on hand are to be transferred to the said party of the first part free of all charges for freight and drayage that may have been paid on same by the said party of the second part.

It is further agreed by and between the parties hereto that the ownership of all wagons furnished under this or any previous contract, or their proceeds, shall remain in the Mitchell Wagon Company until settlement shall have been made for them by the said party of the second part, as provided

in contract under which they were shipped.

If from any cause whatever, the said Mitchell Wagon Company are unable to furnish the wagons ordered, they shall not be held liable for any commission or damage whatsoever; and it is further agreed that this appointment be and the same is hereby made revocable at the pleasure of the said party of the first part.

No verbal agreement pertaining to the within contract, other than as spe-

cified herein, will be recognized.

Witness our hands the day and year first above written:

Mitchell Wagon Company,
By J. K. Hemphill, Agent.
J. B. West & Co.

Taken by J. K. Hemphill, Agent. Subject to the approval of Mitchell Wagon Company.

Approved. Racine, Wis., May 25, 1914.

Mitchell Wagon Company, T. A. Mitchell, Treasurer. at the end of six months. At the time the bankruptcy proceeding was brought but one shipment had been made under the contract and six months had not elapsed from the time thereof.

[1-4] The right of appellant to the relief sought by it depends upon whether the contract under which the wagons were shipped was a sale, conditional or absolute with lien for the purchase price, or an agency to sell. If it was a conditional sale, appellant is not entitled thereto, because such a sale in Tennessee is void as contrary to the public policy of the state. Coweta Fertilizer Co. v. Brown, 163 Fed. 162, 189 C. C. A. 612. If it was an absolute sale with such lien, the lien is of no avail, for want of record. It is only in case the contract was an agency to sell that appellant is entitled to such relief. The fact that it contemplated and provided for a purchase of the wagons by the bankrupt in the course of the transaction did not prevent its being an agency to sell until such purchase. In Mechem on Sales, § 45, it is said:

"It is, moreover, possible that the relations of the parties may change or be susceptible of change during the progress of the transaction. Thus there may be the creation of a genuine agency to sell, but coupled with it the right of the agent to himself become the purchaser if he so desires or a stipulation that in a certain contingency—as if he sell at a different time or price than fixed—he shall or may be treated as a purchaser. In such a case, if the contingency contemplated occurs, the transaction will cease to be an agency to sell and will become a sale."

And in his work on Agency (2d Ed.) § 2499, the same author said: "It is not necessarily inconsistent with the idea of a present agency that the contract shall provide that, at the close of the season or the happening of some other event, the title to the goods remaining unsold shall, at the option of the consignee, then vest in the latter who shall thereupon become responsible for the price."

The contract here provided for the bankrupt becoming purchaser in several contingencies. One was when he sold the wagons. This follows from the fact that he had a right to sell on such terms as to price and time of payment as he liked, but was bound, if he sold, to pay appellant for them at a fixed price and a fixed time, and the proceeds of the sale were to be his. A sale by him was, in effect, a purchase and a resale.

In Ex parte White, L. R. 6 Ch. App. 397, Mellish, J., said:

"It appears to me that the real question is: When Nevill sold the goods, did he sell them as the agent of Towle & Co., so as to make Towle & Co. the vendors, and the persons to whom he sold, purchasers from Towle & Co.? Or did he sell on his own account, so as to create the relation of purchaser and vendor between himself and Towle & Co., and again the relation of vendor and purchaser between himself and the persons to whom he sold? Now, it is said that he was a del credere agent, and no doubt it requires a very minute examination of what the course of business is, to distinguish between a del credere agent, and a person who is an agent up to a certain point, that is to say, until he has sold the goods, but who, when he has sold the goods, has purchased them on his own credit and sold them again on his own account. And no doubt persons may suppose that their relationship is that of principal and agent, when in point of law it is not. It is quite clear that Nevill, if he sold these goods, was to pay Towle & Co. for them, at a fixed price—that is to say, a price fixed beforehand between him and them—and at a fixed time. Now, if it had been his duty to sell to his cus-

tomers at that price, and to receive payment from them at that time, then the course of dealing would be consistent with his being merely a del credere agent, because I apprehend that a del credere agent, like any other agent, is to sell according to the instructions of his principal, and to make such contracts as he is authorized to make for his principal; and he is distinguished from other agents simply in this, that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them; and therefore, if he sells at the price at which he is authorized by his principal to sell, and upon the credit which he is authorized by his principal to give, and the customer pays him according to his contract, then, no doubt, he is bound, like any other agent, as soon as he receives the money to hand it over to the principal. But if the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price and at a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers is not a contract made on account of his principal, for he is to pay a price which may be different from those fixed by the contract. He is not guaranteeing the performance, by the persons to whom he sells, of their contract with him, which is the proper business of a del credere agent; but he is to undertake to pay a certain fixed price for those goods, at a certain fixed time, to his principal, wholly independent of what the contract may be which he makes with the persons to whom he sells; and my opinion is that, in point of law, the alleged agent in such a case is making, on his own account, a contract of purchase with his alleged principal, and is again reselling."

Another was at any time within 12 months from the date of shipment at his option by paying the fixed price, in cash, when he would be entitled to 5 per cent. discount. There were two other contingencies in which the bankrupt agreed to purchase at the appellant's option. One was at the expiration of the selling period of 12 months and the other in case he sold or closed out his business. The bankrupt agreed, in either contingency, at appellant's option, to purchase all the wagons then unsold. Until then a purchase by the bankrupt in one or the other of these four contingencies, what was the relation between appellant and the bankrupt? Was is that of seller and buyer, or principal and agent? The contract is entitled "Agent's Commission Agreement," and its initial provision is that the bankrupt is thereby appointed appellant's "agent for the sale of their farm wagons" for the time and in the territory thereby prescribed. But this is not conclusive. Indeed, it may be of little weight, as it may turn out to be a pretense. This apart, however, it would seem that there can be no question that the relation between them was that of principal and agent, and not of seller and buyer. This follows from the facts that there was no agreement on the part of the bankrupt to pay the prices fixed for the wagons-it was not contemplated that he should pay for them except upon his becoming a purchaser in one of the contingencies named—and that the appellant had the right to demand a return of the wagons at any time. That it had such right does not follow from the provision that, until a bankrupt so becoming a purchaser, the ownership of the wagons should remain in it. This is a provision characteristic of a conditional sale contract. Nor should the provision that the appointment of the bankrupt as agent was revocable at the pleasure of the appellant be stressed. The contract contemplated other shipments under it, and the purpose of the provision may have been to confer the right of withholding further shipments rather than that of demanding the return of wagons shipped. The existence of such a right is to be gathered from the provision that the bankrupt should be entitled to reimbursement for freight and drayage paid out by him if appellant should order the wagons reshipped or turned over to other parties when he had complied with the terms of the contract, but not if appellant concluded it wanted possession because of any violation thereof, to which the provision that the bankrupt was to pay all expenses until the wagons were sold or "ordered away" looked. This provision rather presupposes that the bankrupt had such right than confers it. But that which is presupposed by a contract is as much a part of it as that which is expressly provided for therein. This provision may be thought to be a harsh one. But there is no gainsaying that it is there.

The relevant decisions in other jurisdictions are very numerous—so numerous as to forbid an attempt to consider them. Note, however, may be taken of those upon which the parties herein rely to sustain their respective contentions. Of those cited by appellee, note need be taken only of these two, to wit, Arbuckle v. Kirkpatrick, 98 Tenn. 227, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854, and In re Rabenau (D. C.) 118 Fed. 471, the former of which was relied on by the lower court. The others are clearly not in point. In the Tennessee case Judge Wilkes, in enumerating the more prominent features of the contract there involved, which were thought to characterize it as one of sale and not of agency, put this at the front:

"It will be noted that under no circumstances were any goods ever to be returned to Arbuckle & Co.; all must be paid for in 60 days, whether sold or not. There is no stipulation to buy at the expiration of 60 days, but the contract clearly contemplates a payment without further bargain when that time arrives, and implies a present sale, on a credit of 60 days."

There is no such feature as that in this case. In the Rabenau Case it is sufficient to note that the transaction there was "duplex." There was a "doubling of contracts," one of which was a conditional sale and the other intended to be an agency to sell contract. Judge Philips held that the purpose of this was to evade the recording statute. Possibly something he said may be in point here, but it was said under the shadow of the two-faced character of the transaction.

The appellant cites these decisions of the Appellate Court of the Seventh Circuit, to wit, In re Galt, 120 Fed. 64, 56 C. C. A. 470, and In re Flanders, 134 Fed. 560, 67 C. C. A. 484; and these by the Appellate Court of the Eighth Circuit, to wit, John Deere Plow Co. v. McDavid, 137 Fed. 802, 70 C. C. A. 422, In re Columbus Buggy Co., 143 Fed. 859, 74 C. C. A. 611, Franklin v. Stoughton Wagon Co., 168 Fed. 857, 94 C. C. A. 269, and this by Judge Sanford of the Eastern and Middle Districts of Tennessee, In re Harris & Bacherig (D. C.) 214 Fed. 482, in each of which the contract involved was held to be an agency to sell contract. The Flanders, John Deere Plow Co., and Columbus Buggy Cases are unlike this, in that the contract did not contemplate that the agent should become a purchaser in any contingency; and the Galt, Stoughton Wagon Co., and Harris & Bacherig Cases are like it only in that the contract contemplated that he would become

a purchaser in one contingency only and that at the option of the principal at the end of the selling period. It may not be amiss, however, to quote from the opinions in them as to the test of determining whether a given contract is a sale or an agency to sell. In the Galt Case Judge Jenkins said:

"In a bailment the bailor may require the restoration of the thing bailed, and in a sale, whether absolute or conditional, there must be an agreement, express or implied, to pay the purchase price of the thing sold."

In the Flanders Case, he said:

"The rule by which to distinguish between a bailment and a conditional sale we consider as decided in the case of In re Galt, 120 Fed. 64 [56 C. C. A. 470.] We there held that, if the sender has a right to compel return of the thing sent, it is a bailment, and not a [conditional] sale, and that in a sale there must be an agreement, express or implied, to pay the purchase price."

In the John Deere Plow Co. Case, Judge Riner said:

"The plow company had the right, under the contract, to require the goods returned, and in this it lacks one of the necessary elements of a contract of sale, namely, to pay money, or its equivalent, for the goods delivered, with no obligation to return."

In the Columbus Buggy Co. Case, Judge Sanborn said:

"The power to require the restoration of the subject of the agreement is an indelible incident of a contract of bailment."

In the Stoughton Wagon Co. Case, Judge Riner said:

"We think the wagon company retained full control of the disposition to be made of the wagons, in that it could direct the goods returned to the house and shipped elsewhere as desired, and in this it lacks one of the necessary elements of a contract of sale, namely, to pay money or its equivalent for the goods delivered with no obligation to return."

And in the Harris & Bacherig Case, Judge Sanford said:

"Where, as in the present case, the consignment contract expressly reserves title in the consignor, with the right to demand the return of the unsold goods, and merely gives him an option, upon the happening of certain conditions, to change the contract into one of sale as to the unsold goods, the contract remains until this option is exercised by the consignor one of consignment merely and not of sale."

The contract here involved, therefore, as to all its characteristics, goes beyond any of the cases cited by either side.

In the case of In re Reynolds (D. C.) 203 Fed. 162, the writer of this opinion had to deal with a case where the contract involved provided not only that the agent at the principal's option should become the purchaser of unsold goods at the end of the selling period, but also that, as to goods sold, the agent on the first day of each month should settle for those sold the previous month, in cash or by his four months' note, which made the proceeds of the sale, up to that time the property of the principal, thereafter the property of the agent, and he held that the contract was an agency to sell.

There is no decision of this court that can be said to be exactly in point. The case of Coweta Fertilizer Co. v. Brown, supra, from Tennessee, was somewhat similar to that of Arbuckle v. Kirkpatrick, su-

pra, which Judge Lurton cited in support of the position taken that the contract there involved was an absolute sale with lien for the purchase price. The receiver of the goods obligated himself to pay a fixed price at a fixed time, and there was no right to a return of the goods. Both sides agreed that the contract was one of sale and not of bailment. The sole difference was as to whether the sale was conditional or absolute, and, if the former, whether the goods could be reclaimed. The cases of Mishawaka Woolen Mfg. Co. v. Westveer, 191 Fed. 465, 112 C. C. A. 109, John Deere Plow Co. v. Mowry, 222 Fed. 1, 137 C. C. A. 539, In re Stoughton Wagon Co., 231 Fed. 676, — C. C. A. —, and Walter A. Wood M. & R. M. Co. v. Croll, 231 Fed. 679, — C. C. A. —, were from Michigan. In that state a conditional sale is valid and the goods are reclaimable from a holder of a mortgage of record or a trustee in bankruptcy. In each of these cases the contract under which the goods were delivered was a sale. question was whether the sale was conditional or absolute with a lien for the purchase price, in which latter case the lien, for want of record, was subordinate to the right of such holder or trustee. It was held that the sale was absolute with such lien. The main ground for the decision, at least in all but the first one, was that the party to whom the goods were delivered had the right of resale. This right was regarded as inconsistent with ownership in the party who had delivered them as in a conditional sale. It was consistent only with an agency to sell, which it was not claimed to be. Judge Denison, in the John Deere Plow Co. v. Mowry Case, characterized the contract with which it was consistent as "a pro tem. agency or consignment"; "a consignment or an agency to resell up to the time when the vendee became obliged to pay the price and take the title"; and "what was (temporarily and pending the maturing of the sale) a mere consignment or agency." And in a note thereto he distinguished John Deere Plow Co. v. McDavid, supra, from the case in hand, in that the relation created by the contract there involved was that of principal and agent. As the contract here contemplated a resale, it would seem under these decisions that if it could be said that it was a sale at all, it was an absolute sale with lien for purchase price, rather than a conditional one.

The appellees urge the course of dealing between the bankrupt and appellant's predecessor as having bearing on the interpretation of the contract. But assuming that it is relevant, it is not inconsistent with the interpretation of the contract which we have made.

We hold, then, that the contract was an agency to sell, and not a sale, and, as, at the time of the bringing of the bankruptcy proceeding, the bankrupt had not become the purchaser of the wagons then on hand, shipped under the contract in either of the contingencies contemplated thereby, appellant was the owner and entitled to the possession thereof.

[5] The appellees set up a defense to appellant's right to recover its wagons that it was a foreign corporation and had not complied with the statute of Tennessee requiring such a corporation to register its charter before it has a right to do business therein. It is sufficient

answer to this defense to say that the appellant had not violated that statute by doing business in Tennessee. It is not claimed that it did business therein except in so far as the sale of its wagons by the bankrupt as a factor was the doing of business by it. But this is not a doing of business by it in Tennessee within the meaning of the statute. And this has been so held by the Supreme Court of Tennessee, since the hearing below, in the case of Cooper Rubber Co. v. Johnson, 133 Tenn. 562, 182 S. W. 593. And see the case of Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1, 84 C. C. A. 167.

We are therefore constrained to reverse the judgment of the lower court, with direction to sustain appellant's claim.

ENNIS-BROWN CO. v. CENTRAL PAC. RY. CO. et al. (and fifteen other cases.)

(Circuit Court of Appeals, Ninth Circuit. August 14, 1916.) No. 2729.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. €=13.] Gilbert, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Suit in equity by the Ennis-Brown Company against the Central Pacific Railway Company and the Southern Pacific Company, with fifteen other cases. Decrees for defendants, and complainant appeals. Affirmed.

For opinion below, see 228 Fed. 46.

The suit above entitled and fifteen other similar suits consolidated with it were instituted for the purpose of quieting the alleged title of the appellant to certain lands in the city of Sacramento, Cal., lying between the west line of Front street and the Sacramento river, and for an injunction against the assertion of any adverse interest therein by the appellees, and for general relief. Omitting the jurisdictional averments and description of the property, the facts set up in each of the original bills of complaint are in substance these: That the complainant "is, and at all the times mentioned herein was, the owner in fee simple" of the property described, and "that the defendants and each of them claim an estate or interest in said property adverse to the complainant, which claim is without right," and "defendants have not, nor has either of them, any estate, title, right, or interest in or to the property or any portion thereof; that the defendant Central Pacific Railway Company is not in possession of the premises involved or any part thereof."

The answers of the defendants to the original bills set up similar defenses to each of the suits, denying in substance any title or interest in the com-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

plainant, and setting up a fee-simple title to the property in question in the Central Pacific Railway Company, and a lease of the property by that company to the Southern Pacific Company. The answers further allege that the Central Pacific Railway Company is not in actual possession of any part of the premises, but that it is in possession thereof through the defendant Southern Pacific Company by lease and agreement made by the predecessor in interest of the Central Pacific Railway Company to the said Southern Pacific Company, and that the said Central Pacific Railway Company claims to be the owner in fee simple absolute of the said property, subject to the possession of the said Southern Pacific Company under said lease and agreement, and that the said Central Pacific Railway Company "has acquired title to said real property from all persons of every kind and description who have at any time had any right, title, claim, or interest in and to said property or any part thereof." The answers also pleaded the various statutes of limitation and further alleged:

"That the said Central Pacific Railroad Company of California and its successors in interest, ever since 1863, have, and the said defendants, as such successors, do now maintain, upon said property, valuable and extensive railroad works and improvements and railroad tracks, and that now, and for many years last past, the said railroad works and improvements have, and do now, constitute a part of the railroad system of the said Central Pacific Railway Company, which runs from Ogden, in the state of Utah, through portions of the state of Utah, and through the state of Nevada, and through portions of the state of California, and over and through the property described in the complaint, and connected up by tracks with other property of other railroad corporations, and that ever since 1863 the said railroad tracks, works, and improvements on the said real property described in the complaint have been, and now are, used and employed by the said defendants and their predecessors in interest, in interstate commerce, as well as intrastate commerce, by virtue of the fact that the said Central Pacific Railway Company, and its predecessors in interest, and the said Southern Pacific Company have been, and now are, common carriers of freight and persons for hire. That ever since 1863 vast and large sums of money have been expended by the said defendants and their predecessors in interest in constructing, maintaining, and operating buildings and structures upon the said property as a part of the said system. That a part of the said property is covered by the railroad freight sheds of the said defendants, and the balance of said property by railroad tracks and other improvements of the said defendants, all of which has been, during the said period of time, and now are, devoted to public use. That the said complainant, and its predecessors in interest, have stood by and permitted the said defendants, and their predecessors in interest, to expend large sums of money in the construction, maintenance, and operation of the said improvements and railroad works and tracks, with the knowledge of the said defendants and their predecessors in interest claiming to own the said lands in fee simple absolute, and have never made any claim to the said defendants, or either of them, until the commencement of the present action, that the said complainant, or its predecessors in interest, ever claimed any right, title, claim, or interest in and to the said lands, or any part thereof. That the said complainant and its predecessors in interest have expressly and impliedly acquiesced in and consented to the entry of the said defendants and their predecessors in interest upon the lands described in the complaint, and in the construction, operation, and maintenance of the said railroad works and improvements and structures hereinbefore referred to, and for more than 50 years last past have never made any objection or hinderance thereto. That the railroad tracks over and through the lands described in the complaint are used, and have been for many years last past used, by the said defendants for the construction, operation, and maintenance of the main line tracks, which connect and have connected the city of Sacramento with the said railroad system and with other places in the state of California, and with cities and towns in other states of the United States. That the said property contains, and has for many years contained, other tracks, which are used, and are now being used, for switching and terminal purposes in the reception and delivery

of freight in connection with the said railroad system, and along the east side of the said property described in the complaint, together with property adjoining the same on the north and south, there is now, and has been, constructed and maintained by the said defendant, and their predecessors in interest, a large structure, known as the Sacramento freight sheds of the said defendants, and to the west thereof, during said time, have been located, and are now located, the tracks leading to and from the said freight sheds, as well as the main line tracks, and to the west thereof, and bordering upon the Sacramento river, there have been, and during all of said time have been, maintained and operated by the said defendants, and their predecessors in interest, wharves used by the said defendants and their predecessors in interest in connection with the said railroad system, and as means of receiving and discharging freight to and from steamers, which constitute, and for many years last past has constituted, a part of the system of the said defendants in connection with the said railroad system. The said steamers, during all of said time, have and do now ply upon the Sacramento river in carrying freight to and from the city of Sacramento, and which is handled by the said defendants as a part of its railroad system, also as a part of its steamer sys-That if the said complainant succeeds in establishing title to the said lands described in the complaint, or any part thereof, and obtains possession thereof, the railroad system of the said defendants, as well as the steamer system of the said defendants, will be interfered with and broken, and the said defendants prevented from carrying freight and passengers to and from the city of Sacramento to other points within the state of California, and to and from other states, and thereby great and irreparable public loss will be sustained. That for more than 50 years last past the said complainant and its predecessors in interest have stood silently by and permitted the system of the said defendants and its predecessors in interest to grow and expand, and the property described in the complaint to be used as a part of the said system, and large sums of money to be expended by the said defendants upon the faith thereof, and never, at any time, objected to the right of the said defendants and their predecessors in interest to use the said property, as a part of its railroad and steamer system, but at all times consented and acquiesced in and to the use of the same by the said defendants and their predecessors in interest. Defendants therefore aver, in equity and good conscience, that the said complainant is now estopped to claim any right, title, claim, or interest in and to the property described in the complaint, or any part thereof. That the alleged cause of action in equity of said complainant is barred by its laches, and the laches of its predecessors in interest. That the alleged cause of action is stale and presents no equity. That the said complainant does not come into equity with clean hands. That, prior to the commencement of the present action in equity, complainant, or its predecessors in interest, have never asserted any claim or title to the lands described in the complaint, or any part of such lands. That if the said complainant, or its predecessors, ever had any interest or estate in and to said property, the said defendants and their predecessors in interest could have acquired the same by law of the eminent domain, under the laws of the state of California, as each of the same is, and has been, ever since its organization, a steam railroad corporation, engaged in the business of a common carrier of persons and freight for hire. That all of the lands described in the complaint are necessary to the said public use in charge of the said defendants.'

On March 1, 1915, the suits were set for trial at Sacramento May 25th. On May 24, 1915, the defendants moved the court to transfer the suits to the law side of the court, on the ground that it appeared that the complainant had a plain, adequate, and complete remedy at law, which motion the court granted unless complainant should amend the bills within 10 days. Within that time it did file amended bills in all respects similar to the original ones,

but with the following additional averments:

"The defendants Southern Pacific Company and Central Pacific Railway Company are, and each of them is, engaged in the general business of railroad corporations as common carriers of passengers and freight, and said Southern Pacific Company maintains upon and over a portion of the property described in the amended bill filed herein a railroad main track over and

upon which it operates trains in the exercise of its said business. vent the maintenance and operations of said railroad track would interfere with the service of said defendant Southern Pacific Company to the general public in the city of Sacramento and in the county of Sacramento, and elsewhere. On other portions of said property said Southern Pacific Company maintains other railroad tracks, which are switching tracks, and a large structure known as the Sacramento freight sheds, and sheds used as a wharf bordering upon the Sacramento river. The public interest neither of the inhabitants of the city of Sacramento nor or [of] the county of Sacramento. nor of any other community requires the maintenance of [or] continuance of said last-mentioned tracks or said sheds by said Southern Pacific Company. All of said tracks herein mentioned and sheds are used exclusively by the defendant Southern Pacific Company, and said company claims that as a public service corporation it is entitled to the continuous and exclusive use of said tracks, sheds, and the land upon which the same are situated. four most important business streets in the city of Sacramento running toward the Sacramento river are I, J, K, and L streets; that said land is situated near the foot of said streets, borders upon the Sacramento river, and, together with the land adjacent thereto is the most convenient point for the shipment of freight into and from the city of Sacramento; that the commerce of the city of Sacramento by water is approximately one-half of the commerce of said city; that the public interest of the citizens of the city of Sacramento and of the county of Sacramento and thereabouts requires that said property should not be used exclusively by said defendant Southern Pacific Company; that the use of said property by said Southern Pacific Company is subordinate to the requirement of public interest; that the land upon which said sheds are built should be open to use by others than said defendant, Southern Pacific Company, and to the title and rights of the complainant therein and thereto." The prayer of the bill was that the defendants be required to set out the source and nature of their respective claims, and that they be adjudged without right and of no force and effect, and that the defendants and each of them be perpetually enjoined from asserting any interest in the property, and for such other and further relief as the equities of the case should require, and for costs.

Thereupon the defendants moved the court to dismiss each of the bills as so amended upon various grounds stated, some of which grounds were sustained by the trial court, and an order entered allowing the complainant 10 days within which to further amend, which leave being refused, judgments were entered dismissing the bills as amended. The case is brought

here by complainant by appeal.

Burrell G. White, of San Francisco, Cal., for appellant.

E. J. Foulds, of San Francisco, Cal., and William H. Devlin and Devlin & Devlin, all of Sacramento, Cal. (Edward Elliott and Roy S. Bartlett, both of San Francisco, Cal., of counsel), for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). It will be readily seen that, while the bills allege that the defendant companies are "engaged in the general business of railroad corporations as common carriers of passengers and freight," and that the defendant Southern Pacific Company is, in the conduct of such business, in the exclusive possession of the property described in the bills, and that the defendant Central Pacific Railway Company "is not in possession of" it, they make no reference to the fact, alleged in the answer of the defendants to the original bills, that the Southern Pacific Company entered into the actual possession of the property about 50 years before the bringing of the suits under a lease from the pred-

ecessor in interest of the Central Pacific Railway Company, and has ever since held the same under such lease; and while the bills as amended allege the public character of the business of the Southern Pacific Company and the exclusive possession of that company of the property in question in the carrying on of such business, they do not allege that the complainant had any interest therein at the time that company took possession of the land in the carrying on of its business of common carrier of passengers and freight.

Now, what is the necessary result of all of this? If it be conceded that the Southern Pacific Company took possession of the property without any right whatever, and built its railroad tracks, sheds, and other structures in the prosecution of its business as common carrier, the law is well settled that the owner of the land, remaining inactive and permitting such expenditures, "will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages." Roberts v. Northern Pacific Railroad, 158 U. S. 1, 11, 15 Sup. Ct. 756, 758 (39 L. Ed. 873); Kindred v. Union Pacific Railroad Co., 225 U. S. 582, 32 Sup. Ct. 780, 56 L. Ed. 1216, and cases there cited. Indeed, it is conceded on behalf of the appellant that the latter cannot maintain an action of ejectment to recover the possession of the premises in question, because the defendant Southern Pacific Company is in possession thereof as a public service corporation; but it is insisted that the appellant has not "an adequate and complete remedy in an action for damages against said Southern Pacific Company, because damages for the taking of the land is not adequate or complete as a substitute for the rights of ownership in real property, and that under the allegations of the amended bills appellant could not be required to accept damages unless the land involved be necessary to the exclusive use of appellee Southern Pacific Company as a public service corporation, and that it is entitled to test the question of the necessity of the taking (in equity) and is not compelled to admit the necessity and sue in damages"; and that position is largely based upon the decision of the Circuit Court of Appeals of the Eighth Circuit in the case of Stuart v. U. P. R. R. Co., 178 Fed. 753, 103 C. C. A. 89, where Judge Van Devanter (now Mr. Justice Van Devanter of the Supreme Court), in delivering the opinion of the court, said, among other things:

"It is true, generally speaking, that in the courts of the United States a suit to quiet title cannot be maintained by a complainant who is not in possession against a defendant who is in possession; and this is so because there is a plain, complete, and adequate remedy at law. Whitehead v. Shattuck, 138 U. S. 146, 150, 11 Sup. Ct. 276, 34 L. Ed. 873; United States Mining Co. v. Lawson, 67 C. C. A. 587, 134 Fed. 769; Lawson v. United States Mining Co., 207 U. S. 1, 9, 28 Sup. Ct. 15, 52 L. Ed. 65. But it also is true that in exceptional cases, where there is no such remedy at law, the general rule does not apply."

And the court proceeded to show that that case was one of the exceptional ones. It was a suit to quiet title to a tract of 160 acres of land patented to the complainant by the government, across which extended the right of way of the defendant railroad company. Ex-

cept as occupied by the defendant company for purposes of its right of way, the land was not in the actual possession of either party. In holding that that suit was well brought in equity the court said:

"What really is the subject of the adverse claims of the parties is a strip 400 feet in width along the appellee's railroad. Part of this is in the actual possession of the appellee, is occupied by permanent and costly railroad structures, and is being used as a right of way for strictly railroad purposes. If it be not true that the Pacific Railroad Acts granted a right of way 400 feet in width across the Eastman tract, it still is true that they authorized the acquisition, by agreement or condemnation, of a right of way thereover, not exceeding 200 feet in width. The owners of the tract did not insist that the railroad be not constructed and put in operation in advance of an exercise of this authority, but by their silence and inaction acquiesced in such construction and operation without any precedent agreement or condemnation. The railroad has been in operation since 1870, and its continued operation has become a matter of large public concern. In addition, there is a pronounced and bona fide dispute as to how much of the tract has been occupied and used as a right of way; the appellants insisting that this occupancy and use have been confined to 25 feet or less on either side of the center line of the railroad, and the appellee insisting that they have extended to 50 feet or more on either side. In these circumstances it is apparent, as we think, that the appellants are entitled to a hearing and decision as to what extent the appellee is entitled to occupy and use the tract as a right of way, that they are not entitled to oust the appellee from its actual possession or to interrupt the operation of its railroad, and that their rights can be completely and adequately determined by a suit in equity in the nature of one to quiet title, but not otherwise. As was said in Northern Pacific Railroad Co. v. Smith, 171 U. S. 260, 271, 18 Sup. Ct. 794, 798, 43 L. Ed. 157: 'There is abundant authority for the proposition that, while no man can be deprived of his property, even in the exercise of the right of eminent domain, unless he is compensated therefor, yet that the property holder, if cognizant of the facts, may, by permitting a railroad company, without objection, to take possession of the land, construct its track, and operate its road, preclude himself from a remedy by an action of ejectment. His remedy must be sought either in a suit in equity, or in a proceeding under the statute, if one be provided, regulating the appropriating of private property for railroad purposes. Other cases of like import are Roberts v. Northern Pacific R. R. Co., 158 U. S. 1, 11, 15 Sup. Ct. 756, 39 L. Ed. 873; Penn Life Ins. Co. v. Austin, 168 U. S. 685, 698, 18 Sup. Ct. 223, 42 L. Ed. 626; New York City v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820; Donohue v. El Paso & Southwestern R. R. Co., 214 U. S. 499, 29 Sup. Ct. 698, 53 L. Ed. 1060. There may be cases in which an action for compensation or damages under the statute would afford a plain, complete, and adequate remedy; but this is not such a case, for, in the absence of a prior determination of the dispute respecting the width of the strip actually occupied and used as a right of way, such an action could not be maintained without either conceding the greater occupancy and use asserted by the appellee or risking a recovery of less than the actual damages. A remedy cannot be regarded as plain, complete, and adequate when to pursue it is to jeopardize a part of what is claimed, irrespective of the merits."

It is thus apparent that the sole ground upon which that case was held a proper one for equity was the dispute and uncertainty over the extent of the actual possession of the defendant company and the limits of its right of way under the congressional grant, whereas in the present case the bills expressly allege that the defendant Southern Pacific Company is in the exclusive possession of the entire tract in controversy for purposes of public use. If not acquired by agreement from the owner of the property, beyond question it could have been condemned to the extent that it was necessary for those

purposes. And in such an action both the necessity and the extent of the use are pure questions of law. It was so at common law, and it is so by statute of California. Said the Supreme Court in Kohl et al. v. United States, 91 U. S. 367, 376, 23 L. Ed. 449:

"The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by a statute; but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury."

The statute of California in providing for the condemnation of private property declares, among other things, that before such property can be taken it must appear "(1) that the use to which it is to be applied is a use authorized by law; (2) that the taking is necessary to such use"—which latter provision necessarily includes the right to determine to what extent the proposed taking is necessary. Section 1241, Code Civil Procedure.

Taking the appellant to have the legal title to the land in question, as alleged in the bills, they nevertheless show upon their face that the defendant Southern Pacific Company is in the actual possession and use of the whole of it in pursuit of its business as common carrier of passengers and freight, and it must be, as it is, conceded by the appellant that it is not entitled to retake such possession, but, as has been shown, is restricted to a suit for such damages as may have been sustained by the owner. Such right of action for damages, however, is, as the Supreme Court has distinctly held in the cases first above cited, in the party holding the title at the time of the original wrongful entry. The bills in question fail to show that the complainant was such owner at that time, and, the appellant declining to further amend, the court below, in our opinion, was right in dismissing them—it being, we think, idle to contend that the bills, in view of their averments, make any case either in equity or at law against the defendant Central Pacific Railway Company cognizable in a court of the United States, for they show, not only that that company as well as the complainant was out of possession of the property at the time of the commencement of the suit, but that the whole of it was then in the actual possession of a common carrier of passengers and freight, actively engaged in such transportation business, for which reason the alleged owner is, as has been seen, precluded from recovering the property itself, but is remitted to an action at law for the recovery of such damages as may have been sustained by the taking and appropriating of the property to public use. Authorities supra.

The judgment is affirmed.

GILBERT, Circuit Judge. I dissent from the opinion of the ma-

jority of this court on two grounds:

First. The defendants in the court below, the appellees here, answered the bill of complaint on the merits and asked for equitable relief, without raising any objection to the jurisdiction in equity on the

ground of the existence of a remedy at law. The rule is well settled that, by thus answering in a case where it is competent for a court of equity to grant the relief sought, the defendant waives the objection that the plaintiff has a plain and adequate remedy at law. Southern Pac. R. Co. v. United States, 133 Fed. 651, 66 C. C. A. 581; Southern Pac. R. Co. v. United States, 133 Fed. 662, 66 C. C. A. 560; Southern Pacific Railroad Co. v. United States, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. Ed. 507; Cobban v. Conklin, 208 Fed. 231, 125 C. C. A. 431.

Second. I cannot assent to the proposition that the appellant has an adequate remedy at law. If the allegations of the bill are true—and we must take them to be true—the appellant owns land of which the appellees have taken possession, and which is not necessary for their uses as railroad corporations. What remedy has the appellant at law? It is conceded that it cannot bring ejectment to recover the possession of that portion of the land which is actually used and needed for railroad purposes. It must also be admitted that it cannot bring ejectment to recover possession of the remainder of the land, for the limits and boundaries of that land have never been ascertained, and they cannot be determined in an action of ejectment. No court has adjudged, and no statute has fixed, the quantity and limits of the land that the appellees shall occupy for their railroad. What remedy at law remains to the appellant? The majority of the court say an action for damages. But an action for damages, like an action of ejectment, could not be made to perform the function of determining the boundary line between that which the appellees shall properly occupy and that of which the appellant has the right to recover the possession. It is true, as was said by the court below, that the right of eminent domain always was a right at common law. But it is a right available only to the corporation which seeks to condemn. The landowner cannot bring the statutory action at law to determine whether his land is needed for public use, the extent of the necessary use, and the damages recoverable therefor. When his land has actually been taken for public use, his only remedies are an action either for damages, case, debt, or ejectment. 15 Cyc. 985, 986. In none of those actions can he bring in issue the question whether his land is needed for public use, or the extent of the necessary public use, and in no such action could the appellant in this case obtain an adjudication of the important question for which the suit was brought, viz. the quantity of land that the appellees may lawfully occupy, and the boundaries of the land which shall remain to the appellant.

A case in point is Stuart v. Union Pac. R. Co., 178 Fed. 753, 103 C. C. A. 89, in which it was held that, where a landowner without objection permits a railroad company to remain upon his land, construct its road thereover, and put the same in operation, without first making compensation therefor, he is precluded from ousting the railroad company from its actual possession or interrupting the operation of its road, and that where the extent of the company's actual occupancy and use of the land for railroad purposes is in dispute, so that the landowner cannot maintain an action merely to recover compensation, with-

out either conceding the greater occupancy and use by the railroad company or risking a recovery of less than he is actually entitled to receive, he is without a plain, complete, and adequate remedy, save by a suit in equity in the nature of one to quiet title, and this although he be not in possession of any part of the land. The decision in that case was affirmed in Stuart v. Union Pac. R. R. Co., 227 U. S. 342, 33 Sup. Ct. 338, 57 L. Ed. 535.

The appellant, having bought the land in controversy after the occupation thereof by the appellees, did not acquire by the purchase the right to recover damages for the original taking of such land as was necessary for railroad uses. Roberts v. Northern Pacific Railroad, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873; Kindred v. Union Pacific R. R. Co., 225 U. S. 582, 32 Sup. Ct. 780, 56 L. Ed. 1216. But it unquestionably did acquire the title and the right to the possession of all the land conveyed that was not necessary for such uses, and it has the right to have the boundaries of that land delimited, and its title thereto established. But, according to the opinion of the majority of this court, it is an empty right, for they deny the appellant a remedy. Their judgment is that the appellant can never question the right of the railroad companies to occupy and use the whole of the land in controversy, nor litigate the question of the quantity of land that they may lawfully claim or use, and that the appellant must abandon its claim to the title to any of such land, and relinquish the possession of the whole thereof to the appellees, for this is what it means when they say that the appellees are in possession of the whole of it, and the appellant's only remedy is an action for damages.

UNITED STATES et al. v. NEW ORLEANS PAC. RY. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. October 3, 1916. Rehearing Denied November 4, 1916.)

No. 2871.

1. Public Lands \$\infty\$=120—Cancellation of Patents—Limitations.

Act March 2, 1896, c. 39, § 1, 29 Stat. 42 (Comp. St. 1913, § 4901), providing that suits by the United States to vacate and annul any patent to lands theretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of that act, is applicable to a patent to public land of the United States which was open to sale and conveyance through the land department, though the patent was subject to be declared void on the ground that the land patented was reserved or excluded from the grant under which the patent was erroneously issued.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. $\Longrightarrow 120.]$

2. Public Lands

□114(1)—Cancellation of Patents—Effect of Running of Limitations.

Under Act March 2, 1896, § 1 (Comp. St. 1913, § 4901), requiring suits to vacate patents theretofore issued under railroad or wagon road grants to be brought within five years, the lapse of the prescribed time gives to

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the patent the same effect against the United States that it would have had if it had been valid in the first place.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 314, 316; Dec. Dig. ⊕ 114(1).]

8. Public Lands 5-120—Cancellation of Patents—Limitations.

Act Feb. 8, 1887, c. 120, 24 Stat. 391, confirms to a railroad therein named the lands of a railroad grant theretofore made to such railroad's assignor, but provides that all such lands occupied by actual settlers at the date of the definite location of the road and still remaining in their possession or the possession of their heirs or assigns shall be excepted therefrom and be subject to entry under the public land laws. Held, that this did not grant lands so occupied to the occupants, their heirs or assigns, or deprive such land of its status as public land subject to entry under the public land laws, and hence Act March 2, 1896, § 1 (Comp. 8t. 1913, § 4901), applied to a suit to cancel a patent previously issued to the railroad company as erroneously issued.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. €=120.]

4. Public Lands = 120-Cancellation of Patents-Limitations.

Act March 2, 1896, § 1 (Comp. St. 1913, § 4901), in view of its broad general language, is not inapplicable to a suit to cancel a patent erroneously issued prior to its enactment under a railroad or wagon road grant, though the cancellation is intended to inure to the benefit of an occupant of the land or his heirs or assigns, and not to the benefit of the United States.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. ≈⇒120.1

5. Public Lands \$=128-Trusts-Enforcement-Parties.

If, under the proviso of Act Feb. 8, 1887, § 2 (24 Stat. 391), land thereby confirmed to a railroad and previously patented to it was held in trust for one occupying the land when the act was passed, the resulting cause of action for enforcement of the trust accrued to the occupant, and the government has no interest entitling it to sue for the enforcement thereof; the exercise of no governmental power being required to secure such enforcement.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 344; Dec. Dig. &—128.]

8. Public Lands \$\insigma 114(1)\$—Patents—Operation—Subsequent Proceedings.

The jurisdiction of the land office over public lands having terminated by the issue of a patent, the subsequent pendency of an application of an occupant to make a homestead entry thereof was without effect upon the title which the patent passed.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 314, 316; Dec. Dig. \rightleftharpoons 114(1).]

7. Public Lands = 131-Possession-Character-Evidence.

That one in possession of land when it was confirmed to a railroad company by Act Feb. 8, 1887 (24 Stat. 391), subsequently applied to the land office to make a homestead entry thereof, was evidence that his possession was not under a claim of ownership, but only under a claim of prior right to acquire ownership from the government.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 347; Dec. Dig. \Longrightarrow 131.]

8. Public Lands =131-Abandonment of Rights.

Where an occupant of land patented and confirmed to a railroad company by Act Feb. 8, 1887, subsequently homesteaded other land, he thereby relinquished his right, if any, to acquire the land patented to the railroad by homestead entry, or to have it held in trust for him, and

could convey no rights to another, as he thereby exhausted his privilege of homesteading land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 347; Dec. Dig. ⊗=131.]

9. Public Lands =116-Patents-Persons Entitled to Attack.

An occupant of land patented to a railroad who relinquished his rights therein by homesteading other land, had no color of right to challenge the action of the land department in patenting the land to the railroad. [Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 323, 325–328; Dec. Dig. \$\simes 116.]

Appeal from the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

Suit by the United States against the New Orleans Pacific Railway Company and another, in which Newton B. Terrell and another intervened. From a decree in favor of defendants, the complainant and the interveners appeal. Affirmed.

On the 3d day of March, 1885, a patent of the United States which included a specified 160 acres of land in Vernon parish, La., was issued to the New Orleans Pacific Railway Company, which was the assignee of a land grant made by an act of Congress of March 3, 1871, to the New Orleans, Baton Rouge & Vicksburg Railroad Company. 16 Stat. 573, c. 122. On January 10, 1890, the patentee conveyed the land mentioned to Jabez B. Watkins, and the interest of the latter by mesne conveyances has passed to the Gulf Lumber Company, a corporation, to which a deed was made on April 10, 1907, by the Wright-Blodgett Company, then the holder of the claim under the patent. The bill in this case, filed January 21, 1915, in the name of the United States against the New Orleans Pacific Railway Company and the Gulf Lumber Company, averred that prior to and at the time of the filing of the maps showing the definite location of the road of the New Orleans Pacific Railway Company, and at the time of the passage of the act of Congress of February 8, 1887, entitled "An act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, to confirm title to certain lands, and for other purposes" (24 Stat. L. 391), the provisions of which act it was averred were accepted, as provided for in the act, by the New Orleans Pacific Railway Company, on April 20, 1887, the land in question was occupied by, and in possession of, Wiley Terrell, who was then and there an actual settler and in all respects qualified to enter public lands of the United States under the homestead laws thereof; that the Gulf Lumber Company had full knowledge and notice of the rights and occupancy of the said actual settler; and that, because of quoted provisions contained in the last-mentioned act of Congress, the inclusion of the 160 acres mentioned in the patent of March 3, 1885, was erroneous. The bill prayed in the alternative: (1) That the patent and the deed to the Gulf Lumber Company be canceled and declared null and void; or (2) that the title held by the Gulf Lumber Company be decreed to be held by it in trust for the said Wiley Terrell, or his heirs or assigns, and to be conveyed to said Wiley Terrell, his heirs or assigns. Each of the defendants filed an answer in which, besides other matters set up as defenses, it was duly pleaded that the claim asserted by the bill was barred by the statute of limitations of March 2, 1896 (29 Stat. L. 42; 2 U. S. Comp. St. 1913, § 4901), and by laches and equitable estoppel. Elijah W. Terrell and Newton B. Terrell filed separate interventions in the suit, each of them claiming that at the time the bill was filed he was in possession of part of the 160 acres described in the patent, was qualified to acquire it by homestead entry, and was entitled to do so as the assignee of one to whom, as the result of successive transfers, the rights of Wiley Terrell had passed. By the decree which is appealed from the bill and the intervening petitions were dismissed, the assailed patent was confirmed as to the 160

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acres in question, and the Gulf Lumber Company was quieted in its possession and ownership thereof.

Geo. Whitfield Jack, U. S. Atty., Robert A. Hunter, Asst. U. S. Atty., and J. H. Stephens, Jr., all of Shreveport, La., for appellants. Mark Norris, of Grand Rapids, Mich., W. H. Thompson, of Winnsboro, La., and Blanchard, Smith & Palmer, of Shreveport, La., for appellee Gulf Lumber Co.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

WALKER, Circuit Judge (after stating the facts as above). For support of the claims asserted by the bill and by the intervening petitions much reliance is placed upon provisions contained in the abovementioned act of Congress of February 8, 1887, which was enacted, and the provisions of which were formally accepted by the patentee, after the date of the issue of the attacked patent, but before the patentee made the conveyance to Jabez B. Watkins, through whom the appellee Gulf Lumber Company claims title. The tract in question was embraced in the grant and confirmation to the New Orleans Pacific Railroad Company made by section 2 of that act, unless it was excepted by the proviso to that section:

"That all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States."

It is contended by the counsel for the appellants that that proviso, and the provision of section 6 of the same act making it applicable to lands excepted from the grant and confirmation which had already been patented before the act was passed, had the effect of giving to land occupied by an actual settler at the date of the definite location of the road, and remaining in his possession or in the possession of his heirs or assigns at the time of the passage of the act, but which had been previously patented and the title to which was held by the patentee at the time it accepted the provisions of the act, the status of erroneously patented lands, which the patentee was obligated to relinquish or reconvey to the United States upon the demand of the Secretary of the Interior, and the patent to which was subject to be canceled in a suit brought for that purpose by the Attorney General pursuant to the authority and command of section 2 of the act of March 3, 1887, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes." 24 Stat. 556, c. 376; 2 U. S. Comp. St. 1913, § 4896. These contentions are combatted by counsel for the appellees upon grounds not now necessary to be stated or considered. It is not material to determine whether the patent was or was not subject to cancellation if, because of a duly pleaded bar caused by lapse of time or otherwise, that relief, though the plaintiff formerly was entitled to it, is not grantable in this suit, which was brought nearly thirty years after the patent was issued.

[1-3] The right to a cancellation of the patent is barred by the Act of March 2, 1896 (29 Stat. 42; 2 U. S. Comp. St. 1913, § 4901), unless there is something in the case to make that statute inapplicable to it. That act provides "that suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act," that is to say, from March 2, 1896. The statute is applicable to a patent to public land of the United States which was open to sale and conveyance through the Land Department, though the patent was subject to be declared void on the ground that the land patented was reserved or excluded from the grant under which the patent was erroneously issued; and the lapse of the prescribed time before the institution of the suit to vacate and annul the patent gives to the patent the same effect against the United States that it would have had if it had been valid in the first place. United States v. Chandler-Dunbar Co., 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881; United States v. Winona, etc., Railroad, 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789. But it is insisted that the above-quoted proviso to section 2 of the Act of February 8, 1887, had the effect of preventing the land in question, occupied as it was at the date of the definite location of the road and when the act was passed, being considered public land subject to sale and conveyance through the Land Department. To yield to this insistence, we think, would be going in the teeth of the express words of the proviso declaring that lands so occupied "shall be subject to entry under the public land laws of the United States." The proviso had the effect of excluding lands so occupied from the grant and confirmation made by the preceding part of the section, and it may be inferred that the purpose of such exclusion was to afford to the occupants of the lands the opportunity of acquiring them under the public land laws, if they possessed the qualifications and took the steps requisite to entitle them to do so; but nothing in the proviso indicates a purpose to give it the effect of a grant to the occupants, their heirs or assigns, of the lands so occupied, and its explicit language forbids the conclusion that land so occupied or settled upon was thereby deprived of the status of public land subject to entry under the public land laws of the United States, or that the mere fact of occupation gave to the occupant the right of one who had effectively entered the land, rather than of making it merely subject to entry. See Oregon & Cal. R. R. v. United States, 238 U. S. 393, 434. 35 Sup. Ct. 908, 59 L. Ed. 1360.

In this connection, the decision in the case of Northern Pacific Railway Co. v. United States, 227 U. S. 355, 33 Sup. Ct. 368, 57 L. Ed. 544, was called to our attention. There is an obvious distinction between the facts of that case and those of the case at bar. It was held in that case that the limitation which the statute created did not apply to a suit for the cancellation of a patent to land which at and prior to the date of the issue of the patent belonged, not to the United States as a part of its public domain, but to the Yakima Indians, being part

of a reservation made by a treaty with them which was ratified many years before the patent issued. Land to which a tribe of Indians has a perfected right does not belong to the same category as land which by statute is explicitly declared to be "subject to entry under the public land laws of the United States." We are of opinion that at the time of the issue of the patent the land in question was public land of the United States which was open to sale and conveyance through the Land Department.

[4] Another contention is that the fact that the sought for remedy of a cancellation of the patent was intended to inure to the benefit, not of the United States, but of an occupant of the land in question, or his heirs or assigns, renders the statute inapplicable to this suit. Nothing in the language of the statute gives any color to the claim that any suit brought by the United States to vacate and annul any patent to public land erroneously issued prior to the enactment under a railroad or wagon road grant was intended to be exempt from the bar which the statute created. It is apparent that the enactment evidences a purpose to restrict a vast power theretofore judicially recognized, and decided to have been confided to the Attorney General, resorts to which had not been infrequent, and to control it by a statute of limitations having the effect of avoiding some of the evils that might be expected to result from an abuse of the power by a postponement of its exercise until by lapse of time those claiming under a patent might be deprived of the means, perhaps available at an earlier date, of combating a charge that it was procured by fraud or was erroneously issued. United States v. San Jacinto Tin Co., 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747. There had been notable instances of the exercise of this power by the Attorney General for the exclusive benefit of private parties asserting prior claims to the land involved, which the government was under some duty to protect. United States v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121; United States v. Missouri, K. & T. R. Co., 141 U. S. 358, 12 Sup. Ct. 13, 35 L. Ed. 766: Germania Iron Co. v. United States, 165 U. S. 379, 17 Sup. Ct. 337, 41 L. Ed. 754; United States v. Winona, etc., Railroad, 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789. It may be supposed that such instances, as well as those in which the power had been invoked to protect some public interest or title, had effect in bringing the lawmakers to a realization of the propriety of restricting the power by an explicit statute of limitations, applicable specifically to a suit by the United States to vacate and annul a land patent, whether the suit is or is not one in which, because the only interest or right sought to be protected is that of a private party, some other bar or defense available against such party could successfully be set up. At any rate, we are of opinion that the broad general language of the statute forbids the conclusion that it is inapplicable to such a suit as the one under consideration.

[5] The claims asserted by the bill and by the intervening petitions that the land in question was held by the patentee and those claiming under it subject to a trust in favor of Wiley Terrell, his heirs or assigns, involve the recognition of the patent as valid and that it effected

an extinguishment of the title and interest of the government in the land. If a trust in favor of an occupant of the land arose because of the circumstances attending the acquisition of the patent, the resulting cause of action accrued, not to the government, but to the cestui que trust. The exercise of no governmental power was required to secure an enforcement of such a trust. The controversy to which the assertion of such a claim gives rise is one in which the government is not concerned, and in which private parties alone are interested, and the settlement of it properly may be left to personal litigation between them. United States v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121; Northern Pacific Railway v. Trodick, 221 U. S. 208, 31 Sup. Ct. 607, 55 L. Ed. 704. The conclusion is that the government has nothing to complain of in the decree appealed from, as each of the remedies its bill prayed for in the alternative was properly denied, any right it may have had to one of those remedies being barred by the limitation pleaded, and the other, assuming that it was not also subject to the same bar, being one to which the government was not entitled because of its lack of interest in the claim asserted.

What has been said disposes of the attack upon the decree except as to that part of it which adjudged against the claims asserted by the intervening petitions and quieted the Gulf Lumber Company in its ownership and possession of the lands involved in the suit. That part of the decree might properly be the subject of complaint by the interveners if the effect of it was to deprive them of an interest in the land to which the evidence showed that they were entitled.

[6.7] The evidence tended to prove that Wiley Terrell lived on the land in question continuously from 1879 until long after the passage of the act of February 8, 1887. If the patentee held the title to that land subject to a trust in favor of Wiley Terrell, that trust became enforceable by the latter certainly not later than April 20. 1887, the date of the acceptance by the patentee of the provisions of the act just mentioned. He did nothing evidencing the assertion of such a claim, but on October 14, 1887, more than two years after the patent to the land had issued, he applied in the local land office to make a homestead entry of the land. That proceeding was pending several years. Its pendency before a tribunal, the jurisdiction of which over the land had terminated by the issue of the patent before the proceeding was instituted (Bicknell v. Comstock, 113 U. S. 149, 5 Sup. Ct. 399, 28 L. Ed. 962; Germania Iron Co. v. United States. 165 U. S. 379, 17 Sup. Ct. 337, 41 L. Ed. 754), was without effect upon the title which the patent passed, but was evidence of the fact that whatever possession Wiley Terrell had was not under a claim of ownership, but only under a claim of a prior right to acquire ownership from the United States. In 1899 he made a homestead entry on a different 160 acres, a patent to which was issued to him. In 1902 or 1903 he made a verbal sale—what the sale was intended to embrace, whether all or a part of the land or only improvements on it, does not clearly appear—to one McCullough, who, before he made this purchase, had homesteaded 160 acres of land elsewhere and obtained a patent therefor. The sale to McCullough was followed

by his going on the land and occupying some of it—the extent of the occupation was not clearly shown—in person or by tenants, until 1909, when he sold his improvements to one Merchant, who never lived on the land, and who sold to one O'Niell, through transfers from whom one of the interveners acquired possession of part of the land, and the other acquired possession of another part of it. They also claim under a quitclaim deed made by their father, Wiley Terrell, after his transfer to McCullough and while the latter was in possession. During all this time the land was uninclosed, most of it being covered by virgin forest, and having not more than two small clearings on it, and was assessed for taxation to the successive holders of the record title, who paid taxes on it, and manifested their claim of ownership by such acts as might be expected of the owner of land mostly covered by virgin timber. It was not made to appear that either of the successive occupants asserted a claim different from the one asserted by Wiley Terrell.

[8, 9] The foregoing recital discloses several obstacles in the way of the maintenance of the claims asserted by and in behalf of the interveners. If the land in the hands of the patentee or its assigns was chargeable with a trust in favor of Wiley Terrell by reason of the fact that he, being an actual settler, had a right, made by statute superior to any possessed by the patentee, to acquire the land from the government, that trust became enforceable not later than April 20, 1887. It seems that the claim, if it was not otherwise extinguished, must have become stale, or rendered unenforceable by laches, as a result of the unexplained delay of more than a quarter of a century in asserting it against the holder of the record title; and that in favor of the present holder of that title, which, presumably influenced by the apparent abandonment of the trust claim evidenced by the nonassertion of it during the immediately preceding 20 years, acquired that title in April, 1907, by paying a valuable consideration therefor, there is an estoppel on the interveners now to assert their claim. Osborne v. Altschul (C. C.) 101 Fed. 739; Holt v. Murphy, 207 U. S. 407, 28 Sup. Ct. 212, 52 L. Ed. 271. But if at any time Wiley Terrell was entitled to acquire the land in question by a homestead entry, he relinquished that right in 1899 by homesteading other land. After he took that step, he was without color of right to challenge the action of the Land Department in patenting the land in question to the New Orleans Pacific Railway Company, or to claim that that land continued to be held in trust for him, or subject to his homestead right to it, and the rights of the patentee and its assigns took precedence of any subsequently arising claim by an occupant of a right to acquire the same land from the government. Love v. Flahive, 205 U. S. 195, 202, 27 Sup. Ct. 486, 51 L. Ed. 768; Moss v. Dowman (C. C.) 82 Fed. 810. The sale to McCullough in 1902 or 1903 did not have the effect of conferring such a right. The assignor did not possess it, as, if he had ever had it, he had lost it by abandoning it, and the assignee was disqualified to acquire it as a result of his having already exhausted his privilege of homesteading land. As the immediate predecessors of the interveners in

the occupancy of the land did not possess the right claimed, their sales to the latter could not confer it on them. In short, the claims of the interveners are based upon asserted rights which, if they ever existed, had by abandonment ceased to exist years before either of the interveners had any connection with the land in question. Neither the pleadings nor the evidence in the case furnish any support for a claim that a right to the land has been acquired by an adverse possession of it. It was not made to appear that the interveners have any right or title to be prejudicially affected by the decree complained of.

As neither of the appellants has a just ground of complaint against

that decree, it is affirmed.

MAXEY, District Judge, was prevented by illness from participating in the decision of this case.

UNITED STATES et al. v. NEW ORLEANS PAC. RY. CO. et al. (Circuit Court of Appeals, Fifth Circuit. October 3, 1916. Rehearing Denied November 4, 1916.)

No. 2870.

1. Adverse Possession \$\sim 85(3)\$—Claim of Title—Evidence.

Evidence held insufficient to show that an occupant of land patented to another held the land or any part of it adversely under a claim of right for the requisite period.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 503, 688-690; Dec. Dig. \$\sim 85(3).1

2. VENDOR AND PURCHASER \$\infty 232(1)\$\to Bona Fide Purchasers\$\to Notice of OCCUPANT'S RIGHTS.

Where an occupant of land patented to a railroad company, though knowing that it was "claimed as railroad land" after an ineffective attempt to enter the land under the homestead law, took no further action indicating the assertion of a claim to the land except to live on a part of the tract in the midst of the woods covering the rest, and returned and paid taxes only on his improvements, purchasers of the record title were justified in believing that his occupancy was that of a mere intruder.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. 68 540, 550, 551; Dec. Dig. €=232(1).]

3. Adverse Possession 68-Claim of Ownership-Interest.

Mere occupancy of land, if unaccompanied by any claim of ownership, no matter how long continued, does not confer title,

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 387-393; Dec. Dig. €==68.]

4. Public Lands \$\infty 128-Patents-Trusts-Laches.

The claim of an occupant of land patented to another, claiming the beneficial ownership of the land on the theory that the title passing from the government by the issue of the patent enured to his benefit, is cognizable only in equity, and is subject to the equitable defenses of staleness and laches.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 344; Dec. Dig. \$=128; Trusts, Cent. Dig. § 101.]

5. Public Lands = 128 - Patents - Trusts - Laches.

In the case of such an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law, and, independently of any statute of limitations, a court of equity declines to assist one who has slept upon his rights and shows no excuse for his laches.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 344; Dec.

Dig. \$\ins128.]

6. Public Lands = 128-Patents-Trusts-Laches.

In April, 1887, a railroad company accepted the provisions of Act Feb. 8, 1887, c. 120, 24 Stat. 391, confirming to it land previously granted to its assignor, but providing that lands occupied by actual settlers at the date of the definite location of the road and still in their possession or the possession of their heirs and assigns should be excepted from the grant and be subject to entry under the public land laws. A portion of the land previously patented to the railroad company was then occupied by the intervener. The railroad company had previously sold a part of such land and appropriated the proceeds to its own use, and soon afterwards disposed of the rest of the land, and the successive holders of the record title thereafter dealt openly with the land as their own without admitting that the intervener had any beneficial interest in it or in the proceeds of sales. They had the land regularly assessed to them and regularly paid the taxes thereon. Though the intervener knew the facts, and though the conduct of the holders of the record title was disclosed by public records, the intervener took no action to enforce his claim for over 25 years, but continued to live on a small part of the land in the midst of the woods covering the remainder of the land. Held that, if the railroad company when it acquired the legal title held it in trust for the intervener, the resulting right of action to enforce such trust accrued in 1887 and was barred by the intervener's inexcusable laches.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 344; Dec. Dig. \Longrightarrow 128; Trusts, Cent. Dig. § 101.]

Appeal from the District Court of the United States for the District

of Louisiana; Aleck Boarman, Judge.

Suit by the United States against the New Orleans Pacific Railway Company and others, in which Stephen N. Grant intervened. From a decree in favor of defendants, complainant and the intervener appeal. Affirmed.

Geo. Whitfield Jack, U. S. Atty., and Robert A. Hunter, Asst. U. S. Atty., both of Shreveport, La.

Don E. So Relle, of Many, La., for appellant intervener.

H. H. White, of Alexandria, La., James G. Palmer, of Shreveport, La., F. G. Hudson, Jr., of Monroe, La., and Mark Norris, of Grand Rapids, Mich., for appellees.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

WALKER, Circuit Judge. This case in its pleadings and evidence and in the decree rendered is very similar to the case of United States, Newton B. Terrell, and Elijah W. Terrell v. New Orleans Pacific Railway Company & Gulf Lumber Company, 235 Fed. 833, — C. C. A. — (present term, U. S. C. C. A., 5th Circuit). It is unlike that case in that the intervener in this case, Stephen N. Grant, who commenced to live on part of the land in question in 1886, following a

verbal purchase from one Killen, who had lived on the land since 1880, of the latter's "improvements and claim," continued to live there up to the time of the filing of the bill, was qualified to make a homestead entry, and has not homesteaded other land. For support of the part of the decree appealed from which denied relief to the government, it is

enough to refer to the ruling made in the case above cited.

[1, 2] As to the part of the decree which rejected the demand of the intervener and quieted the W. P. Pickering Lumber Company and the Southland Lumber Company in the ownership of the parts of the 160 acres in question claimed by those companies, respectively, the following facts disclosed by the record are deemed to have some pertinency: By three deeds made and duly recorded in 1886, 1888, and 1889, respectively, the patentee sold and conveyed different parcels, together embracing the 160 acres in question, to three individuals, through whom, by mesne conveyances, all duly recorded, the title conferred by the patent was acquired by the two lumber companies mentioned by warranty deeds made in 1902 and 1903, respectively, each of which companies paid at the time of its purchase a fair price for the land so conveyed to it. Since the date of the patent, March 3, 1885, the successive holders of the record title to the land in question have had it regularly assessed to them and have regularly paid the taxes due thereon up to the present time. From 1880 to 1885, inclusive, Killen had assessed to him the improvements on the land and paid taxes thereon for those years. From 1890 to 1914, inclusive, the intervener had the improvements assessed to him and paid taxes thereon for those years. According to his own statement, his intention relative to the land when he moved on it following his purchase from Killen was to make it his home and to acquire it under the homestead law if he could.

There is nothing in the record to indicate that at any time prior to the filing of his intervening petition he claimed to be the owner of the land. In the latter part of 1890, more than five years after the issue of the patent, and after the patentee had sold and conveyed its interest, he filed in the local land office an application to enter the land under the homestead law. After that ineffective proceeding ended, he took no further action indicative of the assertion of any claim beyond merely continuing to live on the land until he filed his intervening petition in this case. A tract of something over 30 acres, some of it land not embraced in the 160 acres in question, has been cleared for many vears. The improvements, consisting of a "common rough house" of six rooms, and some outhouses, are located on this clearing. On another part of the 160 acres a tract of about 2 acres was cleared and inclosed within a year or two before this suit was brought. Within a year after the intervener moved on the land following his purchase from Killen, he, as stated by himself in his testimony, learned that it was "claimed as railroad land." The claim that the railroad company and the other successive holders of the record title held that title. not as the beneficial owner of the land, but in trust for the intervener, was, so far as anything in the record discloses, made by him for the first time when he filed his intervening petition in this case. There is no suggestion in the pleadings in the case that the right to the land of the holders of the record title had been lost by another's adverse possession of it for the time required to effect that result.

[3] The intervener cannot sustain a complaint against the decree appealed from on the ground that the evidence showed that he had acquired a right to the land by an adverse possession of it. Mere occupancy of land, if unaccompanied by any claim of ownership, no matter how long continued, does not confer title. Sharon v. Tucker, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532; Jasperson v. Scharnikow, 150 Fed. 571, 80 C. C. A. 373, 15 L. R. A. (N. S.) 1178, and note; 2 Corpus Juris, 125. Certainly the intervener's conduct was not such as to notify parties seeking information upon the subject that he held the land or any part of it adversely and not in subordination to any title or claim of another. His effort to acquire the land under the homestead law, though made in a tribunal the jurisdiction of which over the land was terminated by the issue of the patent before that tribunal was resorted to, was a distinct admission that he was not the owner. It was not made to appear that his intention with reference to the land underwent a change after that abortive proceeding ended. In the absence of other evidence of a change in the character of the intervener's possession, the fact that there was no change is persuasively indicated by his continuing to return and pay taxes on improvements only, and also by the circumstance that he is now in court praying that, by a cancellation of the attacked patent, he be afforded the opportunity to acquire ownership of the land under the homestead The evidence leaves it in doubt whether either of the successive holders of the record title was aware that any one was living on the land. If the facts as they existed at the time of and shortly prior to the purchases of the two defendant lumber companies were known to the representatives of those companies, they were such as were calculated to lead one contemplating a purchase from the holders of the record title to the conclusion that the intervener's occupancy of a part of the tract, in the midst of the woods which covered the remainder of it, was that of a mere intruder, who set up no claim of owi and whose conduct indicated an abandonment of the only claim he had ever made of a right to acquire ownership, which many years before he had ineffectively asserted in a tribunal which was without jurisdiction to enforce the claim, if it ever was a valid one. We conclude that it satisfactorily appears from the evidence that the intervener did not hold the land in question or any part of it adversely under a claim of ownership for the period requisite to confer title, and, further, that his conduct was such as was calculated to lead one in the position of the defendant lumber companies, prior to their purchases, to the conclusion that his occupancy of a part of the land was of a kind that prevented its being an obstacle to the acquisition of ownership of the entire tract by a conveyance from the holder of the record title.

[4-6] We come now to a consideration of the claim that in equity the intervener was entitled to the beneficial ownership of the land, and that this right of his is still enforceable by a decree adjudging that those having the record title hold in trust for his use and benefit. The theory of this claim is that, at the time of the issue of the patent, the intervener had acquired such a right to the land that the

title which passed from the government by the issue of the patent inured in equity to his benefit and was there enforceable against the patentee and any subsequent holder of such title not protected as a bona fide purchaser for value without notice of the equity or by an estoppel effective against the claimant of the equity. The claim does not imply that the ownership of the holder of the legal title is or has been assailable at law. Silver v. Ladd, 7 Wall. 219, 228, 19 L. Ed. 138; Burke v. Southern Pacific R. R. Co., 234 U. S. 669, 675, 34 Sup. Ct. 907, 58 L. Ed. 1527; Svor v. Morris, 227 U. S. 524, 33 Sup. Ct. 385, 57 L. Ed. 623. It is not cognizable elsewhere than in a court of equity, and is subject to the equitable defenses of staleness or laches. The claimant's lack of due diligence in asserting the claim against a holder of the legal title who does not acquiesce in its validity renders it unenforceable in equity. In the case of such an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law, and, independently of any statute of limitations, a court of equity declines to assist one who asserts such a claim, if he has slept upon his rights and shows no excuse for his laches in asserting them. Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718.

Assuming that the circumstances attending the acquisition of the legal title by the patentee were such as to give rise to a trust in favor of the intervener, the resulting right of action accrued not later than April, 1887, when the patentee accepted the provisions of the act of Congress of February 8, 1887. Before the date of such acceptance the patentee had already sold part of the land in dispute. and, as it may be inferred, had appropriated the proceeds of the sale to its own use. The rest of the land was similarly disposed of by the patentee before the end of 1889. The subsequent successive holders of the title conferred by the patent in like manner openly dealt with the land as their own, obviously not admitting that the intervener had any beneficial interest in it or in the proceeds of the successive sales of it. Within a very short time after the trust, if it ever existed, became enforceable, the intervener learned of the facts which he now claims gave him an equitable right of action, and the conduct of the holder of the record title, not concealed, but contemporaneously disclosed by public records, evidenced a distinct repudiation of the alleged trust relation, which entitled the intervener to immediate relief and opened the door to the defense of laches. Patterson v. Hewitt, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214. The intervener took no action then to make known or enforce the claim now asserted, and allowed more than a quarter of a century to elapse before he presented the claim in a court of equity. During all that time the land, except the two cleared tracts above referred to, remained uninclosed and covered with virgin timber, all of it was openly dealt with as their own by the successive holders of the legal title. and, though the intervener lived on and used a small part of it, the circumstances attending his connection with the land continued to be such as to negative a conclusion that he was setting up a claim that he had acquired the beneficial ownership of the whole or any

part of it. We think nothing more than a statement of these facts is required to support the conclusion reached, that the evidence conclusively shows that the intervener was guilty of such inexcusable laches as to make now unenforceable the equitable claim which he asserts, however well founded that claim once may have been.

It follows from the conclusions above stated that neither of the appellants has a tenable ground of complaint against the decree ap-

pealed from.

That decree is affirmed.

MAXEY, District Judge, was prevented by illness from participating in the decision of this case.

UNITED STATES et al. v. NEW ORLEANS PAC. RY. CO. et al. (three cases).

(Circuit Court of Appeals, Fifth Circuit. October 3, 1916. Rehearing Denied November 4, 1916.)

Nos. 2852, 2864, 2865.

Appeals from the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

Suits by the United States against the New Orleans Pacific Railway Company and another, in which Mrs. M. Caroline Hughes and another intervened by the United States against the New Orleans Pacific Railway Company and others, in which Mrs. Josephine Brown intervened, and by the United States against the New Orleans Pacific Railway Company and another, in which William R. Turner intervened. Decrees for defendants, and complainant and interveners appeal. Affirmed.

In No. 2852:

Geo. Whitfield Jack, U. S. Atty., and Robt. A. Hunter, Asst. U. S. Atty., both of Shreveport, La., for appellants.

H. H. White, of Alexandria, La., F. G. Hudson, Jr., of Monroe, La., and Mark Norris, of Grand Rapids, Mich., for appellees.

In No. 2864:

Geo. Whitfield Jack, U. S. Atty., and Robt. A. Hunter, Asst. U. S. Atty., both of Shreveport, La., and S. M. Atkinson, of Mansfield, La., for appellants.

H. H. White, of Alexandria, La., F. G. Hudson, of Monroe, La., James George Palmer, of Shreveport, La., and Mark Norris, of Grand Rapids, Mich., for appellees.

In No. 2865:

and the second of

Geo. Whitfield Jack, U. S. Atty., Robert A. Hunter, Asst. U. S. Atty., and Sidney I. Foster, all of Shreveport, La., for appellants.

F. G. Hudson, Jr., of Monroe, La., James Geo. Palmer, of Shreveport, La., and Mark Norris, of Grand Rapids, Mich., for appellees.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. For reasons stated in the opinions rendered in the cases of United States and Newton B. Terrell et al. v. New Orleans Pacific Railway Co. et al., 235 Fed. 833, — C. C. A. —, and of United States and Stephen N. Grant v. New Orleans Pacific Railway Co. et al., 235 Fed. 841, — C. C. A. — (present term, U. S., C. C. A., 5th Circuit), the decree appealed from in each of the three above-mentioned cases is affirmed.

MAXEY, District Judge, was prevented by illness from participating in the decision of these cases.

BACKUS, Commissioner of Immigration, v. OWE SAM GOON. Ex parte OWE SAM GOON.

(Circuit Court of Appeals, Ninth Circuit. October 9, 1916.)
No. 2702.

1. ALIENS \$\infty 32(2)\$—Deportation—Authority of Secretary of Labor.

As Chinese Exclusion Act Sept. 13, 1888, c. 1015, 25 Stat. 476, vests authority to deport Chinese persons only in United States courts, judges and commissioners thereof, the only authority possessed by the Secretary of Labor to deport an alien, though he be a Chinese person, is based on Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. 32(2).]

2. ALIENS \$\infty 32(2)\$—Deportation—Authority of Secretary of Labor.

Index Immigration Act Feb 20 1007 outhorising the Secretary of Labor.

Under Immigration Act Feb. 20, 1907, authorizing the Secretary of Labor, when satisfied that an alien is subject to deportation under the provisions of the act or some other law of the United States, to cause such alien within three years after landing or entry to be taken into custody and deported, the Secretary of Labor can order deportation of an alien only when he has entered the United States within a period of three years preceding his arrest by immigration authorities.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. €=32(2).]

3. ALIENS \$\infty\$32(9)\topobtation\topopPetition for Habeas Corpus\topuJudgment \topopConstruction.

A demurrer to the petition of a Chinese person for habeas corpus to obtain release from imprisonment, under an order of the Secretary of Labor directing his deportation, was overruled on the ground that the evidence on the hearing by the immigration authorities was insufficient to show that the Chinese person had entered the United States in violation of law. The opinion of the District Court, after reciting that in proceedings under Chinese Exclusion Act, the alien was entitled to hearing before the courts, further stated that, though the courts could not prescribe the rules for admission of evidence by immigration authorities, nevertheless the evidence offered was insufficient. Held, that the judgment was not subject to attack on the theory that the demurrer was overruled solely on the ground that the warrant of deportation was in violation of Chinese Exclusion Act, and not that it was in violation of Immigration Act.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 94; Dec. Dig. ©=32(9).]

4. Aliens = 44—Immigration—Immigration Authorities—Right to Administer Oath.

While Immigration Act Feb. 20, 1907, § 24 (Comp. St. 1913, § 4273), authorizes immigration officers to administer oaths and take and consider evidence touching the right of aliens to enter the United States, an immigration inspector is not authorized to administer an oath to take evidence in a proceeding for the deportation of an alien.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 102-104; Dec. Dig. 41.]

5. Evidence \$\infty 78-Best Evidence Rule-Presumption.

Where the best evidence which might be produced is not offered, there is a presumption that such evidence, if produced, would have been unfavorable.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 98, 100; Dec. 2-78.]

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

6. Aliens \$\infty 32(8)\$—Deportation—Right to Order.

The Secretary of Labor cannot order the deportation of an alien on the ground that he entered in violation of Immigration Act, where the judgment is based on mere conjecture.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. 32(8).]

7. ALIENS \$\infty\$ 32(13)—IMMIGRATION—ORDER OF IMMIGRATION AUTHORITIES—PROVINCE OF COURTS.

While the courts cannot review the evidence on which the immigration authorities ordered the deportation of an alien on the ground that he was in the United States in violation of Immigration Act the courts may consider the jurisdictional questio... of whether there is evidence to support the finding of the immigration authorities.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig.

32(13).]

8. ALIENS \$\infty 32(8)\$—Deportation—Proceedings—Evidence.

In a proceeding to deport petitioner, a Chinese laborer, who came to the United States in 1873 or 1874 and registered and received a certificate as a Chinese laborer in 1894, on the ground that he was in Mexico within three years of the institution of the proceedings, and must have entered the country within that time, the only evidence that petitioner had been in Mexico was recognition by a resident of that country of petitioner's photograph. The Mexican resident was not produced, his evidence being taken by an immigrant inspector. The rules of the Department of Labor require the best evidence which can be obtained to be secured in proceedings for the deportation of aliens and provide for vestigation, and though much more satisfactory evidence might well have been secured, it was not produced, but an order for deportation was entered. Held that, though petitioner was found in Arizona concealed in a refrigerator car, there was not sufficient evidence to sustain the order for deportation on the ground that within three years of the institution of the proceeding he had entered from Mexico in violation of Immigration

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⊕32(8).]

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

In the matter of the petition of Owe Sam Goon for a writ of habeas corpus, directed against Samuel W. Backus as Commissioner of Immigration at the Port of San Francisco. From an order granting the writ and directing the discharge of petitioner (230 Fed. 654), respondent appeals. Affirmed.

Owe Sam Goon, a native of China, came here in 1873 or 1874. In March, 1894, he was duly registered under Act May 5, 1892, c. 60, 27 Stat. 25 (Comp. St. 1913, §§ 4315–4323), and received his certificate as a Chinese laborer residing in Sacramento, Cal. He was arrested in Tucson, Ariz., on February 19, 1915, having been found in a refrigerator car of the Southern Pacific Company arriving from the East. The case was heard by the immigrant inspector, and he was held for deportation to China on the theory that he had recently entered the United States from Juarez, Mexico, in violation of section 7 of the Chinese Exclusion Act of September 13, 1888 (Comp. St. 1913, § 4308), being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section, and that he entered in violation of section 36 of the Immigration Act of February 20, 1907 (Comp. St. 1913, § 4285).

of the Immigration Act of February 20, 1907 (Comp. St. 1913, § 4285). Section 13 of the Act of September 13, 1888 (25 Stat. 476, 479 [Comp. St. 1913, § 4313]), provides, in part, as follows: "That any Chinese person, or

person of Chinese descent, found unlawfully in the United States, or its territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district."

Section 20 of the Immigration Act of Feb. 20. 1907 (34 Stat. 898), as amended by the Acts of March 26, 1910 (36 Stat. 263, c. 128), and March 4, 1913 (37 Stat. 736, c. 141; Comp. St. 1913, § 4269), provides: "That any alien who shall enter the United States in violation of law * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States."

Section 21 (section 4270) provides, in part, as follows: "That in case the Secretary of Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came."

therein to be taken into custody and returned to the country whence he came." Section 36 (section 4285) provides, in part, as follows: "That all aliens who shall enter the United States except at the seaports thereof, or at such place or places as the Secretary of Labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be de-

ported as provided by sections twenty and twenty-one of this act."

The hearing of the case was had before the immigrant inspector in Tucson, Ariz. The only evidence that the government produced tending to prove that Owe Sam Goon had entered the United States within three years from Juarez, Mexico, was the statement of one Pascual Carrion, of Juarez, Mexico. The statement was made to an immigrant inspector at El Paso, Tex., and purports to have been made under oath; but by whom the oath was administered does not appear. It will be assumed that what purports to be an oath was administered by the immigrant inspector who conducted the examination. This statement of Carrion was to the effect that he had seen Owe Sam Goon a number of times in a laundry at Juarez, the last time being in August or September of The identification was made by means of a photograph of the accused taken in Tucson, Ariz. It was not made in the presence of the accused, nor was Carrion's statement made in his presence, nor upon notice that it would be made, and no opportunity given the accused to cross-examine Carrion concerning the statement. Subsequent to this statement, the accused was delivered into the custody of the Commissioner of Immigration at San Francisco, and on March 9, 1915, a warrant of deportation was issued by the Assistant Secretary of Labor by which it was ordered that the accused be deported to China in accordance with section 21 of the Immigration Act.

Petition for a writ of habeas corpus was thereafter presented to the District Court by one Ow Seong, praying the discharge of the prisoner from the custody of the Commissioner of Immigration, the appellant herein. On June 8, 1915, an order was entered by the District Court discharging the prisoner from the custody of the appellant. The Commissioner of Immigration appeals.

John W. Preston, U. S. Atty., and Caspar A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellant.

Joseph P. Fallon, of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1, 2]
1. It is clear that whatever authority is possessed by the Secretary of 235 F.—54

Labor to deport aliens found in this country is derived from the Immigration Act of February 20, 1907, c. 1134 (34 Stat. 898, 908), and not from the Chinese Exclusion Act of September 13, 1888, c. 1015 (25 Stat. 476), which vests such authority only in United States courts, and justices, judges, and commissioners thereof. This authority is possessed by the Secretary of Labor only when he shall have been satisfied that an alien is subject to deportation under the provisions of the Immigration Act or some other law of the United States, and in such case "he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came." The jurisdiction of the Secretary of Labor is therefore made to depend upon the fact that the alien has entered the United States within the period of three years preceding his arrest by the immigration authorities. United States v. Wong You, 223 U. S. 67, 69, 70, 32 Sup. Ct. 195, 56 L. Ed. 354; Low Wah Suey v. Backus, 225 U. S. 460, 466, 468, 32 Sup. Ct. 734, 56 L. Ed. 1165; Matsumura v. Higgins, 187 Fed. 601, 602, 109 C. C. A. 431.

[3] In overruling the demurrer to the petition, the lower court said: "This testimony was not taken in the presence of petitioner, but the witness Carrion identified a photograph of petitioner as that of the man seen

by him in the laundry at Juarez.

"Under the Chinese Exclusion Act, a Chinese alien unlawfully in the country is entitled to a hearing before a commissioner or judge, before he may be deported. At such hearing the ordinary rules of evidence are generally applied. Under the Immigration Act, however, any alien may be deported after a hearing before the immigration officers at any time within three years after the date of his entry into the United States, if such entry shall have been in violation of law. The claim here is that, as petitioner was identified as having been in Juarez as late as August or September of last year, he must have entered from there in violation of law, as he did not enter through any of the immigration channels. He was not found on the Mexican border, and the only evidence that he had been out of the United States within the three years was the evidence of Carrion, who did not see the petitioner himself for the purposes of identification, but only a photograph.

"The court does not undertake to prescribe rules of evidence for the Immigration Department; but in a case like the present, where the very jurisdiction of the department depends upon the establishment of a certain fact, which fact, when established, takes the alien's case out of the jurisdiction of the courts of the United States where it is placed by the Chinese Exclusion Law, the court is entitled to regard, not perhaps the weight of the evidence, but certainly the character of the evidence by which such a transfer of jurisdiction is effected. In the case at bar we have a Chinaman, resident of this country for 40 years, having a laborer's certificate entitling him to remain, who is not found near the Mexican border line, and who is ordered deported, without being confronted by the witness upon whose testimony the jurisdiction

of the Immigration Department to make the order depends.

"In my judgment, while affidavits and ex parte statements, and statements not under oath, have been held admissible in proceedings by the Immigration Department looking to the exclusion or deportation of allens, the right to remain here of a Chinese person so long a resident of the United States, and who is fortified by the possession of that evidence of his proper presence here which the law requires, should not be made to depend upon the fact that some resident of another country not produced at the hearing has identified a photograph, when such identification is the only thing which could deprive the alien of his right to be heard before a commissioner or judge, where such identification would not be admissible as evidence at all."

2. It is contended by appellant that, from the opinion above mentioned, it is apparent that the lower court considered only the legality of the assistant secretary's finding in the warrant of deportation that the alien was in the United States in violation of section 7 of the Chinese Exclusion Act, and either overlooked or ignored the finding that the alien was in the United States in violation of section 36 of the Immigration Act.

There is nothing in the opinion suggesting that the court either overlooked or ignored the finding that the alien was in the United States in violation of section 36 of the Immigration Act; on the contrary, the decision is based upon the question of jurisdiction of the

assistant secretary under that act.

[4-8] 3. It is contended that the fact that the witness Pascual Carrion identified a photograph of the alien as that of a Chinaman he had seen in Mexico, when coupled with the fact that the alien was found in a refrigerator car at Tucson, Ariz., and failed to give a satisfactory account of himself when examined by the immigration authorities, was sufficient evidence to satisfy the Secretary of Labor that the alien had recently entered this country from Mexico; and the cases of Sibray v. United States, 227 Fed. 1, 141 C. C. A. 555, Jeung Bow v. United States, 228 Fed. 868, 143 C. C. A. 266, and Ex parte Wong Yee Toon (D. C.) 227 Fed. 247, are cited in support of the proposition that the hearing before the immigration authorities need not be conducted in accordance with the procedure and rules of evidence which are observed in the courts of law.

But, as said by the court below:

"Where the very jurisdiction of the department depends upon the establishment of a certain fact, which fact, when established, takes the alien's case out of the jurisdiction of the courts of the United States where it is placed by the Chinese Exclusion Law, the court is entitled to regard, not perhaps the weight of the evidence, but certainly the character of the evidence by which such a transfer of jurisdiction is effected."

The accused was arrested in Tucson, Ariz., on February 19, 1915. He was examined by the immigrant inspector on February 20, 1915, and, in reply to questions propounded by the inspector, gave an account of his residence in California and Nevada from the date of his arrival in San Francisco from China in 1873 or 1874 down to his departure from California some months previously. From that statement it appears that he had been employed at well-known places and by well-known persons in California, among others by the Governor of the state. He stated that he had been registered as a resident of Sacramento, Cal. This certificate, admitted as true by the government, was subsequently produced and shows that he was registered in Sacramento, Cal., in March, 1894, under the Act of May 5, 1892. This certificate was prima facie evidence of his right to be in the United States. Moreover, his statement as to his various employments in California was capable of easy verification, if true, or contradiction, if not true. The absence of any such inquiry or examination by the officers, coupled with the certificate of residence, carries the presumption that the statement was true.

A warrant of arrest having been issued by the Assistant Secretary of Labor, the accused was again examined on March 1, 1915, by the immigrant inspector, when the examining officer introduced in evidence the statement of Pascual Carrion, and was asked the following questions:

"Q. What, if anything, have you to say in answer to the testimony of the witness Pasqual Carrion to the effect that you were in Juarez, Mexico, in August or September, 1914? A. If he states that he has seen me in Juarez, Mexico, what can I say? If he says he has seen me there, I cannot say anything else.

"Q. Then you don't deny that this witness did see you in Juarez, Mexico, in August or September, 1914? A. I have never been there, I don't know the

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"Q. Do you desire to offer any testimony in support of your claim that you have never been in Juarez, Mexico? A. No, I cannot offer any evidence or any witnesses."

Further than his own denial that he had ever been in Mexico, it was probably beyond his power to prove this negative; but, on the other hand, if he had been working in a laundry on Noche Triets behind a carpenter and blacksmith shop in Juarez, Mexico, in August or September, 1914, as recited in the statement of Pascual Carrion, the fact was of easy proof by competent testimony, and it should have been produced. Section 22 of the Act of February 20, 1907 (34 Stat. 898 [Comp. St. 1913, § 959]), authorizes the Commissioner General of Immigration, under the direction of the Secretary of Labor, to establish rules "not inconsistent with law" for carrying out the provisions of the act. Under this authority, certain rules have been established for such service, among others rule 22 relating to the arrest and deportation of aliens on warrant. The rule, so far as pertinent to the present inquiry, is as follows:

"Subdivision 1. Officers shall make thorough investigation of all cases where they are credibly informed or have reason to believe that a specified alien in the United States is subject to arrest and deportation on warrant. All such cases, by whomsoever discovered, shall be reported to the immigration officer stationed nearest the place where the alien is found to be.

"Subd. 2. The application must state facts bringing the alien within one or more of the classes subject to deportation after entry. The proof of these

facts should be the best that can be obtained."

The rule of law respecting evidence demands of a party seeking to establish a fact that he produce the best evidence available to him. Greenleaf on Evidence (16th Ed.) § 81; Wigmore on Evidence, § 1173; Jones on Evidence, vol. 2, § 212. And this is the identical rule prescribed by the Department of Labor for the examination of the case of an alien charged with being subject to arrest and deportation under the Immigration Act. Of course, this means that the best evidence must be proper evidence. Jones on Evidence, supra.

The statement of Pascual Carrion recites that he was sworn—by whom, it does not appear—presumably by the examining inspector, but that official had no authority to administer an oath in this case. Whitfield v. Hanges, 222 Fed. 745, 749, 138 C. C. A. 199. Section 24 of the Immigration Act provides that immigration officers shall have power to administer oaths and take and consider evidence touch-

ing the right of an alien to enter the United States. 34 Stat. 906. The inquiry in this case related to the deportation of the accused, and not to his right to enter the United States. He was in the United States, armed with a certificate of registration, and he denied that he had been out of the United States since his registration in Sacramento, Cal., in March, 1894, at the same time accounting for his residence in the United States since that time.

But the statement of Carrion was not the best evidence if it had been made under an oath administered by an authorized officer. The identification of the accused was by means of a photograph; it was not made in the presence of the accused, and the latter had no opportunity to examine the alleged witness concerning the identification or statement. But whether or not the accused had been employed in a laundry in Juarez, Mexico, in August or September, 1914, must have been a matter of easy verification or contradiction by the production of legal testimony, and the officers were employed for that purpose under a rule of the department requiring that the investigation should be thorough. Moreover, the Commissioner General of Immigration, with the approval of the Secretary of Labor, had authority under section 22 of the Immigration Act to detail an immigration officer to make the necessary investigation in Juarez, Mexico. The rule of evidence in this respect is that no evidence shall be admitted which, from the nature of the case, supposes still greater evidence behind in the party's possession or power. Clifton v. United States, 45 U. S. (4 How.) 242, 247, 11 L. Ed. 957. The presumption in such case is that, if the legal testimony had been produced, it would have been unfavorable, if not directly adverse, to the case. Clifton v. United States, supra.

The warrant of deportation recites that Louis F. Post, Assistant Secretary of Labor, has "become satisfied that the alien, Owe Sam Goon, who landed at an unknown port, subsequent to the 1st day of July, 1914, is subject to be returned to the country whence he came under section 21 of the Immigration Act approved February 20, 1907, being subject to deportation under the provisions of a law of the United States, to wit, the Chinese Exclusion Laws." The warrant

further recites:

"From proofs submitted to me, after due hearing before Immigrant Inspector Alfred E. Burnett held at Tucson, Ariz., I have become satisfied that the said alien has been found in the United States in violation of the act of Congress approved February 20, 1907, amended by the act approved March 26, 1910."

As has been stated, the Secretary of Labor is not authorized by law to deport aliens under the Chinese Exclusion Law, and there was no legal proof, nor was the best evidence attainable submitted which authorized him to deport the accused under the Immigration Act.

But it is contended that, when the accused was arrested, he was unable to explain the circumstances connected with his presence in a freight car arriving at Tucson from the East. This fact may be a ground for some suspicion and possibly some conjecture as to where he came from; but mere suspicion or conjecture were not sufficient

upon which to base a judgment that transfers the exclusive jurisdiction to make the inquiry from the courts of the United States to the Department of Labor. As has been repeatedly stated, it is not our function to weigh the evidence in this class of cases; but we may properly consider the jurisdictional question of law whether there was evidence to sustain the conclusion that the accused was in the United States in violation of law and subject to deportation under section 21 of the Immigration Act. In the absence of the best evidence attainable to sustain the same, we may also conclude that the order of deportation was arbitrary and unfair, and subject to judicial review. United States v. Ju Toy, 198 U. S. 253, 260, 25 Sup. Ct. 644, 40 L. Ed. 1140; Chin Yow v. United States, 208 U. S. 8, 12, 28 Sup. Ct. 201, 52 L. Ed. 369; In re Chan Kam, 232 Fed. 855, 857, — C. C. A. —, and cases therein cited.

The case of Wong Back Sue v. Connell, 233 Fed. 659, — C. C. A. —, turned upon other questions than that of jurisdiction of the Department of Labor to issue the order of deportation under section 21 of the Act of February 20, 1907. It is not an authority ex-

cept upon the questions there involved.

It follows that the order appealed from, granting the petition for a writ of habeas corpus herein, should be affirmed; and it is so ordered.

McNEIL HIGGINS CO. v. OLD DOMINION S. S. CO.

(Circuit Court of Appeals, Seventh Circuit. June 28, 1916.)

No. 2365.

1. Shipping \$\infty\$132(6)—Carriage of Goods—Actions—Evidence—Sufficiency.

In an action for damages arising out of a shipment of coffee, the question, whether the coffee after being wet in a storm of such magnitude as to constitute an act of God was of any value, held for the jury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 487; Dec. Dig. \$ 32(6).]

2. Shipping \$\infty 130-Carriage of Goods-Care-Act of God.

After a ship has been overtaken by a storm that may be properly classed as an act of God, it is the duty of the carrier to exercise at least reasonable diligence in endeavoring to save the goods shipped and prevent further loss.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 469, 470; Dec. Dig. ∞ 130.1

3. Shipping \$\infty 132(6)\$—Carbiage of Goods—Actions—Evidence.

In an action for damages arising out of a shipment of coffee which was caught and wet in a storm of such magnitude as to amount to an act of God, the questions whether the carrier was negligent in failing to transport the coffee to its destination, as well as in failing to take immediate steps to dry the coffee, held under the evidence for the jury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 487; Dec. Dig. \$32(6).]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the McNeil Higgins Company against the Old Dominion Steamship Company. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded.

Action to recover damages arising out of the shipment of a carload of

coffee. Judgment for carrier upon directed verdict.

On March 15, 1913, defendant received from plaintiff 279 bags of coffee of the alleged value of \$10,000 to be carried from New York to Chicago. The shipment passed from New York City to Newport News, Va., and thence to Cincinnati, Ohio, and was there transferred to the Chesapeake & Ohio Railroad Company to be carried to plaintiff. On March 24th, at Peru, Ind., the shipment met the so-called Dayton flood and windstorm. The top of the car was blown off, and the coffee was soaked by the rain from above and by water rising until it entered the car.

Plaintiff admits that the storm thus encountered was extraordinary, unusual, and unprecedented, and constituted what is termed an "act of God." Its action is based upon carrier's alleged negligence after such catastrophe was

encountered.

The defendant held the car at Peru from March 24th to April 10th, when it was taken back to Cincinnati where the coffee was offered for sale, but no

bid was received. Ten days later it was taken to Chicago.

Defendant's explanation for shipping the car to Cincinnati was that all evidences of the routing as well as the name of the consignee were destroyed in the flood, and in the opinion of its claim agent Cincinnati was a good coffee market. Peru is 120 miles from Chicago, and Cincinnati is 234 miles from Chicago

Chicago.

Plaintiff contends that the coffee was only partially damaged by the water at Peru, and that if the car had been promptly and properly cared for the damage would have been comparatively slight. Defendant's evidence tended to show that the coffee was first offered for sale at Peru, that the shipment to Cincinnati was made as soon as possible, and that its line from Peru to Chicago was not open prior to April 10th. Defendant's evidence also tended to show that the coffee was utterly worthless before the water receded.

The car reached Chicago April 24th and was rejected by plaintiff, and therefore the state of the state of

The car reached Chicago April 24th and was rejected by plaintiff, and thereafter sold by defendant at public auction to coffee dealers. The amount realized therefrom was \$101.01 after paying all freight charges and expenses of

handling.

At the close of the trial the court continued the case for a day to permit plaintiff to furnish additional proof that defendant's line was open between Peru and Chicago at the time the shipment was made to Cincinnati. The court held the testimony offered failed to establish that fact. The request for additional time in which to secure such proof was refused.

Charles A. Butler, of Chicago, Ill., for plaintiff in error. James Stillwell, Frank J. Loesch, R. W. Richards, and T. J. Scofield, all of Chicago, Ill., for defendant in error.

Before MACK, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). Defendant contends that the District Court correctly directed a verdict in its favor for two reasons: (a) That the evidence conclusively established that the soaking which the coffee received before the water receded left it utterly valueless, and that subsequent delay, excusable or otherwise, resulted in no damage. (b) That the evidence conclusively showed the carrier was not guilty of any want of ordinary care after encountering the storm.

We are unable to agree with the defendant on either proposition.

[1] Whether the value of the coffee was totally destroyed by the rains at Peru and before the car could possibly be moved or the cargo

unloaded is hardly debatable. The car reached Peru March 24th. It left Peru April 10th. It left Cincinnati about April 20th and arrived in Chicago April 24th. If, thereafter, it brought the sum of \$101.01 over and above all freight charges and expenses of sale in Chicago, it is inconceivable that the coffee was valueless when it left Peru.

The testimony of plaintiff's witnesses was that the coffee would have depreciated in value by reason of the rain, but that, if it had reached a roaster within 3 or 4 days after being soaked, its value would have decreased only about 2 or 3 cents a pound; that, if it had reached a roaster 7 or 8 days after it had been submerged in water, there would have been a reduction in value of 3 or 4 cents a pound. Its invoiced price was 14% cents per pound. Indeed, it is obvious that the damage depended on the extent of the soaking and the promptness with which the coffee was properly cared for after being soaked.

There also was competent evidence showing that Chicago was the most available market for the sale of coffee, and was a larger and

better coffee market than Cincinnati.

While these conclusions were challenged by defendant's witnesses, we conclude that the question of any damages as well as the amount of damage was for the jury.

[2, 3] The defendant, however, further contends that the evidence fails to show that it was guilty of any want of care after meeting this storm at Peru. We conclude that this question was also one for the

jury.

The duty of a carrier to use reasonable care to protect the shipper's property from damage, after the shipment has been overtaken by a storm that may be properly classed as an act of God, is well established. Lang v. Pennsylvania R. Co., 154 Pa. 342, 26 Atl. 370, 20 L. R. A. 360, 35 Am. St. Rep. 846; Black v. C., B. & Q. R. R. Co., 30 Neb. 197, 46 N. W. 428, 4 R. C. L. § 191; Blythe v. Denver & Rio Grande R. R. Co., 15 Colo. 133, 25 Pac. 702, 11 L. R. A. 615, 22 Am. St. Rep. 403. Under such circumstances, a carrier is required to exercise at least reasonable diligence in endeavoring to save the cargo, or to prevent further loss.

When the plaintiff presented evidence that the car was consigned to Chicago, that the defendant shipped it from Peru back to Cincinnati on April 10th and there held it until April 20th, and then shipped it to Chicago, and that Chicago was a larger and better market for coffee than Cincinnati, it established facts, which, if unexplained, made

a prima facie case of negligence against the carrier.

True, the carrier attempted to meet these facts by showing that its affairs were in such chaotic condition due to the flood and through no fault of its own; that the name of the consignee and the place of destination were both lost unto it. But it appears that such information was obtainable, and whether the carrier was negligent in not promptly ascertaining the destination of the shipment and the name of the consignee was for the jury. It affirmatively appears that such information was in the possession of the conductor of this train, who at all times was in Peru. It appears that the conductor kept a train book which contained "about the same as a bill of lading," and gave

Chicago as the destination of the car. The car was in a train that was obviously routed from east to west. The carrier also had available the permanent records, kept at Newport News, Va., and such records showed the destination of the car in question. Finally, it appeared that the plaintiff frequently notified defendant's agent that he had a car of coffee on the way, and the representative of the defendant notified plaintiff on April 10th (the day the car was shipped from Peru to Cincinnati) that said car was in the flood at Peru. These facts certainly made a jury question of defendant's alleged negligence in sending the car to Cincinnati without consignee's consent, and in failing to notify plaintiff of the location and condition of the car.

The defendant learned on the evening of March 24th that the top of the car was removed and that the coffee was certain to receive a soaking. Had the consignee been promptly notified of these facts, it is fair to assume that some arrangement might have been made to unload the car at Peru and avoid further loss. It appears that there was at least one concern in Peru engaged in roasting coffee. Even if there were none, there was no reason why consignee's representatives might not have gone to Peru, only a distance of 120 miles, and per-

sonally taken charge of the car.

There is evidence in the record showing that the car in question could have been moved from Cincinnati to Chicago at a date earlier than April 20th. Defendant's employé admitted that he was instructed at Cincinnati on April 15th to forward the car to Chicago. Nevertheless the shipment was delayed until the 20th, and no attempt to

explain this delay was made.

Again, it affirmatively appears as an apparently uncontroverted fact that from and after March 26th the Wabash Railroad was carrying freight in and out of Peru toward Chicago. There is also evidence tending to show that freight was shipped out of Peru on defendant's lines in both directions as early as April 5th. It is true this evidence thus particularly referred to was neither conclusive nor in many respects undisputed or unexplained; but the weight of the evidence, as well as the inferences arising therefrom, was for the jury.

Other questions presented by the defendant have been eliminated

by a stipulation filed in this court.

The judgment is reversed, and the cause remanded, with directions to the District Court to grant a new trial.

CHICAGO & E. I. R. CO. v. COLLINS PRODUCE CO.

(Circuit Court of Appeals, Seventh Circuit. July 25, 1916. Rehearing Denied September 27, 1916.)

No. 2155.

1. CARRIERS = 185(1)—CARRIAGE OF GOODS—INTERSTATE COMMERCE—CARMACK AMENDMENT.

Carmack Amendment to Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [Comp. St. 1913, § 8592]), declaring that the initial

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carrier shall be liable to the lawful holder of the bill of lading or receipt for any loss, damage, or injury caused by it or by any connecting carrier, does not impose upon the shipper the burden of establishing, in a suit against the initial carrier, that the loss was in fact caused by the initial or connecting carrier, but merely extends the common-law liability of the initial carrier to all losses, whether occurring on its line or that of a connecting carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 835-844; Dec. Dig. ⇔ 185(1).]

2. CARRIERS \$==132-CARRIAGE OF GOODS-ACTIONS.

In an action against a carrier for loss of goods, the shipper is not bound to show that the goods were lost through any act of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 578-582, 605; Dec. Dig. €=132.]

3. CARRIERS \$\iffsim 119\$—CARRIAGE OF GOODS—DECLARATION OF MARTIAL LAW.

The mere declaration of martial law in a district will not relieve a common carrier operating therein of all liability to the shipper.

[Ed. Note —For other cases see Carriers Cont. Dig. \$8,502.530; Dec.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 523-530; Dec. Dig. ⊕=119.]

4. CARRIERS \$==215(1)—CARRIAGE OF GOODS—LIABILITY.

Where martial law was declared in a flood district and at the suggestion and instigation of the carrier a shipment of chickens was appropriated by the military authorities, the carrier, having caused the appropriation, cannot defeat recovery by the shipper on the ground that there was a confiscation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 923: Dec. Dig. ⊕ 215(1).]

5. CARRIERS \$== 122-CARRIAGE OF GOODS-ACT OF GOD.

Where a shipment is caught in a flood of so unusual a character as to constitute an act of God, the carrier is not relieved of all liability, but is bound to exercise reasonable diligence to save the shipment or prevent additional loss.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §\$ 537, 538, 557-559; Dec. Dig. €==122.]

6. CARRIERS \$\infty 132\to CARRIAGE OF GOODS\to Loss of Goods.

Where goods are lost by a common carrier in transit, the carrier has the burden of showing that the loss resulted from some cause for which the carrier was not responsible in law or by contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 578-582, 605; Dec. Dig. ⊕=132.]

7. CARRIERS 6-123-CARBIAGE OF GOODS-ACT OF GOD.

Where goods are injured or a shipment lost through the joint influence of the carrier's negligence and act of God, the carrier is not relieved from liability.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 506, 507, 539-543; Dec. Dig. \$\sim 123.]

8. Carriers \$\infty 230(1)\$—Carriage of Goods—Actions—Evidence—Jury Question.

Whether a shipment of chickens in possession of a carrier which was caught in a flood and held up was confiscated by military authorities. martial law being declared in the district, in such a manner as to free the carrier from responsibility, held under the evidence for the jury.

(Ed. Note.—For other cases, see Carriers, Cent. Dig. § 962; Dec. Dig. ⇒ 230(1).] 9. Appeal and Error \$\sim 882(8)\$—Estoppel—Reading Depositions in Evidence.

Where defendant read in evidence depositions taken by plaintiff, defendant cannot complain on appeal that the depositions contained incompetent and hearsay evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3597, 3598; Dec. Dig. € 882(8).]

10. CARRIERS @==228(1)-CARRIAGE OF GOODS-AGENTS-AUTHORITY.

The authority of the superintendent or assistant superintendent of a division of a railroad company to bind the company in disposing of a shipment of chickens, stopped in transit by a flood, can be inferred without other evidence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957, 958; Dec. Dig. ⊕ 228(1).]

11. Carriers == 228(3)—Carriage of Goods—Actions—Evidence.

Where, pursuant to the bill of lading requiring presentation of claim before suit, a shipper presented his claim for poultry lost in transit, the claim in an action therefor is admissible in evidence to show compliance with the bill of lading though setting forth the price of the poultry.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. \$228(3).]

In Error to the District Court of the United States for the Eastern District of Illinois.

Action by the Collins Produce Company against the Chicago & Eastern Illinois Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The Collins Produce Company, defendant in error, herein called "plaintiff," brought suit against the Chicago & Eastern Illinois Railroad Company, plaintiff in error, herein called "defendant," for damages occasioned by the loss of a car of chickens. Verdict and judgment for plaintiff for \$4,125.82.

Plaintiff shipped a car of chickens from Cypress, Ill., for Newark, N. J., taking defendant's bill of lading therefor. The shipment left Cypress March 21st over defendant's line and was conveyed to Cincinnati, where it was delivered to a connecting carrier, the Cincinnati, Hamilton & Dayton Railroad Company for forward movement to its destination.

The car duly reached Dayton, Ohio, March 25th, where it met "the Dayton flood," which was so unusual and extraordinary as concededly to come within the legal definition of "an act of God." The car was surrounded by water, but on comparatively high land, and no damage occurred to the poultry. In fact, the water at this place scarcely rose above the tracks.

The general situation in Dayton, occasioned by the rise of water, was such as to call for official action on the part of the Governor of Ohio, who ordered the militia to Dayton and proclaimed martial law. Gen. Wood was placed in command.

The car of poultry was at all times in the charge of plaintiff's caretaker, whose duty it was to feed and water and look after the poultry en route. He continued his duties while the car was at Dayton, and claims that he had no difficulty in securing the necessary feed. At Dayton the caretaker employed an assistant and made arrangements to unload the poultry in a yard provided for that purpose, if the situation required it.

The car of chickens was confiscated on March 31st on the order of Gen. Wood and by his authority removed and disposed of, all against the protest of the caretaker.

Plaintiff contended that the confiscation was unwarranted and was made at the request of defendant. This contention defendant disputed.

The court submitted the case to the jury upon one theory, viz., that the defendant was liable if the car was seized by the military authorities on the

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invitation of the carrier or any of its authorized officers and agents. All other controlling issues were resolved by the District Court in favor of the carrier.

The court presented the particular issue to the jury in the following language: "The defendant is only liable in this case for the failure of the Cincinnati, Hamilton & Dayton Railroad to discharge the duties cast upon it by law. It was its duty, of course, to transport this property, if it could do so. It couldn't overcome the flood—it couldn't overcome the action of the military authorities, if the military authorities acted of their own volition. And the only question in this case is a question of fact and a very simple one, and it is this, whether, from all of this evidence, you believe that this property was taken and seized by the military authorities by and on invitation of the Cincinnati, Hamilton & Dayton Railroad or any of its authorized officers and agents. That is the only question you have to decide in this case."

The defendant at the close of the trial moved the court to direct the jury to render a verdict in its favor, which motion was denied. Errors complained of are: (a) Erroneous construction of the Carmack amendment to the interstate commerce law. (b) The admission and rejection of evidence. (c) Refusal

to direct a verdict in favor of the defendant.

L. O. Whitnel, of East St. Louis, Ill., for plaintiff in error. G. Gale Gilbert, of Mt. Vernon, Ill., for defendant in error. Before MACK, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). [1] It is contended for defendant that the liability of the initial carrier for loss occurring while the shipment is in the charge of the connecting carrier is not the same as the liability of the initial carrier for loss while the shipment is in its charge and is not the common-law liability of a carrier. In support thereof, counsel refers to that portion of section 20 of the act to regulate commerce, commonly called the Carmack amendment, which reads as follows:

"Any common carrier * * * shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose lines such property may pass."

Defendant's position is that the words "caused by it" appearing in the quotation impose upon the shipper the burden of establishing that the loss was in fact caused by the carrier, and reliance is placed upon the case of Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. The United States Supreme Court, in the case of Cincinnati, New Orleans & Tex. Pac. Ry. Co. v. Rankin, 241 U. S. 319, 36 Sup. Ct. 555, 60 L. Ed. 1022, decided May 22, 1916, after referring to the case of Adams Express Co. v. Croninger, passing upon the words "caused by it," as they appear in section 20 of the Interstate Commerce Act, says:

"Properly understood, neither this nor any other of our opinions holds that this amendment has changed the common-law doctrine heretofore approved by us in respect to the carrier's liability for loss occurring on its own line."

The trial court properly concluded that the Carmack amendment to the twentieth section of the act to regulate commerce did not change the common-law rule or restrict the liability of the carrier. The amendment merely imposed a liability upon the initial carrier for a

loss occurring on the line of a connecting carrier. It was not intended to restrict, nor did it limit, the liability of any carrier. Atlantic Coast Line Co. v. Riverside Mills, 219 U. S. 194, 205, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7; Gal. H. & S. Ry. Co. v. Wallace, 223 U. S. 492, 32 Sup. Ct. 205, 56 L. Ed. 516. Also see decisions of United States Supreme Court (Advance Sheets): New York, P. & N. Ry. Co. v. Peninsula Produce Exchange Co., 240 U. S. 34, 36 Sup. Ct. 230, 60 L. Ed. 511, decided January 24, 1916; Cincinnati, N. O. & Tex. Pac. Ry. Co. v. Rankin, 241 U. S. 319, 36 Sup. Ct. 555, 60 L. Ed. 1022, decided May 22, 1916; N. P. Ry. Co. v. Wall, 241 U. S. 87, 36 Sup. Ct. 493, 60 L. Ed. 905, decided April 24, 1916.

[2] Defendant maintains that: (a) Invitation by the carrier to the military authorities to seize the car did not constitute "loss, damage or injury to such property caused by it or by any common carrier." (b) The seizure and confiscation of the car of chickens was by military authority over which the common carrier had no control, and that liability for loss by reason thereof was not imposed by the bill

of lading or by the common law.

The first contention of defendant is based upon an erroneous construction of the Carmack amendment to the interstate commerce act as heretofore pointed out. The loss being established, the liability of the initial carrier was not dependent upon the plaintiff's proof that such loss was caused by either the initial or connecting carrier. Defendant's liability was the common-law liability of a carrier, and it was not incumbent upon plaintiff to show that an act of the carrier occasioned the loss. Galveston, H. & S. Ry. Co. v. Wallace, 223 U. S. 491, 32 Sup. Ct. 205, 56 L. Ed. 516.

[3-8] The claim of nonliability for seizure of the car of chickens, as an act over which defendant had no control, presents a more

serious question.

It appears from the bill of lading that the carrier's liability was restricted by the following express language:

"No carrier nor party in possession of any of the property herein described shall be liable for any loss thereof or any damage thereto or delay caused by the act of God, the public enemy, quarantine, authority of law, or the act or default of the shipper or owner."

We find few precedents to guide us in a case like this one.

It is obvious, however, that the mere declaration of martial law would not relieve a common carrier, operating in the district thus covered, of all liability to the shipper. I. C. R. R. Co. v. McClellan, 54 Ill. 71, 5 Am. Rep. 83.

The trial court accepted the view most favorable to the defendant and concluded that martial law in its fullest sense was in fact declared, that the Governor of the state had full authority so to do, and that he exercised his power in the case, and was amply justified in exercising such power, and that Gen. Wood in charge of the military forces acted within the power delegated to him by the Governor.

Accepting this view, the district court concluded to rest the carrier's liability merely upon the action of the railroad officials lead-

ing up to the confiscation of the car of chickens. In view of this court's conclusion on this phase of the question and the law applicable thereto, it is not necessary to consider the effect, generally, upon a carrier's liability, of the declaration of martial law under the circumstances here disclosed.

While the testimony on this issue was controverted, the district court was amply justified in submitting to the jury the question of whether the property was taken and seized by the military authorities by and upon the invitation of the carrier, provided the determination

of this issue imposed a liability on the carrier.

Col. Vollrath, one of Gen. Wood's aids, testified that he received a postal card from an official of the Cincinnati, Hamilton & Dayton Railroad Company calling his attention to this car of poultry and urging that attention be given to it. A few days later he received a telephonic communication calling his attention to the car of chickens, urging him to take possession of it, and he stated such request was made either by the superintendent or assistant superintendent of the road. Assistant Adjutant General Clark testified that he received a similar telephone call from one claiming to be the freight agent of the Cincinnati, Hamilton & Dayton Railroad and that it seemed best to dispose of the contents of the car, and that "he thought it was best that the military authorities take over those chickens and distribute them."

Gen. Wood stated that if it had not been for this report, confirmed by the statement of the railroad company, he would not have ordered the carload of poultry confiscated. It further appears from the caretaker's testimony that the chickens were in good condition, and that he had sufficient food on hand or available. The superintendent of the Cincinnati, Hamilton & Dayton Railroad admitted that he went to see the caretaker and advised him that rather "than let any poultry die it would be advisable to turn them over to the authorities together with his invoice."

Notwithstanding the superintendent and assistant superintendent denied having sent the postal card and denied having held any telephonic communication with the military authorities, we conclude that, upon this state of the evidence, the court properly concluded that this issue of fact could not be taken from the jury.

Nor did the court err in concluding that these facts, if found in

favor of the shipper, imposed a liability upon the carrier.

If the military authorities took the car at the request of the carrier, and would not have done so but for such request, can it be said that the loss was caused by "the act of God" or "the authority of law"? We think not. Under these circumstances, the car was not taken by the military authorities under and by virtue of the martial law declared in the city. If it were a fact that the car was taken at the request of the carrier, it was not such confiscation by military authorities as to enable the carrier to escape liability.

Even though the rainfall was so extraordinary as to constitute "an act of God," the carrier was not relieved from all liability to the shipper. It still owed the shipper the duty of exercising reasonable diligence in endeavoring to save the shipment or prevent further loss.

McNeil Higgins Co. v. Old Dominion Steamship Co., 235 Fed. 854, — C. C. A. —, decided by this court at this session.

The burden of proving that the loss resulted from some cause for which the carrier was not responsible in law or by contract is upon the defendant. Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace, 223 U. S. 481, 492, 32 Sup. Ct. 205, 56 L. Ed. 516. It became therefore incumbent upon the defendant to show that the loss was due solely to some one or more of the causes which by

law exempted it from liability.

If the loss be occasioned by a commingling of the "act of God" and the negligence of the carrier, the latter is not relieved from liability. Wolf v. American Express Co., 43 Mo. 421, 97 Am. Dec. 406; Wald v. Pittsburgh, C., C. & St. L. R. R., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332. For the same reason we conclude that the exception represented by the words "authority of law" as they appear in the bill of lading relieves the carrier from liability only when such cause is free from any act of the carrier contributing to the loss. 4 Ruling Case Law, § 199; B. & O. R. R. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579; I. C. R. R. Co. v. McClellan, 54 Ill. 58, 5 Am. Rep. 83.

The rule seems to be well stated in 4 Ruling Case Law, § 199, as

follows:

"Since a carrier is bound, both by duty and necessity, to respect and yield to the paramount public authority in power at the place where his undertaking is to be performed, it has been held that, if the process is not void on its face, he will be protected even though the statute under which the property is seized is unconstitutional. * * * Moreover, in order that the act of public authority may be a protection in such cases, it is necessary that the seizure be made without the procurement or connivance of the carrier."

The District Court therefore did not err in refusing to direct the verdict for the defendant.

[9] Defendant further complains because of the admission of incompetent and hearsay evidence and because the evidence received did not establish the authority of or the agency of the parties whose statements were so received in evidence.

The objection that the evidence was incompetent and mere hearsay is untenable for the reason that the defendant read in evidence the depositions containing the statements now complained of. The testimony of the witnesses, whose evidence is now objected to, was taken by deposition at the request of the plaintiff. On the trial these depositions were read in evidence by defendant. It follows that defend-

ant is in no position to complain.

[10] Objection is also made because the testimony failed to show that the statements were made by any one authorized to speak for the defendant. The difficulty with this objection is that the testimony complained of was received without objection. Witnesses stated that either the superintendent or the assistant superintendent made the request of Gen. Wood that the car of chickens be confiscated. If the party who thus made the request was either the superintendent or the assistant superintendent of the division, there can be no question but that agency as well as authority was inferable.

[11] Complaint is also made because the court admitted in evidence a claim presented to the defendant by the plaintiff, and which contained a statement of the number of pounds of poultry as well as the price at which the poultry was to be sold at Newark, N. J. The evidence was properly received, not to establish price, but to show the plaintiff presented its claim to the carrier prior to the commencement of the action, and pursuant to the provisions of the bill of lading. It was not offered or received for any other purpose and value was established by other testimony.

The judgment is therefore affirmed.

SPIESBERGER v. MICHIGAN CENT. R. CO.

(Circuit Court of Appeals, Seventh Circuit. July 13, 1916.)

No. 2264.

1. TRIAL \$\infty\$=169-DIRECTED VERDICT-RIGHT TO.

In a passenger's personal injury action, verdict is properly directed for the carrier, where there is no evidence of its negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 381–387, 389; Dec. Dig. \$\infty\$169.]

2. Carriers \$\infty 414\to Carriage of Passengers\to Agents\to Porters.

Passengers in a parlor car belonging to another company are still passengers of the railroad company, and where the porter in charge of the car, though not a servant of the railroad company, was allowed to announce stations, the railroad company is liable for his acts; he being in that respect its agent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1578, 1582, 1589; Dec. Dig. ⊕ 414.]

3. Carriers \$\iff 320(26)\$—Carriage of Passengers—Actions—Jury Question.

Where a passenger, his station being announced and the vestibule doors being open, proceeds to the platform of the car and onto the steps as the train is brought practically to a stop, the carrier cannot as a matter of law be declared free from liability for injuries resulting to the passenger when he is thrown from the car steps by the sudden starting of the train with unnecessary violence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1244, 1322; Dec. Dig. ⇐⇒320(26).]

4. Carriers \Longleftrightarrow 347(10)—Carriage of Passengers—Actions—Contributory Negligence.

Where a passenger, his station being announced and the vestibule being open, goes to the platform and on the train slackening speed to a practical stop goes upon the steps, he cannot as a matter of law be held guilty of contributory negligence, though he is thrown from the steps by the sudden starting of the train with unnecessary violence, particularly where the stop was at a station and darkness prevented the passenger from seeing that it was not the one announced.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1355, 1356, 1386, 1402; Dec. Dig. \Longrightarrow 347(10).]

5. Carriers \$\infty\$=320(26), 347(10)—Carriage of Passengers—Actions—Evidence—Jury Question.

In an action for injuries received by a passenger who was thrown from the steps of a car when the train which had practically stopped was started with a sudden jerk, the questions of the passenger's contributory negligence in going on the steps, and the carrier's negligence, *held* for the jury.

[Ed. Note,—For other cases, see Carriers, Cent. Dig. §§ 1244, 1322, 1355, 1356, 1386, 1402; Dec. Dig. \$\infty 320(26), 347(10); Negligence, Cent. Dig. § 301.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by Levi Spiesberger against the Michigan Central Railroad Company. There was a judgment for defendant on directed verdict, and, new trial being denied, plaintiff brings error. Reversed and remanded.

August 13, 1911, plaintiff, aged 69, for many years a commercial traveler, took passage on defendant's train at Kennedy, Mich., with a party of 8 or 10 relatives and friends, including a son and wife, daughter and husband, and a granddaughter with her intended husband. The train comprised several vestibuled coaches, the rear one a Pullman parlor car, in which the entire party sought space, and all could be accommodated except plaintiff, who took a seat in the day coach, next forward. The destination of the entire party was Forty-Third street station, Chicago. The train was behind its schedule, and reached Sixty-Third street station about 10 p. m., where a stop was made. Passing Sixty-Third street, plaintiff left his car and crossed the vestibuled platform to the parlor car to see that his party would be While talking with them there, the porter of the parlor car getting ready. announced the Fifty-Third street station, and after having stopped there he announced Forty-Third street as the next stop, whereupon plaintiff, getting ready to leave the train walked out on the platform. Other passengers were coming out of both coaches onto the platform preparatory to leaving at Forty-Third street. Plaintiff and some others stepped over onto the platform of the day coach. The train was slowing down, and, according to the testimony of some of the witnesses, came to a stop, whereupon plaintiff and others back of him assuming that Forty-Third street station was reached, started to descend the steps. The vestibule doors were open and the trapdoors over the steps up, offering unobstructed egress from the cars. As plaintiff was descending, his hand grasping the handrail, the train started ahead with a sudden jerk, throwing him off and under the train, which, passing over him, cut off one of his legs, broke the other, and otherwise injured him. It was found that the place of injury was Forty-Seventh street, where there is a station quite similar to that at Forty-Third, but used only for suburban trains, and not a regular stopping place for through trains like this one, such as were the Sixty-Third, Fifty-Third, and Forty-Third street stations. Plaintiff had frequently traveled over this route and was generally familiar with it, knew the stations, and that it was customary to announce them; but the night was dark, and there was nothing to indicate to passengers what the stations were, other than the porter's announcement prior to reaching them, and there was no warning given to passengers that the place where the train seemed then about to stop was not the Forty-Third street station which had been announced.

There was some variance in the testimony as to whether or not the train came to a complete stop at Forty-Seventh street, or rather an uncertainty in the minds of some of the witnesses as to whether it actually stopped. Plaintiff said it did stop. Herod Cutter, who lived near the station and was then with his wife calling at a cottage just south of the station, abutting on the track, testified the train came to a stop and then pulled on, when he heard a peculiar cry and found plaintiff injured. On cross-examination he said he would not say under oath that the train actually came to a stop, but his impression was that it did, and this is what attracted his attention, as those trains do not ordinarily stop at that station. Harry F. Brown, who was just behind plaintiff, following him out, said he thought "the train was at a standstill." Again, he said: "It was almost to a standstill, going very

slightly, comparatively it was stopped you might say. I could not say it was moving." Later he testified, "It came to a dead stop." Sinsheimer said, "It came practically to a standstill."

As to the manner in which the stations were called, plaintiff testified that the only announcement made was on leaving the stations, when the name of the next scheduled station was called out as the place where the train would next stop, and that after the train left Fifty-Third street the porter called out "Forty-Third street next stop." There is some controversy as to whether or not plaintiff's testimony can be construed to mean that, in addition to announcing what the next station would be, the stations were also announced when they were actually reached. The record leaves this in some doubt, depending upon the significance to be given to a nod of plaintiff's head in answer to some question. But witnesses Brown and Herbert Spiesberger testified that after leaving the stations the only announcement made by the porter was what the next station would be, i. e., after leaving Sixty-Third street he announced the next stop will be Fifty-Third street, and on leaving Fifty-Third street, he announced that the next stop will be Forty-Third street, and that there was no further announcement on reaching the station.

On the subject of the train starting with a jerk, plaintiff testified: "When I got to the second step it gave a sudden jerk, just a tremendous jerk, just twisted me around, and I fell off." Brown testified that plaintiff was walking down the steps and he (Brown) following, and the car started ahead and jerked plaintiff off and he went under the steps; that the effect of the starting was that all the passengers fell back in the direction from which they were coming. Lederer, who followed Brown, testified that, as plaintiff was stepping down, the train gave a jerk and threw Brown against the witness, and himself back against the vestibule to the east. Sinsheimer said, "The train slacked up and practically came to a standstill and then gave a lurch." Spiesberger, Jr., who was standing in the passage of the parlor car leading to the platform, said he felt a slackening of the movement of the train until he felt no more motion, and then all in the passageway sagged back and forth against each other in a sort of surging movement which jolted them around, and then the train went forward; that there was a stop and then a forward motion and all started ahead.

At the conclusion of the evidence for plaintiff, defendant's counsel moved the court to instruct the jury to find for defendant. Motion was granted, and the jury was so instructed, and rendered a verdict accordingly. Motion for new trial was overruled and judgment given on verdict. Upon the action of the court in directing the verdict, and declining to grant a new trial, error is assigned.

Elias Mayer, of Chicago, Ill., for plaintiff in error. John D. Black, of Chicago, Ill., for defendant in error. Before BAKER, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1,2] It is insisted for defendant that the record fails absolutely to show any negligence on the part of the company. If this is so, the court's direction of verdict was right. A plea was filed denying that the porter who called the stations was an employé of defendant, but there was no proof as to whether he was or not. However, he was in apparent charge of a car which was a part of the company's train, used to transport its passengers, and it does not appear that there was any one else in that part of the train to whom the company delegated its very useful and usual function of announcing the stations. Though passengers are in a parlor car which may belong to some other concern, they are none the less the passengers of the company, and the porter of the car, whether directly employed by the company or through some other instrumentality, is with respect to the pas-

sengers, and their safety, acting for the company. Penna. Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141; Calhoun v. Pullman Co., 159 Fed. 387, 86 C. C. A. 387, 16 L. R. A. (N. S.) 575; L. & N. Ry. Co. v. Ray, 101 Tenn. 1, 46 S. W. 554; Campbell v. Seaboard Air Line Ry., 83 S. C. 448, 65 S. E. 628, 23 L. R. A. (N. S.) 1056, 137 Am. St. Rep. 824.

[3] In announcing, after leaving Fifty-Third Street, that Forty-Third street would be the next stop, the jury might have been justified in concluding that, when a stop was made a few moments thereafter, the company might reasonably have anticipated that passengers would infer it was the station announced; and, if the vestibule doors and the trapdoors were open, that passengers for the station announced would be likely to assume they were expected to alight, particularly if the place of stoppage was in fact a station, the night dark, and the train lighted so it might be difficult for the passenger, however generally familiar with the surroundings, to readily realize just where he was or that the place of stopping was not the station announced. And if in such situation passengers bound for the station announced are about to alight, and, by a sudden jerk of the train, are thrown off and injured, for the court to say as a matter of law that the evidence fails to show negligence on the part of the company is clearly an invasion of the jury's province. That under generally similar circumstances juries may properly find the carrier negligent as a basis for awarding damages to passengers sustaining injuries in consequence has been decided in numerous cases. Some of them are: Washington & Georgetown R. R. Co. v. Harmon, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284; B. & O. S. W. R. R. Co. v. Mullen, 217 Ill. 203, 75 N. E. 474, 2 L. R. A. (N. S.) 115, 3 Ann. Cas. 1015; Ward v. C. & N. W. R. R. Co., 165 Ill. 462, 46 N. E. 365; C. & A. R. R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313; Bartle v. N. Y. C. & H. R. R. R. Co., 193 N. Y. 362, 85 N. E. 1091; Dallas v. I. C. R. R. Co., 144 Ky. 737, 139 S. W. 958; Wolf v. C. & N. W. R. R. Co., 131 Wis. 335, 111 N. W. 514; C. H. & I. R. R. Co. v. Revalee, 17 Ind. App. 657, 46 N. E. 352; C. H. & I. R. R. Co. v. Worthington, 30 Ind. App. 663, 65 N. E. 557, 66 N. E. 478, 96 Am. St. Rep. 355; P. & R. R. R. Co. v. Edelstein (Pa.) 16 Atl. 487; Phila., etc., R. R. Co. v. McCormick, 124 Pa. 427, 16 Atl. 848; Balto. & P. R. R. Co. v. Jean, 98 Md. 546, 57 Atl. 540.

shows plaintiff's own negligence contributed to his injury; and if this is so the judgment of the District Court must stand, for, notwith-standing any proof of negligence of the company, if the plaintiff's own negligence contributed to his injury he has no cause of action. One cannot well consider the question of the company's negligence without at the same time considering that of the plaintiff. What the company might reasonably expect of passengers in a given situation is of the essence of the question of the company's negligence; and whether or not passengers might reasonably be expected to do those things, or be in such situation, would have like bearing on the questions.

tion of the negligence of the passenger.

When a station is announced, and its near approach reasonably expected, it cannot be said to be negligence per se for passengers to get ready to leave the train. Common experience shows that, if their preparation for departure did not begin until the station was actually reached and the train had stopped, they would most likely be carried beyond their destination. They must not unreasonably expose themselves to danger by going upon the platforms of rapidly moving trains; but where the train is apparently slowing down for the station announced, and is seemingly about to stop, it is not necessarily negligence in the passenger to go out upon the vestibuled platform or to begin descending the steps before the train has actually and fully stopped. Whether in going on the platform and steps the passenger manifests negligence for his own safety is ordinarily not a question of law for the court, but is for the jury. Thomas et al. v. San Pedro L. A. & S. Ry. Co., 170 Fed. 129, 95 C. C. A. 371 (9th C. C. A.); St. L., I. M. Ry. Co. v. Leftwich, 117 Fed. 127, 54 C. C. A. 1; Northern Pac. Ry. Co. v. Adams, 116 Fed. 324, 54 C. C. A. 196; Larson v. M. & St. L. R. R. Co., 85 Minn. 387, 88 N. W. 994.

In B. & O. R. R. Co. v. Meyers, 62 Fed. 367, 10 C. C. A. 485, this court was passing on a case where a passenger desiring to leave the train at a station was informed that no station stop was made there, but the brakeman told him the train stopped at a nearby railroad crossing, and he would notify the passenger so that he might leave at such crossing. When about a mile from the crossing and while the train was running rapidly, the brakeman opened the door and beckoned to the passenger; who thereupon went upon the platform, standing there and holding firmly to the railing, and, while so standing waiting for the train to stop, the unnecessarily sudden application of the air brakes caused such a jerking of the train as to throw off and injure the passenger. It was urged that by placing himself in this dangerous position the passenger so far contributed to the accident as to bar his recovery of damages. The court said:

"But whether or not one is guilty of negligence in standing upon the platform of a car in motion is dependent upon the circumstances of the case, and is determined by the consideration whether a reasonably prudent man, under the circumstances existing, would have done so or not. The duty of the passenger is dictated and measured by the exigency of the occasion. Here the defendant in error had announced to him, by the act of the brakeman, that the train was about to come to a stop. * * * He had a right to presume that the train was abating its speed, with a view to stopping. We think it was a proper question to be submitted to the jury whether the defendant in error, under the circumstances, was guilty of an act which a reasonably prudent man in like situation would not have done."

Negligence cannot be predicated upon that which cannot reasonably be anticipated. If the plaintiff and the other passengers from both cars, who were coming out upon the platform in the evident belief that the stop for Forty-Third street was about to be made, acted in that respect as might reasonably be expected of ordinarily prudent passengers in like situation, there was no negligence in their so acting; and, if in this situation they could not reasonably have anticipated that the train would start with a sudden jerk of sufficient violence to be dangerous to their well being, they are not as a matter of law charge-

able with contributory negligence in failing to anticipate danger from such a cause.

[5] We are satisfied from the record that the issues of defendant's negligence and of plaintiff's contributory negligence were not determinable by the court as matters of law, but were for the jury.

The judgment of the District Court is reversed, and the cause re-

manded, with direction to grant a new trial.

HALL v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)

No. 2678.

CRIMINAL LAW \$\infty 371(1)\$—EVIDENCE—OTHER OFFENSES.

In a prosecution for unlawful assault upon the person of a young girl, evidence that accused, a physician, had nearly 3 years before, assaulted another young girl, though offered to show intent, is improperly admitted, introducing a collateral issue and not raising a logical inference that accused intended by his acts to assault the prosecutrix.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831; Dec. Dig. \$\sim 371(1).]

Gilbert, Circuit Judge, dissenting,

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska; Charles E. Bunnell, Judge.

M. F. Hall was convicted of unlawful assault, and he brings error.

Reversed and remanded.

Le Roy Tozier, R. F. Roth, and H. E. Pratt, all of Fairbanks, Alaska, T. C. West, of San Francisco, Cal. (West, Rafael & Curley, of San Francisco, Cal., of counsel), for plaintiff in error.

John W. Preston, U. S. Atty., and M. A. Thomas, Asst. U. S.

Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Plaintiff in error was convicted of the crime of an unlawful assault upon the person of one Selma Lappi upon the 24th of September, 1914, at Fairbanks, Alaska. He was sentenced to imprisonment and to pay a fine. This writ of error is brought to reverse the judgment.

Prosecuting witness was 9 years old. She had been treated and operated upon by the defendant, who was a physician, for a disease of the glands of her neck. She testified, in substance, that after the operation she often went to the defendant's office for the purpose of having the bandages upon her neck changed; that upon one occasion, after the doctor had attended to the bandages on her neck, he took her into his lap and with his hand took liberties with her person, and that after the occurrence she complained to her mother.

Over the objection of the defendant the prosecution was permitted to introduce the evidence of Charlotte Geis, a child under 10 years

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of age, who said, in substance, that about August, 1912, or 33 months before the time of the trial of this defendant, she had been into Dr. Hall's office at Fairbanks with her little brother, and that upon one occasion about that time, after the doctor had treated the brother for a cut on his forehead, and after the brother had left the office, the

defendant had put his finger in her private parts.

The defendant, a practicing physician, married, and 50 years of age, testified in his own behalf. He positively denied that he had ever taken any improper liberties with either of the children, and explained at length that he had treated the prosecuting witness for enlarged glands under the ear and under the jaw; that he had first seen the child in March preceding the time when he operated upon her, and had treated her daily for a period of time in July and August, 1914; that he had operated when the child was under the influence of chloroform; that she was nervous and excitable, and particularly resisted the taking off of the adhesive plaster which he used in holding bandages over the wounded places in her neck; that upon the day of the alleged assault the child was very nervous, and that after he had attended to the dressing he lifted her in his arms and sat down on a couch with her and tried to calm her; that he asked her if she felt badly; that she said she did, and put her hand on her side; that he put his hand down and commenced to massage her abdomen.

The principal error assigned was the admission of the evidence of the child Charlotte Geis. We believe that the court erred in admitting this evidence. We shall not dispute in the least the rule that where intent must be proved, other crimes of like nature which are so intimately related to the act in question as to show a common purpose or a continuity of purpose in all may be shown upon the question of intent or to repel the inference of accident. It is, however, never to be lost sight of that the defendant is entitled to be tried upon competent evidence and only for the offense charged, and where there is matter collateral to the issue to be tried, it is the duty of the court to see that proof of collateral matter which can really only tend to prejudice the defendant with the jurors and to produce the impression that he is of low and depraved disposition is not admitted. In Jones on Evidence (1913) 144, we find this statement:

"The intent and disposition with which one does a particular act must be ascertained from his acts and declarations before and at the time; and when a previous act indicates an existing purpose, which from known rules of human conduct may fairly be presumed to continue and control the defendant in the doing of the act in question, it is admissible in evidence. In many cases it is the only way in which criminal intent can be proved; and the evidence is not to be rejected because it might also prove another crime against the defendant. The practical limit to its admission is that it must be sufficiently significant in character, and sufficiently near in point of time, to afford a presumption that the element sought to be established existed at the time of the commission of the offense charged. The limit is largely in the discretion of the judge."

In People v. Stewart, 85 Cal. 174, 24 Pac. 722, a case of assault with intent to commit rape, it was held that in order to show the intent with which an act charged has been done, proof of other acts is often admitted, but that evidence tending to show lewd acts and

occurrences between the defendant and girls other than the prosecuting witness was not admissible. People v. Bowen, 49 Cal. 654, laid down the same rule. In McAllister v. State, 112 Wis. 496, 88 N. W. 212, it was held that in prosecutions for assault with intent to commit rape, evidence of previous attempt by the accused to commit the crime upon other persons is not admissible. Bird v. United States, 180 U. S. 356, 21 Sup. Ct. 403, 45 L. Ed. 570; State v. Walters, 45 Iowa, 389; State v. Lapage, 57 N. H. 245, 24 Am. Rep. 69; Wigmore on Evidence (1904) 357.

We do not hold that upon a charge of an assault with intent to commit rape, evidence of former acts of like character upon a female other than the prosecuting witness cannot, under any circumstances, be received. We are inclined to the view that where such acts give strong indication of a design to commit rape they may be. But it is not a logical inference to say that testimony of an assault upon a child nearly 3 years previously shows that defendant had a design or intent to make an assault nearly 3 years later upon another child. It is too plain, however, that proof of such collateral matter tends to produce the belief that defendant is a person of depraved moral character, and is highly prejudicial to the defendant on trial before a jury. The law, in presuming the defendant innocent until his guilt of the offense charged is proved, will not allow the government to prove evidence of defendant's bad or immoral character until defendant has put his character in issue by evidence in his behalf. It is true that the court instructed the jury that testimony of an assault upon the Geis child was limited in its applicability, and that defendant could only be convicted of the assault described in the indictment; but we think that the error in admitting the evidence was too serious to be avoided by the instruction.

The judgment is reversed, and the cause is remanded, with directions to grant a new trial.

GILBERT, Circuit Judge (dissenting). The court below, in submitting to the jury the question whether the defendant committed the act with which he was charged, limited them to the evidence other than that furnished by Charlotte Geis, and instructed them that the testimony of the latter was admitted for but one purpose, which was its tendency to show the intent of the defendant, and further instructed them that they must eliminate from their consideration all testimony of Charlotte Geis, and, having done so, must determine from the remaining testimony whether or not the defendant committed the act charged in the indictment. The court said:

"For this purpose the testimony of the witness Charlotte Geis can be of no avail, and the same must be entirely eliminated from your consideration."

It thus appears that the testimony of Charlotte Geis was admitted solely for its bearing upon the question of the intent of the defendant in doing the act which was the substance of the charge against him. There was a logical connection between the two acts from which it might be said that proof of the one tended to establish the other. Such evidence should not be rejected where the mind plainly perceives that

the commission of the one act tends to prove that the defendant committed the other. If the charge against the defendant was true, it proved him to be a degenerate who had the disposition to commit such acts, and, if so, it was not reversible error, I think, to admit proof of an act identical in its nature, although it was committed more than 2 years prior to the commission of the act for which he was indicted.

TACOMA RY. & POWER CO. v. COTHARY et ux.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)

No. 2736.

1. Street Railroads ⇐==117(5, 21)—Injuries to Persons on Tracks—Actions
—Jury Question.

In an action for injuries received by a woman struck by defendant's electric car while crossing defendant's tracks which ran in a park, the questions of the injured woman's contributory negligence and of the negligence of defendant's servants *held* for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 243, 249; Dec. Dig. €—117(5, 21).]

2. Street Railroads \$\infty\$ 113(1)—Actions for Injuries—Evidence—Remotences.

Defendant electric railroad company, which maintained tracks within a park, constructed a fence with suitable gates and turnstiles for the protection of the public in getting on and off the cars. Plaintiff, who was attempting to go through a turnstile leading to a bathhouse, was struck by one of defendant's cars and claimed that the turnstile would not revolve and that defendant's servants negligently failed to warn her of the approach of the car or to stop the car when her position of peril was apparent as the turnstile was only a few inches more than two feet from the side of a passing car. Held, that evidence that about a week after the accident the turnstile would not revolve because it had sunk is admissible despite the objection of remoteness.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 229, 231–233; Dec. Dig. € 113(1).]

3. APPEAL AND ERROR 5 1050(3)—REVIEW—HARMLESS ERROR.

In such case, the admission of the evidence, if erroneous, was harmless, as the negligence relied on was not the defect of the turnstile, but the carelessness of the operatives of defendant's car.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4155; Dec. Dig. ⇐ 1050(3).]

4. APPEAL AND ERROR \$\infty 1050(1)\$—REVIEW—HARMLESS ERROR.

Error in permitting counsel to read from the testimony of one of defendant's witnesses given at a former trial is harmless, where the extract tended in no way to contradict his testimony given at the second trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. \(\sigma 1050(1). \)]

5. WITNESSES 389-IMPEACHMENT-EVIDENCE.

In an action by one struck by an electric car where the motorman testified that he stopped the car within two lengths after the accident, his testimony given at a former trial that the car was stopped in three lengths may, despite his admission that he probably so testified, be read in evidence to impeach him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1243–1245; Dec. Dig. ⇐⇒389.]

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by William Cothary and Margaret Cothary, his wife, against the Tacoma Railway & Power Company, a corporation. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

The defendant in error, who was the plaintiff in the court below, and will be here so designated, was struck and injured by an electric car running in Point Defiance Park near Tacoma. The railway company operated the car under an ordinance of the city of Tacoma which gave it license to construct and operate and maintain a line of double-track railway within the park, and required that at the terminus or loop of the railway, and for a distance along the main line, to be agreed upon by the railway company and the park commissioners, the company should construct and maintain "a wire fence six feet high, with suitable gates and turnstiles for the protection of the public in getting on or off the cars." The plaintiff when she was injured was, in company with two others, endeavoring to go through a turnstile in a fence made by the defendant, through which people were accustomed to go from the park to a bathhouse. The distance between the ends of the bars of the turnstile and the side of a passing car was two feet and five inches. There was a long platform six feet wide between the track and the fence in which the turnstile was located. The plaintiff had walked along the railroad track as was the usual custom in going to the bathhouse from the park. On reaching the upper end of the platform, she had turned to look to see if any car was in sight, and, seeing none, had proceeded to the turnstile with her companions. They found that the turnstile for some reason would not revolve. They stepped back and endeavored to make it turn in the opposite direction, and, at a moment when the plaintiff had her hand upon the crossbar pushing it, she was struck by a passing car. She testified that she did not hear the car approaching, that there was no whistle, and that she had not looked to see a coming car from the time when she reached the upper end of the platform. The complaint alleged negligence of the railway company, in that the car track was too close to the turnstile, that the car was running at an excessive rate of speed, that the motorman gave no signal or warning to the plaintiff, and that the motorman was negligent in not stopping the car sooner.

Frank D. Oakley and John A. Shackleford, both of Tacoma, Wash., for plaintiff in error.

Govnor Teats, Leo Teats, and Ralph Teats, all of Tacoma, Wash., for defendants in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The defendant's principal contention is that the court below erred in overruling its motion for an instructed verdict, which was interposed on the ground that the complaint did not state grounds sufficient to constitute a cause of action, that the car was not exceeding any speed limit, nor operated in a careless or negligent manner, and that the plaintiff was guilty of contributory negligence. We think that the question, both of the defendant's negligence and that of the plaintiff's contributory negligence, were, under the circumstances disclosed, questions for the jury. There was evidence that the car approached at the speed of 30 miles an hour, that the motorman, while 150 feet distant from the place of the accident, distinctly saw the position in which the plaintiff stood and made no effort to stop his car or to give her warning. There was evidence that the plaintiff neither saw nor

heard the approaching car, and that she was not lingering or loitering negligently in a place of danger, but was on her way through the turnstile, and that she supposed the obstruction to the turnstile to be but temporary and that in a moment she would be able to pass through the same. It is evident that the turnstile was perilously near the car track. The motorman must have known that the place where the plaintiff and her friends stood was a very dangerous place, requiring

extraordinary care upon his part to avoid accidents.

[2] Error is assigned to the admission of the testimony of a witness who testified that about a week after the accident he went to the turnstile to see why it stuck, and that he found that the turnstile had sunk so that the spokes thereof worked against the adjacent spokes. It is said that this was error for the reason that the plaintiff failed to prove that no change had been made in the turnstile in the intervening week, and cases are cited to the proposition that the burden is on the plaintiff in such a case to show that no change had been made. But the objection which was interposed to the testimony on the trial was that the time was too remote. There can be, in the very nature of things, no fixed rule as to the time that must intervene before such evidence becomes incompetent. 1 Wigmore, § 437. We cannot say that it was not within the court's discretion to permit the testimony over the objection which was made.

[3] We are of opinion, also, that the testimony, even if incompetent, was not prejudicial to the defendant. The condition of the turnstile was not the gist of the charge of negligence. It was not mentioned in the complaint. Proof of it was introduced for the purpose of showing why the plaintiff was delayed in passing through the fence on her way to the bathhouse. It was shown that on that occasion the turnstile stuck. It was not material to the case to show why it stuck,

or the length of time it remained in that condition.

[4, 5] The third assignment of error is that the court permitted the plaintiff to read in evidence certain questions and answers from the testimony of the motorman which had been given on a former trial of the case. It is said that nothing in the testimony of the motorman while on the witness stand justified the reading of his former testimony, and that the same when read tended in no manner to change or qualify his later testimony. If that be true, the defendant could not have been prejudiced by the admission of the evidence. But the record will show that the witness testified that his car was stopped within two car lengths after striking the plaintiff; that, when he was asked if he had not formerly testified that it stopped within three car lengths, he answered that he did not remember. He was willing to admit, however, that, if it so appeared in his former testimony, he probably said so. The testimony was admissible for the purpose of showing that he had so testified on the former trial.

We find no error.

The judgment is affirmed.

CITIZENS' TRUST CO. V. MULLINIX.

In re PEMISCOT LUMBER CO.

(Circuit Court of Appeals, Eighth Circuit. September 4, 1916.)

No 4564.

1. Banks and Banking &= 106-Acts of Officers-Accounting.

Where the cashier of a bank, who was president of a lumber company and authorized to draw checks for the lumber company, directed entries charging the account of the lumber company with a sum of money to be made on the books of the bank, but no check for the amount was drawn, the cashier must be held as acting for the bank in his capacity as cashier, and not as president of the lumber company.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. 35 253— 256: Dec. Dig. €=106.1

2. Banks and Banking \$==106-Actions-Evidence.

In a proceeding where a bank asserted, as against the estate of a bankrupt lumber company, a claim for a sum of money charged on its books against the bankrupt which had been taken by the cashier of the bank, who was president of the bankrupt and authorized to draw checks on its account, held, under the evidence, that the bankrupt was not bound; no check having been discovered.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 253-256; Dec. Dig. ⇐==106.]

3. Subrogation = 26-Right to Subrogation.

Where a bank paid drafts to which were attached notes of a bankrupt lumber company, secured by liens, and marked the notes paid, the bank, having been under no duty to pay the drafts and having no interest to protect, was not subrogated to the liens securing the notes.

IEd. Note.—For other cases, see Subrogation, Cent. Dig. § 67; Dec. Dig. 26.]

4. APPEAL AND EBROR \$\simes 843(2)\$—REVIEW—QUESTIONS PRESENTED FOR REVIEW. Where an appeal in a proceeding involving claims against a bankrupt was by stipulation limited to two claims, as to one of which the question of preference only was involved, the question whether claimant had been paid need not be reviewed, after a decision that claimant was not entitled to preference as to one claim and that the other claim was unenforceable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331; Dec. Dig. \$\infty 843(2).1

Appeal from the District Court of the United States for the East-

ern District of Arkansas; Jacob Trieber, Judge.

In the matter of the bankruptcy of the Pemiscot Lumber Company. Claim by the Citizens' Trust Company, as liquidating agent and receiver of the Pemiscot County Bank, opposed by F. C. Mullinix, trustee of the bankrupt. From the judgment denying one of the claims and priority of another, claimant appeals. Affirmed.

Everett Reeves and C. G. Shepard, both of Caruthersville, Mo., for appellant.

J. R. Turney, of Jonesboro, Ark., for appellee.

Before HOOK and CARLAND, Circuit Judges, and MUNGER, District Judge.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

CARLAND, Circuit Judge. The controversy on this appeal arises out of the mutual accounts of the Pemiscot County Bank and the Pemiscot Lumber Company. The bank failed June 5, 1913, and the lumber company was adjudicated a bankrupt January 5, 1914. The appellant, as liquidating agent of the bank, filed claims against the estate of the lumber company, to the allowance of which the trustee in bankruptcy objected. With the assistance of an expert accountant the referee in bankruptcy heard the evidence for and against the claims and made findings of fact. Upon review these findings were confirmed by the District Court. In this court the following stipulation appears in the record:

"It is agreed and stipulated that the account between the appellant and the bankrupt estate shall be and it is hereby accepted and adopted by both parties hereto as found and determined by the referee, except in the following particulars:

"(a) The appellant claims, in addition to the amount found by the referee, the sum of \$7,500 debited to the account of the Pemiscot Lumber Company with the Pemiscot County Bank on January 14, 1913, for which there is no check.

"(b) That the appellant insists that the claims upon the Going note in the sum of \$2,013.90 and upon the Henry note in the sum of \$4,901.67, of date November 21, 1912, are preferred claims."

[1, 2] The item of \$7,500, above mentioned, was disallowed by the referee. It appeared on the books of the bank under date of January 14, 1913, as a debit item against the lumber company, but no voucher could be found among the papers of the bank for such an entry. On the same day the books of the bank showed an entry whereby A. C. Tindle, who was then cashier thereof, and also president of and authorized to draw checks for the lumber company, had received credit for the amount debited to the lumber company. Tindle was a defaulter to the bank, and no evidence was produced that the lumber company ever received any portion of the \$7,500 charged against it on the day mentioned. The referee found that the two entries simply showed that Tindle had taken \$7,500 of the lumber company's money out of the bank for his own use and benefit; that, if Tindle directed the entries to be made upon the books of the bank of which he was cashier, he did not bind the lumber company, for the reason that, in directing the entries to be made, he would be held to be acting for the bank in his capacity as cashier, and not as president of the lumber company.

It was the contention of the claimant, in the court below and here, that Tindle or some one having the right to draw checks against the account of the Pemiscot Lumber Company, drew a check in favor of A. C. Tindle in the sum of \$7,500; that said check was duly charged against the account of the lumber company and credited to the account of A. C. Tindle, and that the check had been lost or destroyed. The claimant also called as a witness one L. A. Ferguson, a bookkeeper, who testified that in making entries on the books of the bank, especially against the Pemiscot Lumber Company, he either had a check, draft, or debit slip or something; that he did not recall any special charge by debit slip against that account, but he knew it was

done that way. The witness was quite sure he had something to go

by in making the entries on the books.

After all is said, the only thing to support the claim is the debit entry against the lumber company on the books, unsupported by any voucher or any evidence tending to show that the lumber company received the money; whereas, the books apparently show that Tindle received it individually. We think the referee and the District Court were justified upon the evidence in holding that the claim had not been proven.

[3] The only other matter for consideration is the claim that the amounts due on the Going and Henry notes, amounting to \$2,013.90 and \$4,901.67, respectively, should be allowed against the bankrupt estate as preferred claims. We see nothing to sustain the contention that the claims ought to be preferred. These notes were similar in character given by the lumber company to Henry and Going for value received, and both were secured by liens upon the property of the lumber company. When the notes matured they were attached to drafts drawn upon the lumber company and forwarded to the Pemiscot County Bank. When these drafts were received by the bank, they were paid, and the drafts and notes accompanying the same marked "Paid." For some reason which does not appear the bank never charged the amount of these drafts to the lumber company on the bank's books.

The claimant insists that, because the amount of the drafts were not charged to the account of the lumber company upon the books of the bank, the latter is entitled to be subrogated to the lien of the drawers of the draft, as the transaction simply amounted to a purchase of the notes by the bank. This contention cannot prevail. Whether the proper entries were made on the books of the bank or not, the fact still remains undisputed that the drafts and notes were paid when they were presented to the Pemiscot County Bank, and that ended the matter; they now stand as general claims against the bankrupt, but without preference. The bank, when it paid the drafts and the notes, had no interest of its own to protect, the payments were purely voluntary, and no fact is shown which would entitle the bank to the right of subrogation.

[4] The view that we have taken in regard to the claims in issue renders it unnecessary to consider as to whether the contract of July 12, 1913, in connection with the deed of trust executed by Tindle and wife to the bank, constituted a payment of all the obligations of the lumber company to the bank or not, as we find that the claim of \$7,500 is not sustained on the merits, and the only question reserved by the stipulation in regard to the Henry and Going claims is the matter of preference.

Judgment affirmed.

MANDERS v. WILSON et ux.

In re PETERSON et al.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)

No. 2671.

FRAUDULENT CONVEYANCES \$\infty 154(4)\$—WHAT CONSTITUTE—WITHHOLDING OF CONVEYANCE FROM RECORD.

Where a grantee withheld his conveyance from record for over three years, during which time the grantor was in open and exclusive possession of the land, the conveyance being withheld so as not to impair the credit of the grantor, the conveyance is, as to those extending credit on the faith of the grantor's apparent ownership, fraudulent; consequently a complaint by the grantor's trustee in bankruptcy, alleging such facts, is good against demurrer.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 492; Dec. Dig. \$\infty 154(4).]

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Suit by John E. Manders, trustee in bankruptcy, against George H. Wilson and wife. From a judgment sustaining a demurrer to the complaint (230 Fed. 536), plaintiff appeals. Reversed and remanded.

In a suit brought by the appellant, Manders, as trustee in bankruptcy, against the appellees to set aside a conveyance, the court below sustained a demurrer for want of equity to the bill of complaint which alleged, in substance, the following facts: That on October 31, 1914, a petition in bankruptcy was filed against the partnership of Peterson & Wilson, and the individual partners, and on January 26, 1915, they were adjudged to be bankrupt; that on September 27, 1911, and for a long time prior thereto, G. Hazelton Wilson, one of the bankrupts, was the sole owner of and in the actual possession of the real property described in the complaint; that on that date he executed and delivered to the appellees, his father and mother, a deed to the said property, either in payment of an alleged pre-existing indebtedness of \$2,000, or as a mortgage to secure that sum; that the deed remained in the possession of the grantees, and unrecorded from September 27, 1911, to October 23, 1914; that during all that period the grantor was in the open, notorious, and exclusive possession of said real estate, and was the reputed and apparent owner thereof, and neither of the grantees ever had possession of the same or was reputed to be the owner thereof; that the deed was withheld from record by the appellees in order not to impair the credit of the said bankrupt and the credit of the bankrupt partnership, and in order to enable the bankrupt partnership to extend its credit upon the reputed and apparent ownership of the said real property in the said G. Hazelton Wilson; that on or about July 6, 1914, the partners and G. Hazelton Wilson falsely and fraudulently represented to the New England Casualty Company that the said partnership was the owner of and in possession of said real estate through said G. Hazelton Wilson, and that the title was unincumbered; that, relying solely upon said representations and without knowledge of their falsity, and without knowledge of the transfer to the appellees, the corporation extended credit to the bankrupt partnership; and the complaint set forth the transaction whereby said corporation suffered a loss of more than \$2,500. The complaint alleged the value of the real estate to be \$2,000, that the claim against the bankrupt partnership was \$25,000, and that the total assets did not exceed \$4,000, and the prayer of the bill was that the said real estate be declared a part and parcel of the estate in bank-The court below sustained the demurrer for want of authority under state decisions to avoid a deed not otherwise fraudulent, because of the failure to record it, and because the rule in California is that failure to record a transfer of real property renders such transfer void only as against subsequent purchasers or incumbrances in good faith and for value.

Reuben G. Hunt, of San Francisco, Cal., for appellant. Harold L. Levin and H. I. Stafford, both of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). On the question of law presented upon the appeal, the leading case is Blennerhassett v. Sherman, 105 U. S. 100, 26 L. Ed. 1080. In that case it was held that a mortgage executed by an insolvent mortgagor to a creditor who knows of the insolvency, and who, for the purpose of giving him a fictitious credit, actively conceals the mortgage, and withholds it from record, and represents him as having a large estate and unlimited credit, and thus enables him to contract debts which he cannot pay, is void at common law. In the opinion the court cited Hungerford v. Earle, 2 Vern. 261, where the doctrine was declared that "a deed not at first fraudulent may afterwards become so by being concealed or not pursued, by which means creditors are drawn in to lend their money," and cited many cases in which the doctrine of Hungerford v. Earle was approved. That doctrine has been followed in numerous decisions of the federal courts. In Clayton v. Exchange Bank, 121 Fed. 630, 57 C. C. A. 656, a storekeeper executed mortgages to the bank, covering his entire property. The mortgages were withheld from record, although the storekeeper and the bank president both denied any agreement therefor. The storekeeper in purchasing goods referred to his rating, which he had given to a mercantile agency without mentioning the mortgages. He filed a voluntary petition in bankruptcy, and on the same day the bank recorded the mortgages. The bank president denied that he had reason to suspect the mortgagor's insolvency, but admitted that he knew that the recording of the mortgages would have destroyed his credit, and that the purpose of keeping the mortgages off the record was to prevent impairment of his credit. It was held that the mortgage debts were not entitled to priority in payment over the claims of vendors who subsequently sold goods to the storekeeper. In Davis v. Cassels (D. C.) 220 Fed. 958, conveyances by a husband to his wife were withheld from record and concealed in order to avoid impairing the husband's credit. It was held that they were void as to creditors who gave the husband credit on the faith of his apparent continued ownership. In National Bank of Athens v. Shackelford, 208 Fed. 677, 125 C. C. A. 575, a mortgage given by a bankrupt, although for a valuable consideration and valid as between the parties, but withheld from record by agreement or understanding between them so as not to affect the mortgagor's credit. was set aside at the suit of the trustee. Other cases in point are: Corwine v. Thompson Nat. Bank, 105 Fed. 196, 44 C. C. A. 442; In re Noel (D. C.) 137 Fed. 694; In re Duggan, 183 Fed. 405, 106 C. C. A. 51; Fourth Nat. Bank of Macon v. Willingham, 213 Fed. 219, 129 C. C. A. 563; In re National Boat & Engine Co. (D. C.) 216 Fed. 208; and see Loveland on Bankruptcy (4th Ed.) 921.

It is the doctrine of these decisions that such a conveyance is not made valid by the fact that it is supported by a sufficient consideration; that a conveyance, not at first fraudulent, may thereafter be made so by being concealed, if creditors are thereby induced to give credit to the grantor; that it is unnecessary to allege or prove that the grantor was insolvent at the time of making the conveyance; that it is enough if there was an agreement between the grantor and the grantee, either tacit or expressed, that the conveyance was to be concealed for the purpose of sustaining the grantor's credit, and credit was thereby obtained. The delimitations of the doctrine are carefully marked in Rogers v. Page, 140 Fed. 596, 72 C. C. A. 164, in which Judge Lurton said that "the mere fact that a mortgage has, by negligence, been omitted from registration does not avoid it as between parties," that the mere fact of an agreement to withhold from record "is not of itself such evidence of a fraudulent purpose as to constitute fraud in law," but that it is "a circumstance constituting more or less cogent evidence of the want of good faith, according to the particular situation of the parties and the intent as indicated by all of the facts and circumstances of the particular case." In the case at bar, the complaint alleges more than a mere negligent failure to record, or a mere agreement to withhold from record. It alleges that there was no change of possession of the property, but that it remained in the open and notorious possession of the grantor, that the deed was withheld from record for the purpose of enabling the grantor to obtain credit upon his reputed and apparent ownership, and that such credit was obtained. These allegations, if established, entitle the appellant to the relief which he seeks. We hold that the appellees should be required to answer.

The judgment is reversed, and the cause is remanded for further

proceedings.

AMES v. SULLIVAN.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.) No. 2682.

1. Appeal and Error \$\infty\$=1050(1)—Review—Harmless Error.

In ejectment for a mining claim, where defendant contended that plaintiff's rights were lost by failure to do the assessment work, but admitted that he had threatened and driven off one sent to do the assessment work on the claim, the improper admission of a letter written by such person to plaintiff's predecessor in title, reciting such facts, was not prejudicial, though its statement of the threats was slightly different from that of defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. € 1050(1).]

2. Pleading =261-Amendment-Discretion of Court.

It is within the discretion of the trial court to permit an answer after the conclusion of the testimony to set up additional defenses to meet the evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 794–800; Dec. Dig. \$\sim 261.]

3. APPEAL AND ERROR \$\sim 959(4)\$—AMENDMENT—DISCRETION OF COURT.

The discretion of the trial court in ruling upon a proposed amendment to the answer to set up additional defenses after conclusion of the testimony is subject to review in case of abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3831; Dec. Dig. &=959(4).]

4. Mines and Minerals \$\iffill 23(5)\$—Assessment Work—Failure to Perform. Where defendant prevented plaintiff's predecessor in title from performing the assessment work on a mine for a year, driving away laborers and threatening them, defendant, whose claim overlapped that of plaintiff, cannot base any rights on the failure of plaintiff and his predecessors to perform the assessment work, particularly where there was no showing that there was any part of plaintiff's claim outside the overlap on which assessment work might have been beneficially performed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 57; Dec. Dig. ♦ ⇒23(5).]

In Error to the District Court of the United States for the Second Division of the District of Alaska; J. R. Tucker, Judge.

Ejectment by Jerry Sullivan against H. C. Ames. There was a judgment for plaintiff, and defendant brings error. Affirmed.

George B. Grigsby, of Nome, Alaska, and Thomas R. Lyons and Ira D. Orton, both of Seattle, Wash., for plaintiff in error.

T. M. Reed and O. D. Cochran, both of Nome, Alaska, and Thomas R. White, of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. In an action of ejectment the plaintiff alleged that he was the owner of mining claim No. 32 above Allen's Discovery on Kougarok river, Alaska, by virtue of a location made in January, 1902, and that in February, 1912, the defendant wrongfully ousted him. The defendant alleged that he was in the possession of a mining claim known as the Kshunti Fraction, which had been located on July 25, 1903, and that, if the plaintiff's mining claim overlaps the said Kshunti Fraction in whole or in part, the overlap is junior in time and inferior in right to the defendant's title, and the defendant disclaimed any right to any portion of the premises described in the complaint except that which may be found to overlap the Kshunti Fraction. The jury found for the plaintiff, and judgment was entered in his favor for the possession of the claim described in the complaint. To review that judgment the defendant brings this writ of error.

[1] It is contended that the trial court erred in admitting in evidence a letter written in 1912 by one Johnson to Windquist, the plaintiff's predecessor in interest. The letter stated that the writer had been on claim 32 and had done some work, but that he had left because the defendant threatened him with violence, and he did not wish to be "pounded to death," and that the defendant had said that he would "win that claim if he had to kill a number of persons." It is said that the letter was hearsay and incompetent. One of the questions raised by the evidence was whether or not the plaintiff

had done the necessary assessment work on claim 32 for the year 1912. Johnson testified that he went to do the assessment work on the claim in that year, and that the defendant claimed to be in possession and told him to get off the claim "if he wanted to keep out of trouble," and that the defendant twice tried to hit him. The defendant did not deny that he put Johnson off the claim. On the contrary, he testified that he drove him off; but he denied that he said he would "have the claim if he had to kill everybody in Kougarok." We do not think that the letter added any substantial evidence to the facts testified to by the defendant and by the plaintiff's witness Johnson. The defendant did not deny that his attitude was hostile, nor that he attempted twice to strike Johnson, nor that he used the precise words which Johnson attributed to him in the letter. Such being the case, there was no prejudice to the defendant in admitting the letter in evidence.

[2-4] It is assigned as error that the court below overruled the defendant's motion, made at the close of the testimony, for leave to file an amended and supplemental answer setting up the forfeiture of claim No. 32 for failure of the owner to do assessment work thereon in 1911 and 1912; the failure for 1912 being an alleged fact that occurred after the commencement of the action. It is within the discretion of a trial court to permit an answer after the conclusion of the testimony to set up additional defenses to meet the evidence. Ebner Gold Mining Co. v. Alaska-Juneau Gold Mining Co., 210 Fed. 599, 127 C. C. A. 235. And the discretion of the trial court in ruling on such proposed amendments is subject to review in proper cases of its abuse. Cœur d'Alene Lumber Co. v. Thompson, 215 Fed. 8, 131 C. C. A. 316, L. R. A. 1915A, 731. There was no proof, however, of the plaintiff's failure to do the assessment work in 1911, and the failure to do that work for 1912 was shown to have been the result of the defendant's own hostile opposition. He could not by forcibly preventing the performance of the assessment work initiate rights to defeat those of the rightful owner. Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113. The defendant contends that a place to do the work might have been found on some portion of the plaintiff's claim that was not within the overlap of the Kshunti Fraction. But there is no evidence that there was such a place where labor could have been done for the benefit of the improvement or development of the claim. Mills v. Fletcher, 100 Cal. 142, 34 Pac. 637. Under the evidence adduced, and the facts as they were shown at the close of the testimony, we are of the opinion that the trial court did not abuse discretion in denying the motion.

The judgment is affirmed.

In re O'GARA COAL CO.

EQUITABLE TRUST CO. OF NEW YORK v. HANECY et al. (Circuit Court of Appeals, Seventh Circuit. August 29, 1916.)

No. 2395.

1. Bankruptcy \$\infty 442-Review-Questions Reviewable.

An appellate court cannot review matters not decided by the trial court. Therefore, where the lower court which, on review of the referee's order allowing fees to the trustees' attorneys, did not decide out of what funds the fees were payable, although petitioners claimed a lien on a large portion of the bankrupt's property, the question as to the priority of the respective parties cannot be reviewed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 918; Dec. Dig. \$442.]

2. BANKRUPTCY \$== 446—Review.

In view of the presumption of the correctness of the trial court's order, an order of the trial court directing payment to attorneys for the trustees of the bankrupt out of property or funds in the hands of the trustees must be deemed to include a further direction that the fees should be paid only out of funds properly applicable to payment of such fees.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⊗—446.]

3. BANKRUPTCY \$\infty 474-Costs-Fees of Trustees' Attorneys.

Where petitioners asserted liens on the bankrupt's property and fees were allowed the attorneys of the trustees, the trial court should determine what property in the hands of the trustees is subject to petitioners' lien, and what is subject to payment of fees of the trustees' attorneys, taking into consideration the fact whether the services rendered were for the benefit of property claimed by petitioners.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878-884; Dec. Dig. \$\sim 474.]

Petition to Review and Revise an Order of the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of the bankruptcy of the O'Gara Coal Company. Petition by the Equitable Trust Company of New York to review and revise an order of the District Court allowing Elbridge Hanecy and another fees as attorneys. Cause remanded for further proceedings consistent with the opinion.

Petition of the Equitable Trust Company et al., of New York, to review and revise order of District Court entered May 9, 1916, in the estate of O'Gara Coal Company, a bankrupt. The referee found due to respondents for their services as attorneys rendered to the trustees in bankruptcy, \$18,197.76, and ordered the trustees to pay this amount to respondents, and that the payment shall "be superior to the lien of a certain deed of trust executed by said bankrupt on or about the 1st day of September, 1915, to secure the payment of the bond issue of \$3,000,000." On petition to review this order, the District Court eliminated the quoted part of the order of the referee, and directed the trustees to make the payment as part of the costs and expenses of the administration of the bankrupt estate, "out of any property and effects in the hands of the trustees." The amount of respondents' claim is not in dispute and is conceded to be properly allowable as a claim against the bankrupt estate. The bankrupt's assets consist in the main of coal lands, mines, and mine equipment, and the trustees in bankruptcy are operating the mines under order of the court.

Petitioner is trustee under a mortgage given by the bankrupt to secure payment of bonds to the amount of \$3,000,000, about \$2,700,000 of which are outstanding. The mortgage provides it shall be a lien on the property described therein and on all after-acquired property of the mortgagor, and also on all the rents, issues, and profits arising from the mortgaged property. Petitioner contends that all the funds and property now in the hands of the trustees are funds which under the mortgage are subject to the lien of the mortgage, and that none of the funds in the hands of the trustees are applicable to payment of respondents' claim, and petitioner alleges it has heretofore filed its petition in the District Court demanding that the possession of such properties and funds be turned over to the petitioner herein, which petition is alleged to be still pending and undetermined in the District Court.

Respondents contend that, as to a large part of the property in the hands of the trustees upon which petitioner claims to have such lien, the trust deed does not in fact constitute a lien, and that the funds in the hands of the trustees arose mainly from the operation by the trustees of coal mines on property of the bankrupt not subject to such lien, and that respondents are in any event, because of the nature of their services for which their claim was allowed, entitled to have their claim satisfied out of any funds in the hands of the trustees arising from the operation by trustees of the bankrupt's property, regardless of whether or not petitioner's mortgage was in fact a first lien thereon.

Petitioner maintains that the order permits payment of respondents' claim to be made out of any funds in the trustees' hands, notwithstanding petitioner's mortgage may be a first lien thereon.

The order under consideration does not deal with the nature of respondents' services, nor with the source and nature of the funds in the possession of the trustees, and it makes no finding or direction on the subject of any lien of petitioner's mortgage upon such funds or upon all or any of the property out of which they arose, nor is it undertaken to be determined how much, if any, of respondents' claim is applicable to services rendered in the interest of such funds in the trustees' hands, or of the mortgaged property.

Before ALSCHULER and EVANS, Circuit Judges, and SAN-BORN, District Judge.

Julius Moses, of Chicago, Ill., for petitioner.

William A. Rogan and Herman Frank, both of Chicago, Ill., for respondent.

PER CURIAM. [1-3] As the matters which seem here to have been put in issue only by the briefs and arguments of counsel do not appear to have had the consideration of the District Court, and are not determined by the order sought herein to be reviewed, we are not in position to pass upon them. The District Court, by omitting on review of the referee's order the provision therein which gave respondents' claim superiority over the lien of the mortgage, would seem by implication to have concluded that this payment must not be made out of any property or funds in the hands of the trustees which are subject to the mortgage lien. It is our view that the order for payment "out of the property and effects of said estate in the hands of said trustees" must be read as though there had been added to it such words as "properly applicable to the payment thereof," for it is not to be presumed that the court intended to direct payment to respondents out of funds on which another held a prior lien, and which were not subject to be used to pay respondents' claims.

If petitioner or any one else claims to have a lien upon the funds in the hands of the trustees superior to the right of respondents or of any other creditor to have their claims paid out of such funds, it is entitled in a proper proceeding to have such contention heard and determined before such payment of such claim is actually made. For otherwise, if the trustees wrongfully and on their own responsibility paid out the funds, those having the superior claim thereon might to their disadvantage be obliged to resort to the personal liability of the trustees and their sureties to make good any loss occasioned through such improper payment.

While we are satisfied that the order entered does not authorize the trustees, out of funds on which petitioner holds a first and valid lien, to pay respondents on account of any claim for services not rendered in the realization of the funds in the trustees' hands, or in the conservation of the property out of which it arose, yet in view of this controversy we deem it to be in the interest of justice and of all concerned that respondents' claim be not paid until it is ascertained whether all or any part of the funds in the trustees' hands may properly be applied

to such payment.

To that end the order under consideration should be revised and amended so it will provide that such payment may be made only out of funds properly applicable thereto. The trustees should at once and before making payment report to the court the funds of said estate in their hands, and the source from which the same were derived, and if found to be subject to petitioner's prior lien, how much, if any, of respondents' services were rendered in the interest of such fund or mortgaged property, and, upon due notice to all parties concerned, the court should hear and determine all questions as to how much, if any, of the funds in the trustees' hands, are properly applicable to the payment of respondents' said claim. Pending the hearing and determination of these matters, the funds in the hands of the trustees must not be paid out for any purpose so as to reduce same below an amount sufficient to pay in full respondents' said claim. The matter is remanded to the District Court for further proceedings consistent with the views here expressed. Neither party shall recover costs in this court.

HOLT et al. v. SUPREME LODGE KNIGHTS OF PYTHIAS. (Circuit Court of Appeals, Seventh Circuit. July 18, 1916.)

No. 2126.

INSURANCE \$\infty 719(3)\$—Fraternal Insurance—Assessment—Right to Increase.

The original charter of the Supreme Lodge of the Knights of Pythias authorized it to amend its charter and by-laws at will, while its present charter (Act June 29, 1894, c. 119, § 4, 28 Stat. 97) also authorizes amendments at will provided they do not conflict with federal or state laws. The order, which was engaged in the business of fraternal insurance, several times in the past, upon discovery that the assessments charged were insufficient to carry the insurance, increased the insurance assessments. Held that, notwithstanding members became such when the constitution provided for monthly payments by each member to be com-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

puted according to an appended table, the order had power to increase the assessments when it was discovered that those charged were insufficient to satisfy the death claims.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. © 719(3).]

Appeal from the District Court of the United States for the District of Indiana.

Bill by Joseph Holt and others against the Supreme Lodge Knights of Pythias. From decree dismissing the bill, complainants appeal. Affirmed

The suit is an omnibus bill in equity on behalf of 20 named plaintiffs on behalf of themselves and all others similarly situated (155 in number), for an accounting of trust funds held for the insurance department to which plaintiffs belong, and for a receiver, on the ground that the department (known as the fourth class) is insolvent; also, for a ratable distribution of such trust funds among the fourth class members.

The question is whether a fraternal beneficiary society has power to change a contract with an insured member that the rates shall not be changed, by doubling his monthly payments, and on his refusal to pay exclude him from all benefits.

Plaintiffs are citizens of Louisiana, and defendant was first organized under a general law of Congress entitled "An act to provide for the creating of corporations in the District of Columbia by general law." Its charter expired in 1890. Continuing as a de facto corporation or voluntary association for a time it was reincorporated by the act of Congress of June 29, 1894. At that time it had organized the insurance department here in question, and had done business all over the country, so there can be no serious question of its power to act outside the District of Columbia, and where it was authorized to act by its charter of 1894. A later act of June 7, 1900 (c. 861, 31 Stat. 708) ratified meetings of its governing body held outside the District.

This suit was begun January 25, 1911, the jurisdiction depending on the fact that one of the parties is a federal corporation. In its facts the case is substantially the same as Knights of Pythias v. Mims, 241 U. S. 574, 36 Sup. Ct. 702, 60 L. Ed. 1179, decided by the Supreme Court June 12, 1916; the

only difference being in the form of the suit.

Plaintiffs' right to equitable relief depends entirely on the question whether the constitution of the Supreme Lodge, and its by-laws, in force when they respectively became members, constitute a contract which could not be changed by the defendant without plaintiffs' consent. It seems to be contended by the solicitors for plaintiffs that if defendant's constitution gave it no right to change the contracts, or impair the vested rights under them, such contracts may be regarded as still in force, and defendant compelled to perform them. But the bill itself goes only upon the theory that defendant has diverted trust funds: in which plaintiffs are interested, and the only relief prayed for is the appointment of a receiver of such trust funds, with power to have an accounting thereof from defendant, in order that plaintiffs may receive their ratable shares. There is nothing in the bill seeking specific performance of the insurance certificates, or for a recovery of damages for the breach of plaintiffs' contracts; simply the enforcement of a trust relating to the funds on hand when the breach occurred, through payment to plaintiffs of their ratable shares in such trust funds. The case therefore turns on the question whether such a society has power, either under its constitution or otherwise, to change an impracticable or illusory insurance plan without accounting to dissenting members for trust funds belonging to them as such; even though such change may be necessary to the very life and preservation of the society.

The insurance afforded by the order is extended only to those who are members, the far greater proportion of the members not being insured therein. The order generally, however, has charge and jurisdiction over the insurance department. The insurance at first was divided into three classes, the different classes having different privileges and rates. As time passed it was found

that the rates were insufficient, and that with such classifications the plan could not be successfully carried out; thereupon, a fourth class was created, in which, unlike the others, provision was made for the accumulation of an expense fund and a mortuary fund calculated to supplement the monthly assessments and obviate the difficulties arising from a constantly increasing death rate through the advancing age of members. To accumulate such funds and meet the increasing cost of insurance, the rates in this class were materially advanced over the other classes. Business in the other classes ceased, in that no attempt was made to bring new members into them. In course of time the first three classes became practically extinct, there being now only a few members, less than ten in all. Many, if not most of them, having gone into the fourth class, it was provided that the latter class should have no relation to the other classes, but should be practically independent of them, and that the fund accumulated therein should be for the benefit only of that class. Complainants are all persons advanced in years, now past the insurable age, who have for many years past been members of the order, most of them holding original certificates in the first three classes, which were then transferred to the fourth, and all of them were members of that class at and for many years previous to the beginning of this suit.

In 1906, long after all the plaintiffs had become insured members of the fourth class, the society discovered that the rates in force, including those under the constitutions of 1884 and 1886, were entirely inadequate to main-

tain a sufficient mortuary fund.

About one-half of the plaintiffs became insured while the constitution of the lodge which was adopted in 1884 was in force, among other things providing for monthly payments by each member according to his age, and appending a table of monthly rates. The following clause of the instrument is relied on by plaintiffs: "Said monthly payments shall be based upon the average expectancy of life of the applicant and shall continue the same as long as his membership continues." The rest of the plaintiffs joined the lodge after the constitution of 1886 had been adopted, which provided for monthly assessments according to a specified table of rates, and also contained the same provision as to permanent rates as the former one. Later constitutions changed this clause by providing that the rates should remain the same unless changed by the lodge or its board of control.

In regard to the express reserved power to change the rules governing insurance contracts, some of the plaintiffs signed applications agreeing to abide by the rules and regulations of the lodge then in force or thereafter enacted, and in the applications of the others the language was that their contracts should be controlled by the laws, rules, and regulations then in force or thereafter enacted. Plaintiffs' certificates or policies contained similar provisions. The original charter of the corporation provided that the Supreme Lodge might amend its constitution and by-laws at will, and section 4 of its present congressional charter provides that the society may amend its constitution at pleasure, provided the amendments do not conflict with the laws of the United States or any state. This power, as we have seen, was exercised in 1888 and later years by providing that the insured members should continue their original payments unless otherwise fixed by the lodge. In 1906 a more positive clause was adopted, to the effect that the laws of the order, and all amendments thereto, should be part of the insurance contracts.

It further appears that all the plaintiffs submitted to certain increases made by the lodge in their insurance rates, and paid the additional sums required by such legislation down to January 1, 1911, when the new rates be-

came effective, which they refused to pay.

Henry L. Lazarus, of New Orleans, La., for appellants. Sol. H. Esarey, of Indianapolis, Ind., for appellee.

Before MACK and ALSCHULER, Circuit Judges, and SAN-BORN, District Judge.

SANBORN, District Judge (after stating the facts as above). In the Mims Case, 241 U. S. 574, 36 Sup. Ct. 702, 60 L. Ed. 1179, the

Supreme Court decided that the benefit certificate of the member "was not a contract, but was a regulation subject to the possibility inherent in the case," and that "the essence of the arrangement was that the members took the risk of events, and if the assessments levied at a certain time were insufficient to pay a benefit of a certain amount, whether from diminution of the members or any other cause, either they must pay more or the beneficiary take less." No possible distinction can be made between this litigation and the Mims Case brought against the same society.

The decree dismissing the bill is affirmed.

IRVINE v. McDOUGALL et al.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)
No. 2730.

1. MECHANICS' LIENS \$\simex 202-Assignments-Effect of.

The rule that the right to acquire a mechanic's lien is personal and not transferable does not apply to an assignment made to enable the assignee to sue.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 375; Dec. Dig. ⊚=202.]

2. Mechanics' Liens \$\infty\$203(1)\to Assignments\text{-Effect.}

An assignment of a mechanic's lien is not complete until delivery. Therefore, though the lien claimant executed an assignment at the same time he signed the lien claim, the assignment is valid and effective, where the instrument was not delivered until after the filing of the lien claim.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 376, 377; Dec. Dig. &= 203(1).]

Appeal from the District Court of the United States for the Fourth Division of the Territory of Alaska; Charles E. Bunnell, Judge. Suit by Jack Irvine against Angus McDougall and others. From a

Suit by Jack Irvine against Angus McDougall and others. From a judgment in part for defendants, plaintiff appeals. Reversed and remanded.

The appellant brought a suit in his own behalf, and as the assignee of the claims of six others, to foreclose mechanics liens upon certain mining property. The answer denied the assignment to the appellant of the liens of the other lien claimants. The court below sustained the lien of the appellant in full, but found for the appellees as to the other lien claimants, Fox, Hayes, Wenzel, Sully, Berks, and King. The evidence was that Fox and Hayes filed their lien claims on June 2, 1913, that Wenzel and Sully filed theirs on May 27, 1913, and that Berks filed his on June 7, 1913. There was shown in evidence a written assignment to the appellant, signed by all these lien claimants, bearing no date; but the evidence of the appellant was that the instrument was delivered to him shortly after the liens were filed, and other evidence may be taken as showing that the lien claims were all made out and sworn to on May 20, 1913, and on the same date the lien claimants, excepting King, signed the undated assignment. One of the attorneys for the plaintiffs in the court below testified that the assignments were signed on the day that the lien claims were signed; that the assignment was delivered to him with instructions that he hold the same and deliver it to the appellant after the filing of the liens; that he did as directed, and told the appellant that he

turned it over to him formally, but he testified that, notwithstanding the formal delivery, he kept the instrument in his possession until the bringing of the suit. There was no other testimony on the subject of the time when the instrument was delivered, but it was shown that King's assignment was not delivered until after the suit was begun. The trial court ruled that King's assignment was too late to be included in the suit, and, without making a specific finding on the question of delivery, found generally that the other assignments were made before the liens were filed, and therefrom drew the legal conclusion that the assignments were null and void. Whether that conclusion of law was error is the question which the case presents on the appeal.

Harry E. Pratt and Louis K. Pratt, both of Fairbanks, Alaska, and Herman Weinberger, of San Francisco, Cal., for appellant.

Cecil H. Clegg, of Fairbanks, Alaska, for appellee John A. Healey. McGowan & Clark, Thomas McGowan, and John A. Clark, all of Fairbanks, Alaska, for appellees Rutherford and Smith, trustees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] We hold that the decree of the court below is erroneous for the reasons: First, the rule that the right to acquire a lien is personal and not transferable, and is destroyed by assignment, does not apply to an assignment made, as in the present case, for the purpose of enabling the assignee to maintain a suit. Skyrme v. Occidental Mill Co., 8 Nev. 219; House v. Schulze, 21 Tex. Civ. App. 243, 52 S. W. 654. Second, there was no delivery of the instrument of assignment to the appellant until after the liens had been filed, and delivery is essential to the completion of an assignment. 5 Corpus Juris, 907; Ritter v. Stevenson, 7 Cal. 388; Leonard v. Adm'r. of Kebler, 50 Ohio St. 444, 34 N. E. 659; Govin v. De Miranda, 76 Hun, 414, 27 N. Y. S. 1049; Buehler v. Galt, 35 Ill. App. 225; Tatum v. Ballard, 94 Va. 370, 26 S. E. 871.

The decree is reversed, and the cause is remanded for further proceedings, and with instructions to permit the plaintiff to file a supplemental complaint alleging the transfer to him of the lien of King.

WAGNER et al. v. MECCANO, Limited.

(Circuit Court of Appeals, Sixth Circuit. October 11, 1916.)

No. 2977.

1. APPEAL AND ERROR \$\iffill 438\$—Effect of Appeal Right to Reopen Case.

After an interlocutory decree in favor of complainant in a patent case, and after an appeal had been allowed and perfected, but before the statement of the evidence had been settled in the district court or the transcript had been filed on appeal, the defendant discovered a new anticipation and moved for an order directing the reopening of the case and receipt of further evidence. Held that, as jurisdiction of the District Court to reopen would have been lost by perfection of appeal from a final decree, and as the District Court in any event would hesitate to entertain any such proceedings, the appellate court will authorize the District Court to receive and consider the application as if it had been made before the granting of the appeal, with leave to request a dismissal of the appeal and remand of the record in case the district court should

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2196; Dec. Dig. \$\infty\$=438.]

2. APPEAL AND ERROR 5-1197—REMAND—POWER OF TRIAL COURT—LAPSE OF TERM.

In such case, the lapse of a term of the District Court while the cause was in the appellate court will not deprive the District Court, the decree being interlocutory, of the right, after dismissal and remand, to set aside its original decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4666, 4667, 4669-4671; Dec. Dig. &=1197.]

On motion by appellants for an order authorizing and directing the District Court to reopen the case and receive further evidence. On motion by appellee to dismiss. Matter referred to District Court, with leave to reopen case. For opinion below, see 234 Fed. 912.

Toulmin & Toulmin, of Dayton, Ohio, for appellants.

deem the case should be reopened.

Reeve Lewis, of Washington, D. C., and Ralph L. Scott, of New York City (Healy, Ferris & McEvoy, of Cincinnati, Ohio, on the brief), for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. After an interlocutory decree in favor of plaintiff in a patent case, and after an appeal to this court has been allowed and perfected, but before the statement of evidence has been settled in the District Court, and so before the transcript has been filed in this court, the defendant discovers a new anticipation, and moves this court for an order authorizing and directing the district court to reopen the case to receive further evidence.

[1] If the decree below had been final, the jurisdiction of that court to reopen would have been lost by the perfected appeal; and, whether or not with this decree it had power, that court would hesitate to entertain any kind of proceedings looking to revision unless this court so ordered. We think it would be the most satisfactory practice in the sit-

uation here existing that this court should authorize the District Court to receive and consider the application from the same point of view as if it had been made before the appeal was perfected; that, if the District Court should think reopening proper, it should certify to this court a request for dismissal of the appeal and the remanding of the record for that purpose; and this court could then dismiss the appeal accordingly, and without prejudice. Roemer v. Simon, 91 U. S. 149, 23 L. Ed. 267; Cimiotti Co. v. American Co. (C. C. A. 2) 99 Fed. 1003, 39 C. C. A. 677; Nutter v. Mossberg (D. C. Mass.) 118 Fed. 168; Mossberg v. Nutter (C. C. A. 1) 124 Fed. 966, 60 C. C. A. 98; Greene v. United Co. (C. C. A. 1) 124 Fed. 961, 60 C. C. A. 93.

[2] The lapse of a term while the cause was in this court would not deprive the District Court of the power, after such dismissal and remanding, to set aside the decree and reopen the case; at least where the decree was, as here, interlocutory. Mossberg v. Nutter, 124 Fed. 966, 967, 60 C. C. A. 98.

In the meantime, and for such period as the District Court approves, the time for filing the record on the appeal now pending can be extended. If the District Court should not think proper to reopen, then the appeal can proceed, and the party desiring reopening can, by ancillary appeal or otherwise, invoke any power of review this court may have.

FIRESTONE TIRE & RUBBER CO. v. SEBERLING.

(Circuit Court of Appeals, Sixth Circuit. October 13, 1916.)

No. 2954.

COURTS \$\infty 356-Record on Appeal-Transcript-Rules.

General Equity Rule 75, cl. "b" (198 Fed. xl, 115 C. C. A. xl), provides that the testimony of witnesses shall be stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. After a patent case had been heard in open court, the parties and the court, the trial having occupied several days, desired that the record might be printed for use by the trial court in considering and deciding the case and in such manner that a reprinting might be avoided on appeal. Accordingly, the parties stipulated that the record might be printed in the form of questions and answers, and in the form given in open court instead of narrative form, and that upon any appeal the record so prepared should be used, while the trial court entered an order in the same terms. The record as printed contained all the proceedings on the trial, including the arguments and comments of counsel, at length, and the details of testimony by fact witnesses. Held that, as the purpose of the rule is not only to lessen the cost of printing but to lessen the labor of the appellate court, the record as prepared, though authorized by the trial court, is not a compliance with the rule, for immaterial details might well have been omitted; but the point not having previously been raised, and the parties having acted in good faith, the record will be accepted.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. ⊕=356.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Killits, Judge. Suit between the Firestone Tire & Rubber Company and Frank A. Seberling. There was a decree for the latter, and the former appeals. The attention of the court was directed to the record by the clerk.

Record ordered received.

S. H. Tolles, of Cleveland, Ohio, and C. C. Linthicum and Amos C. Miller, both of Chicago, Ill., for appellant.

Wm. L. Day, of Cleveland, Ohio, and Robert F. Rogers and Rogers,

Kennedy & Campbell, all of New York City, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. After a patent case had been heard in open court, by a trial occupying several days, the parties and the court desired that the record might be printed for use by the trial court in considering and deciding the case, and in such manner that a reprinting might be avoided upon appeal to this court. Accordingly, the parties stipulated "that the record herein be printed in the form of question and answer, and in the form given in open court, instead of in narrative form, * * * and that upon any appeal taken in this cause the printed record so prepared shall be used"; and the court entered an order in the same terms. The printed record, so prepared, having been tendered for filing in this court, the clerk has brought to the attention of the court, pursuant to clause 1 of rule 19, the question whether such record complies with clause "b" of Supreme Court General Equity Rule 75 (198 Fed. xl, 115 C. C. A. xl).

This rule provides that testimony of witnesses shall be stated only in narrative form, "save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness." This provision was in aid of at least two purposes: To lessen the cost of printing, and to save the time of the appellate court. It does not undertake to fix or limit the grounds upon which the trial judge may direct reproduction in the exact words of the witness; nor is it necessary here to decide how far, if at all, it permits the judge to be moved by the advantage of having the record printed for his use and saving to the parties the cost of double printing; but an inspection of the record here tendered shows that the parties went beyond what can be allowed, under the most liberal construction. They have printed all the proceedings on the trial, including the arguments and comments of counsel, at length, and have included the details of testimony by fact witnesses to an extent which we cannot suppose the court purposefully required. We think the rule does not contemplate such a blanket direction as is found here, when that direction comes to be interpreted by the application of it which the parties have made. If the record is to be printed for use in argument before the trial court, there seems to be no reason why the parties cannot very considerably condense the typewritten transcript and eliminate immaterial matters, even

though there might not be as much condensation as if the work were done after the decree. Indeed, immediately after the taking of testimony, and in preparation for the argument, if there is an interval for preparation, counsel are likely to be best prepared to arrange and condense the record, and with the least burden to themselves. Cases in which the appeal brings up less than the whole decree and eliminates matters which upon the argument below are thought material are not usual.

It results that we cannot sanction the preparation of transcripts on appeal or records like the present one; but since the course adopted in this case was no doubt taken in good faith and had the approval of the court below, and the rule has not before been interpreted in this respect, we will accept this record.

ELITE MFG. CO. v. ASHLAND MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. October 3, 1916.)

No. 2815.

1.. PATENTS \$\sime 25\$—Invention—What Constitutes.

There is no invention in selecting and assembling the most desirable parts of different mechanisms in the same art, where each operates in the same way in the new device as it did in the old and effects the same results.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-29; Dec. Dig. ←=25.]

2. PATENTS \$\sim 328-Validity-Anticipation.

The Burkholder patent, No. 1,004,741, for a lift jack for automobiles, held invalid for lack of invention and anticipation.

3. PATENTS \$\infty=328\text{-Patentability-Lack of Invention.}

The Burkholder design patent, No. 44,837, for a design for a lifting-jack standard, *held* invalid for want of invention, showing neither beauty, originality, nor creative design.

Appeal from District Court of the United States for the Eastern Division of the Northern District of Ohio; John H. Clarke, Judge. Suit by the Elite Manufacturing Company against the Ashland Manufacturing Company. From a judgment for defendant, plaintiff appeals. Affirmed.

M. G. Norton, of Cleveland, Ohio, for appellant. C. L. Parker, of Washington, D. C., for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

SATER, District Judge. The plaintiff, as assignee of the Burkholder patents, No. 1,004,741, for a lift jack for automobiles, issued October 3, 1911, and No. 44,837, for a design for a lifting-jack standard, issued November 4, 1913, lost its infringement suit against the defendant in the lower court on the ground that neither of its patents disclosed novelty or an exercise of the inventive faculty. Relief

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

is sought against such adverse ruling. The claims of the first-named

patent are shown in the margin.1

[1, 2] The lift jack is not exclusively adapted to automobiles, but may be used for the same general purposes as other lift jacks. The upright standard on which the parts of the jack are mounted has a wide base, its greatest extension being in front of the standard and beneath the supporting arm of the head or rest for the automobile hub. The upper surface of the rest is depressed or curved, the better to engage the object to be raised. Lateral flanges project from the front edges of the standard. A lift bar, having rachet teeth on its outer edges, and so attached to the front of the standard by ears or lugs as to permit its sliding on the standard, projects laterally at its top. Through this projecting portion is a tapered vertical hole in which is inserted the shank of the revolvable rest for the automobile hub or other object to be supported. To an extension at the top of the rear of the standard is affixed by an outer pivot a handle or lever used in operating the jack. Its inner extension is bifurcated at an obtuse angle to its main portion, thus forming a crank handle or lever. To the end of the bifurcated portion of the handle is a yoke or link which extends downward embracing both the standard and the lift bar, its lower curved part engaging the underportion of the nearest ratchet tooth and thus holding the lifted object in an elevated position when the jacking-up process is ended. The jack is operated by placing it where it is to stand; the lift bar is then raised by the handle until it engages the object to be lifted; the yoke is at the same time made to engage the lower surface of the nearest ratchet tooth with the handle in a raised position. The handle being then depressed to its lowest position, raises such object so as to be supported by the jack.

The lifting-jack art is so old and so highly developed as to afford slight opportunity to inventive genius. Claims submitted by the patentee were repeatedly rejected by the patent examiner. The defendant rightfully contends that the two claims finally allowed and here involved are substantially the same as those declared invalid for want of patentable novelty in the interference proceeding between the patentee and Willour, the only difference aside from that of descriptive wording being the inclusion of flanges in claim 1 and a pivot and socket in claim 2. The decision made in that proceeding was not assailed and remains undisturbed. The plaintiff answers that such inclusions, in view of the state of the art, are obviously secondary matters and that the primary feature of its device is the lift bar with an

^{11.} In a device of the character described, a standard, having flanges at its front edges, a lift bar having slidable engagement on said flanges and provided with an outward projection integral with the front edge thereof, and a head having a free pivot on said projection to rotate horizontally, and means to raise said lift bar in respect to said standard.

^{2.} In a device of the character described, a standard, a lift bar mounted upon the edge thereof and provided with an integral arm at its top and a socket in its extremity and a head having a transverse depression on its top adapted to engage the object to be raised and a spindle on its bottom rotatable in said socket.

integral arm and a rotatable head; but these features were also old in the art. A comparison of the plaintiff's jack with the numerous prior patented devices shown in the record would be tedious and is not deemed necessary. Reference to a few will suffice. In construction and principle of operation the Rikard device, patent No. 375,769 (1888), excepting as to flange and pivot and socket features, bears a strong family resemblance to that of plaintiff. But the flanges and every other element, excepting the rotatable head, called for by claim 1, is seen in earlier patents—that of Huber, for instance, No. 362,085 (1887). Excepting the spindle rotatable in its socket, the Cox patent, No. 468,965 (1892), embraces all the elements of the second claim. Rotatable heads are found in a number of earlier patents -some of which are Parks, No. 240,330 (1881), Garcin, No. 303,504 (1884), Aiken, No. 480,685 (1892), and Wands, No. 806,088 (1905). A head or rest with a transverse depression is seen in several of the patents. Heads of that character susceptible of being turned, like that in the plaintiff's device, to any desired position for placing the jack for lifting purposes, appear in the Welles patent, No. 750,740 (1904), and in that of Wands, who specifically mentions this characteristic of his jack. The particular means specified in claim 2 for rotating the head is covered by the patents of Aiken and of Ammidown, No. 60,114 (1866). The various elements shown in plaintiff's patent and mentioned in its respective claims are all found in the prior art, performing respectively the same function in the same way and producing the same result as in plaintiff's device. We are not unmindful that to combine old parts in such manner as to produce a new result by their harmonious co-operation may be patentable; but where the combination is not only of old parts, but obtains old results, without the addition of any new and distinct function, it is not patentable. There is no invention in merely selecting and assembling, as Burkholder did, the most desirable parts of different mechanisms in the same art, where each operates in the same way in the new device as it did in the old, and effects the same results. Goodvear Tire & Rubber Co. v. Rubber Tire Wheel Co., 116 Fed. 363, 369, 53 C. C. A. 583; Overweight Counterbalance Co. v. Henry Vogt Machine Co., 102 Fed. 957, 961, 962, 43 C. C. A. 80; Sheffield Car Co. v. D'Arcy, 194 Fed. 686, 693, 116 C. C. A. 322. All of these cases were decided by this court. It requires only the commonest kind of skill, such as any mechanic ordinarily skilled in the art could and would have exercised, to borrow, as the patentee did, from wellknown styles of jack one or more of their operative parts and put the same into another, there to perform the same function as such respective parts performed in the first. The plaintiff's lifting-jack patent, for want of novelty and patentable invention, cannot be sustained.

[3] The plaintiff's design patent shows the lifting-jack standard with its base, such standard having projecting strengthening flanges and elliptical openings placed at intervals between the base and a point beneath the attachment of the handle. The openings are such as any mechanic would make to economize material and reduce the

weight of the jack without materially reducing its strength. The production of such a design did not call for an exercise of the creative faculty. Originality is wanting. The beauty of the design is not impressive. For these reasons, the patent must be held invalid. Chas. Boldt Co. v. Nivison-Weiskopf Co., 194 Fed. 871, 114 C. C. A. 617 (C. C. A. 6).

The judgment of the lower court is affirmed.

ELLIOTT MACH. CO. v. ROTHSCHILD & CO. et al.

(Circuit Court of Appeals, Seventh Circuit. August 29, 1916.)

No. 2290.

PATENTS \$\iiist\$ 328—Invalidity—Shoe Button Fastening Machine.

The Elliott patent, No. 765,616, for improvement in shoe button fastening machines, in view of the proceedings in the Patent Office, must be limited to the making of the button feeding tube detachable and supplying the machine with a plurality of such tubes for use with buttons of different sizes, and, as so construed, is void for want of invention.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Elliott Machine Company against Rothschild & Company and others. From a decree of the District Court dismissing bill for injunction charging infringement of United States letters patent No. 765,616, to Minnie S. Elliott, for "attachment for button setting machines" (224 Fed. 502), plaintiff appeals. Affirmed.

Edward Rector, of Chicago, Ill., for appellant. William O. Belt, of Chicago, Ill., for appellees.

Before MACK, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. The so-called attachment consists of a detachable button chute or tube in a machine for attaching buttons to shoes, through which chute the buttons pass from the hopper, or source of the button supply, to the place of attachment to the fabric. The commercial Elliott machine, on the market for years prior to filing application for this patent, had the same kind of chute, save only that it was not readily detachable, but was so placed that to remove it required some dismemberment of the machine. However, the patent in question does not purport to cover the Elliott machine in its reconstructed form to admit of ready detachment of the chute, but, as granted, limits the award to this inventor to the elements of that machine as combined with the distinctive feature of a detachable button chute.

The button chute of the patent, as well as of the machine in long prior use, has a retaining spring or device at its lower end to prevent the column of buttons, which descend in the chute by gravity, from running out. A sort of feed finger in the machine reaches in between

the lowest button and the one next above, and forces or pushes the lowest button down through the chute, past this retaining spring, to the place for attaching to the fabric, and, the finger being withdrawn, the button next above falls against the retaining spring, ready to be next seized and pushed down by the feed finger. This retaining spring must be at such a place on the chute that the feed finger will reach in at the point between the two buttons, and will not strike upon either. With large buttons in the chute the point between the two lower buttons would be higher in the chute, and with small buttons it would be lower. Thus the retaining spring must be fixed correspondingly higher or lower on the chute, so the point between the two lower buttons will always be at the same place, where the feed finger reaches in to grasp the lower button.

The advantage of ready detachability is stated in the specification of the patent to be that a chute made for certain sized buttons may be readily removed, and another chute attached, constructed and adjusted to take care of buttons of a different size, thus enabling the same machine to operate with different sized buttons by merely changing its button chute. There is no difference in the mechanism or operation of the old and the new chutes; but it is claimed that under the old method, unless the machine were taken apart and another chute substituted whenever it was desired to use buttons of different size from those for which the chute was then adjusted, it was necessary to have several of the machines, each with its chute having the retaining spring or device at a point where it will accommodate the different size of buttons.

But, when the new machine was equipped with a chute for a given size of button, it was, in all essential respects, like the old Elliott machine equipped for the like size button, and when equipped with a chute for a different size of button it was, in function and operation, just like another of the old machines arranged for such size of button. For the seven years during which the application was pending in the Patent Office the applicant sought repeatedly, but vainly, to secure claims upon a plurality of interchangeable chutes, severally adjusted for different sized buttons, which undertakings were as persistently opposed by the Patent Office, and all such claims were refused, and the claims finally allowed contain no reference whatever to a plurality or interchangeability of chutes, or to chutes of varying construction or adjustment to admit of using different chutes for different sized buttons with same machine. In rejecting a claim which described a plurality or series of these chutes, the Patent Office properly said:

"A description of the machine is complete which includes only one chute, and a description including a series of chutes embraces more than is comprised in the machine. Those chutes which are temporarily disconnected from the machine are wholly separate from, and independent of it, and form no part thereof, and a claim which attempts to cover them all together covers an aggregation."

Plurality or interchangeability of chutes not having been patented to appellee, there is no infringement in their employment by another.

The action seems to be based on the function or the advantageous possibilities in the employment of a plurality of chutes, as stated

in the specifications of the patent, rather than upon its claims. In detachability alone there is no patentable invention, nor in the employment of a series or plurality of attachments, with none of which is achieved a new result, or an old result in a different way. The claims in issue of this patent, predicated as they are on the detachability of the button chute as an essential element, cannot be upheld.

The opinion of the District Court, reported in 224 Fed. 502, discusses more fully these propositions, and with its reasoning and con-

clusions we are in accord.

The decree of the District Court is affirmed.

CHRISTENSEN et al. v. WESTINGHOUSE TRACTION BRAKE CO.

(District Court, W. D. Pennsylvania. September 30, 1916.)

No. 80.

1. PATENTS \$\infty 310(7)\$—PLEADING—COUNTERCLAIM—RIGHT TO SET UP.

In a suit for the infringement of a patent, defendant moved for leave to amend its answer, to set up a counterclaim of complainant's infringement of another patent belonging to defendant. General rule in equity 30 (198 Fed. xxvi, 115 C. C. A. xxvi) provides that the answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counterclaims against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim so set up shall have the same effect as a cross-suit, so as to enable the court to pronounce final judgment, both on the original and cross claims. The rule has no provision enabling plaintiff to obtain affirmative relief, on counterclaim not germane to the suit being set up in the answer as though defendant were proceeding by original bill. Held that, as an ordinary counterclaim which a defendant may assert is one arising out of the transaction that is the subject-matter of the suit, and as there is nothing in the rule to indicate that it was intended to change the ordinary practice defendant cannot set up the counterclaim desired which does not arise out of the same transaction, the provisions doing away with the necessity of the cross-bill having no such effect; the purpose of a cross-bill being either to aid in the defense of the original suit or to obtain a complete determination of the controversies raised between the original complainant and cross-complainant over the subject-matter of the original bill.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 521-532; Dec. Dig. \$\infty 310(7).]

2. Patents \$\infty 310(8)\$—Pleading—Counterclaim—Cross-Bill.

In such case, averments of the proposed counterclaim that defendant was informed and believed that many of the machines which the bill charged had been made and sold by plaintiff embodied an invention belonging to defendant and infringed upon defendant's rights would not entitle defendant to assert the same against plaintiff in a cross-bill, for, if portions of plaintiff's machines infringed the patent of defendant, that would form the basis of an independent suit, and could only incidentally affect the question of damages; plaintiff's right of recovery being limited to infringement of the machines manufactured by defendant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 533, 534; Dec. Dig. ⋒310(8).]

In Equity. Bill by Niels A. Christensen and another against the Westinghouse Traction Brake Company. On motion by defendant for leave to amend its answer by setting up a counterclaim. Motion denied.

Lines, Spooner, Ellis & Quarles, of Milwaukee, Wis., Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., and Wm. R. Rummler, of Chicago, Ill., for plaintiffs.

James K. Bakewell, of Pittsburgh, Pa., Paul Synnestvedt, of Philadelphia, Pa., and Thomas B. Kerr, of New York City, for defendant.

THOMSON, District Judge. This is a motion on the part of defendant for leave to amend its answer by setting up a counterclaim of infringement. Suit is brought for infringement of certain patents, one for an improvement in combined pumps and motors, and the other for an improvement in valves for compressors. These patents are owned by the plaintiff Christensen, under which the plaintiff Allis-Chalmers Manufacturing Company has an exclusive license. The defendant now asks leave to bring into the suit, by way of counterclaim, a charge of infringement against the plaintiffs of its patent for a new and useful improvement in motor compressors.

[1] Defendant's right to counterclaim for infringement of its patent depends on the proper interpretation of rule 30 of the General Rules in Equity (198 Fed. xxvi, 115 C. C. A. xxvi), which reads as

follows:

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counterclaims against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim so set up shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims."

The wording of this rule has resulted in conflicting opinions as to its true meaning. Some judges have given to the rule a very broad interpretation, holding that the first part of the rule is mandatory and the second part permissive; that the words "counterclaim arising out of the transaction which is the subject-matter of the suit" cover broadly all matters which theretofore could have been pleaded by crossbill; and that the word "counterclaim," as used in the second or permissive part of the rule, includes all cross-claims upon which the defendant might sue the plaintiff in equity, even if having no connection whatever with the plaintiff's cause of action. This broad interpretation of the rule is maintained by Judge Chatfield in Marconi Wireless Telegraph Co. v. National Electric Signalling Co. (D. C.) 206 Fed. 295, by Judge Lacombe in Vacuum Cleaner Co. v. American Rotary Valve Co. (D. C.) 208 Fed. 419, and by Judge Rellstab in Electric Boat Co. v. Lake Torpedo Boat Co. (D. C.) 215 Fed. 377. On the other hand, it has been held that the word "counterclaim" in the paragraph "may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him," applies only to a counterclaim proper; that is, such as could properly be set up by cross-bill, the subjectmatter of which grows out of and the relief sought depends upon, the subject-matter of the plaintiff's bill. This view is held by Judge Dodge in Terry Steam Turbine Co. v. Sturtevant Co. (D. C.) 204 Fed. 103, and in Klauder-Weldon Dyeing Machine Co. v. Giles (D. C.) 212 Fed. 452, by Judge Geiger in Adamson v. Shaler (D. C.) 208 Fed. 566, and in Atlas Underwear Co. v. Cooper Underwear Co. (D. C.) 210 Fed. 347, and by Judge Thomas in the district of Connecticut in Sydney v. Mugford Printing & Engraving Co., 214 Fed. 841.

The reasoning of Judge Dodge and those with him, who have adopted the more restricted application of the rule, appears to me as the more logical. It seems to be reasonably clear that the purpose of the rule is to require the setting up in the answer of all matters which could formerly be brought in by cross-bill only. As there is a clearly recognized distinction between a set-off and a counterclaim in equity, it must be assumed that, when the rule used both words, they were used, not interchangeably or as synonymous, but with their true distinction in view. A counterclaim is one which the defendant might assert against the plaintiff in the same suit, the cross-bill being brought either to aid in the defense of the original suit or to obtain a complete determination of the controversies between the original complainant and the cross-complainant over the subject-matter of the original bill. And if this is not its purpose, it is not a cross-bill. The term "counterclaim" or "cross-bill" in equity having a definite legal meaning, it can hardly be supposed that the court in drafting the rule used it in two different senses: The first in its ordinary and accepted signification, that is, a claim "arising out of the transaction which is the subject-matter of the suit"; the second, without any such limitation, thus practically effecting a very radical change in the law as to what could be pleaded by way of counterclaim. It is to be assumed that, if such radical change were intended, it would have been expressly and plainly declared. I do not think the wording of the rule justifies this conclusion. Giving proper effect to the words "without cross-bill" and the words "shall have the same effect as a cross-bill," it seems reasonably clear that the answer was intended to perform the function of a cross-bill, making the cross-bill no longer necessary; the matter thus pleaded in the answer having the same effect as the cross-This could not be true if the defendant is permitted in effect to file an original bill by way of counterclaim having no connection with the subject of the original bill.

There is also force in the position of Judge Geiger that, if the rule were intended to so enlarge the scope of equity procedure as to permit the defendant to incorporate in his answer causes of action not related nor germane to the subject of the bill, then rule 31 (198 Fed. xvii, 115 C. C. A. xvii) should have the necessary provisions to enable the plaintiff to obtain such affirmative relief, as, were the defendant proceeding by original bill, the complainant could obtain, formerly by cross-bill, now by counterclaim. There is plainly no provision in rule 31 for such set-off or counterclaim on the part of the plaintiff, unless it is intended to be embraced in the word "reply." Certainly this at least is very doubtful. I am therefore of opinion that the words

547.25

"and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independant suit in equity against him," apply only to such counterclaims as arise out of the

transaction which is the subject-matter of the suit.

[2] Nor do I think, in the case at bar, that the averment in the proposed counterclaim that "defendant is informed and believes many of the machines which the bill of complaint and the amendment thereto state have been made and sold by the plaintiffs, embody the invention set forth in said patent No. 861,488, and particularly in claims 17 and 18 thereof, and infringe upon defendant's rights thereunder," would entitle the defendant to assert the same against the plaintiff in a cross-bill. It does not go to the question of defendant's infringement of plaintiff's patents, nor do I conceive that it would be any answer to plaintiff's prayer for injunctive relief. If some portion of plaintiff's machine, not covered by his patents, infringes the patent of the defendant, that would form the basis of a separate and independent suit against him. It could only affect the incidental question of damages to which the plaintiff is entitled; his right of recovery being limited to the infringing exclusive of the noninfringing elements of the articles of defendant's manufacture and sale.

For the foregoing reasons, the defendant's motion is denied.

BONE v. WALSH CONST. CO.

(District Court, S. D. Iowa, Davenport Division. September 18, 1916.)

1. Costs = 48-Power of Court-Dismissal.

A court of equity should as far as possible, where plaintiff waits until the moment of trial before dismissing, tax costs so as to reimburse defendant for expenditures made in good faith in preparation for trial, though the court cannot tax any costs which could not have been taxed had the case gone to trial and there been a decree for defendant.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 129, 192-210; Dec. Dig. ६ 48.]

2. Costs \$\infty 187\text{-Taxation-Fees for Expert Witness.}

As the power to impose costs ultimately must be found in the statutes, and the only statute intended to penalize for vexatious proceedings (Rev. St. § 982 [Comp. St. 1913, § 1623]) merely declares that an attorney shall be liable for costs vexatiously increased by him, a plaintiff who delayed dismissal until the eve of trial cannot be taxed with disbursements made by defendant to procure expert witnesses, and defendant is only entitled to the ordinary witness fees therefor.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 738; Dec. Dig. 🖘 187.]

3. Costs \$\infty\$190-Allowance-Dismissal.

Where plaintiff delayed his dismissal until the eve of trial, defendant cannot be allowed as costs disbursement for the preparation of models for various alleged anticipating structures.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 660–662; Dec. Dig. 5 190.]

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. Costs = 182-Allowance-Dismissal.

Under Rev. St. § 983 (Comp. St. 1913, § 1624), providing that lawful fees for exemplification and copies of papers necessarily obtained for use on trials in cases, where by law costs are recoverable, shall be taxed, defendant, where plaintiff delayed dismissal until the eve of trial, is entitled to tax as costs disbursements for certified copies of patents and publications which would necessarily have been used.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 714; Dec. Dig. ⊕ 182.]

In Equity. Suit by Frank A. Bone against the Walsh Construction Company. On motion to tax costs upon dismissal by plaintiff. Costs taxed, part of defendant's disbursements being denied.

Arthur H. Ewald and Oliver W. Sharman, both of Cincinnati, Ohio, and Otis Gilbrech, of Davenport, Iowa, for complainant.

Arthur G. Bush and N. D. Ely, both of Davenport, Iowa, for respondent.

WADE, District Judge. I have made an extensive investigation of the questions presented, for the reason that similar questions have been presented in other cases, and because the same questions may arise in nearly every patent case.

[1] The facts in this case relating to the conduct of the plaintiff, in waiting until the moment of trial to dismiss the proceeding, furnishes ample ground for the court to tax as costs every item which the law permits. In fact, the circumstances justify a court of equity in going as far as possible in compelling the plaintiff to reimburse the defendant for the expenditures which it made in good faith, in preparation for the trial of this case.

But it must be conceded that, upon dismissal, the court cannot tax any costs which could not be taxed if the case had gone to trial and there had been a decree for the defendant. There is no authority for permitting a penalty to be assessed because of the dismissal of the case on the eve of trial.

[2] The only enactment by Congress of a statute intended to penalize for vexatious proceedings is section 982 (Rev. Statutes), which permits an allowance, not against the parties, but against the attor-

neys who engage in such practice.

While there are general expressions that a court of equity has broad powers in the matter of taxation of costs, it will be found, upon examination of these cases, that these expressions relate largely to the apportionment of costs, or to the amount which may be allowed as costs under specific provisions of the statutes; but I find no case which specifically holds that a court of equity has power to determine what costs are assessable.

"Ultimately, no doubt, the power to impose costs must be found in a stat-

ute." Tesla Co. v. Scott (C. C.) 101 Fed. 524.

"If acts of Congress make specific provision for costs, they control. If they make no provision for certain kinds of costs, the provisions, if any, of the state statutes, may be followed (Scatcherd v. Love, 166 Fed. 53, 91 C. C. A. 639, and cases cited), at least if they do not result in injustice in a particular

case (Primrose v. Fenno [C. C.] 113 Fed. 375). Such seems to be the prevail-

ing doctrine at this time.

"Sections 823 and 824, Revised Statutes (U. S. Comp. St. 1901, p. 632 [Comp. St. 1913, §§ 1375, 1378]), distinctly provide that attorneys shall be allowed certain fees, and no others. On the subject of attorney's fees this act controls. It makes no provision for attorney fees on motions. Hearing on a motion is not a final hearing of the cause, upon which the statutory docket fee may be taxed. No attorney fee can be allowed on the motion.

"There is a provision for an attorney fee of \$2.50 for each deposition 'taken and admitted in evidence in a cause.' This means a trial or final hearing, and not an interlocutory hearing. Stimpson v. Brooks, 3 Blatch. 456, Fed. Cas. No. 13,454; Nail Factory v. Corning, 7 Blatchf. 16, Fed. Cas. No. 14,197;

Spill v. Mfg. Co. (C. C.) 28 Fed. 870.

"There is no authority in the statutes, and I know of none in our state decisions, for allowing the traveling expenses of the attorney in going to Pittsburgh. See Wooster v. Handy (C. C.) 23 Fed. 60. There can therefore be no allowance made for the attorney's fees and attorney's expenses asked for." Michigan Co. v. Aluminum Co. [C. C.] 190 Fed. 903.

"We are unable to find in section 982 authority for allowing an arbitrary sum (\$300, \$150 in each case) to be inserted in the judgment and paid by the

complainant to the defendants.

"The question here is, not what the law should be, but what it is. Unquestionably the laws of New York are much more liberal in the matter of costs and allowances than those of the United States, where the costs are hardly more than nominal. In isolated cases the inability of the court to make an adequate allowance may produce hardship; but, on the other hand, the federal system has advantages which are obvious to all who have practiced in the courts of the United States." Motion Picture Co. v. Stiener, 201 Fed. 63, 119 C. C. A. 401.

The main question in this case relates to the money expended in employing expert witnesses. The amount thus expended is \$780.15. No question is made by plaintiff that this amount is unreasonable or unnecessary; so that we are confronted with the question as to whether or not, in the absence of a statute, the expense for experts in the preparation of a case, and in attendance for the trial, aside from statutory witness fees, can be allowed as costs, either upon dismissal, or upon final decree.

In The William Branfoot, 52 Fed. 390, 3 C. C. A. 155, the court says:

"Libelant excepted to the disallowance by the clerk in his taxation of costs of seven items, five of them being charges for expert testimony. As to two of these, the District Court sustained the clerk, upon the ground that the witnesses did not come within the designation of experts, and, as to the other three, because the compensation of 'experts' called by the party in his own behalf cannot be taxed against the losing party as costs or as extra allowances and disbursements, under the statute. Rev. St. §§ 823, 983 [Comp. St. 1913, §§ 1375, 1624].

"We think the court was right, and that, as these charges, including expenses and disbursements, were not incurred under any action of the court, but by the party in the preparation and presentation of his own side of the case, the items were properly disallowed. Another item was for money paid for a copy of the official stenographer's notes, obtained for libelant by his counsel. This was simply for convenience, and not a copy necessarily obtained for use on the trial. The item was properly rejected. The remaining item was for the expenses of a journey to New York, for the purpose of attending the examination of witnesses for libelee; the notice being so short that libelant insists that there was not sufficient time allowed within which to employ and instruct counsel in New York, and that it therefore became necessary that his proctor should be present in person. The District Court correctly held that this was not a necessary disbursement, as, 'if the notice given was unrea-

sonable, counsel could have had the time extended—perhaps have suppressed the deposition."

In Re Carolina Cooperage Co. (D. C.) 96 Fed. 604, the court says:

"Extra allowance to expert witnesses cannot be allowed or taxed against a losing party in a United States District Court sitting in admiralty or bankruptcy, but must be paid, according to the statute, \$1.50 per day for actual attendance, and mileage. Rev. St. § 848 [Comp. St. 1913, § 1452]; The William Branfoot, 3 C. C. A. 155, 52 Fed. 390, 8 U. S. App. 129. Any extra allowance to 'experts', is, a matter of personal or private contract between the parties—the one summoning the expert and the witness so summoned and used. The witness fees will therefore be reduced to the amount allowed by statute, \$1.50 per day for actual attendance, and no more."

The foregoing quotations reflect the general law of the country upon this question. Flinn v. Prairie County, 27 L. R. A. 669 (extensive note); 4 L. R. A. Extra Annotations, 258; 11 R. C. L. § 65; Barrus v. Phaneuf, 166 Mass. 123, 44 N. E. 141, 32 L. R. A. 619; Philler v. Waukesha County, 139 Wis. 211, 120 N. W. 829, 25 L. R. A. (N. S.) 1040, 131 Am. St. Rep. 1055, 17 Ann. Cas. 712 (extensive note).

In fact, the only case in which I find a court allowing, as costs, payment for services of experts in preparation for testifying, is Anderson v. Railway, 103 Minn. 184, 114 N. W. 744, in which the circumstances were peculiar.

From one point of view, this rule seems to work an injustice, and no doubt it does in many cases. The view of the courts seems to be that such matters should stand upon the same footing as counsel fees, as to which Justice Swayne, in Oelrichs v. Spain, 15 Wall. 231, 21 L. Ed. 43. observes:

"In equity cases, when there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the expensa litis to which he may have been subjected. The parties in this respect are upon a footing of equality. * * * When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. * * We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

The rule contended for would involve great uncertainty as to the amount for which the losing party would be liable. In Wendell v. Willetts (C. C.) 183 Fed. 1014, in an action by an expert to recover for services in preparing facts in an insurance claim, the jury awarded \$3,500, which was reduced by the court to \$2,500.

In some of the states, as in Iowa, laws have been passed permitting the courts to allow experts additional per diem while in attendance upon the court; but Congress has made no such enactment, and no Legislature, so far as I have been able to find, has passed a law permitting the taxation as costs of the compensation of the expert for time expended in preparing to testify.

Under the foregoing, I am required to overrule the application of the defendant for allowance of the amount paid to experts, except the sum of \$1.25 per day and mileage. As to this the defendant is permitted to make showing.

[3] The next item is \$50 for "preparation of models of various alleged anticipating structures."

As in the expense for experts, there is just reason that such allowance be made; but I find no authority to justify it. Kelly v. Springfield Co. (C. C.) 83 Fed. 183; Wooster v. Handy (C. C.) 23 Fed. 49.

[4] The other item asked to be taxed is \$48.20 for certified copies of patents and publications. I think this item is allowable, provided a showing be made that they were necessary to the proper presentation of the case upon the merits.

Section 983 of the Revised Statutes provides that:

"Lawful fees for exemplification and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed."

Counsel for plaintiff rely upon Wooster v. Handy (C. C.) 23 Fed. 49, for their contention that allowance cannot be made for copies of papers unless actually used upon a trial. The situation in this case was not there considered, and I feel that, under the peculiar circumstances in this case, the costs should be taxed.

In re UTLEY et al.

(District Court, E. D. Pennsylvania. September 29, 1916.)

No. 5877.

BANKRUPTCY 6-60-ACTS OF BANKRUPTCY-LIABILITY TO ADJUDICATION.

While the main purpose of the Bankruptcy Act is to secure equality among creditors in the distribution of the bankrupt's estate, nevertheless one who has made a general assignment for the benefit of creditors may, though he is solvent, be adjudicated a bankrupt, for Bankruptcy Act July 1, 1898, c. 541, § 3a(4), 30 Stat. 546 (Comp. St. 1913, § 9587), declares the making of the general assignment for creditors an act of bankruptcy, and one of the purposes of the act is to distribute the assets of the debtor among his creditors, and a debtor cannot, by making an assignment, delay such distribution.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. \$\infty\$=\infty\$=0.]

In Bankruptcy. In the matter of the alleged bankruptcy of James S. Utley and others. Sur motion for adjudication in bankruptcy on involuntary petition. Motion continued.

Albert S. Longbottom, of Philadelphia, Pa., for petitioning creditors. William J. Conlen, Joseph S. Conwell and Henry, Pepper, Bodine & Pepper, all of Philadelphia, Pa., for alleged bankrupts.

DICKINSON, District Judge. The question involved in this motion as viewed by the petitioning creditors is one purely of law. It developed at the argument, however, that there is at least possibly a question of fact also involved. The question of law may be thus presented. A debtor possessed of ample assets to more than meet all his obligations nevertheless transfers all his property in trust for the ben-

efit of his creditors, the transaction constituting a general assignment for the benefit of creditors under the provisions of the Pennsylvania law. A petition in involuntary bankruptcy is filed in the usual form, averring insolvency and alleging as the ground of bankruptcy that designated as "(4)" in the bankruptcy statute, to wit, that he had made a general assignment for the benefit of his creditors. An answer is filed, denying insolvency, but admitting the fact averred in the alleged act of bankruptcy. The question arising is whether the assignment for the benefit of creditors without accompanying insolvency is an

act of bankruptcy justifying an adjudication.

A few general observations may serve to clarify a view of this The main purpose of a bankrupt law is undoubtedly to secure equality among creditors in the distribution of the estate of the bankrupt. Solvency is a negation of this purpose, and in this sense is inconsistent with and hence destructive of the very idea of bankruptcy. None the less the objective of the law remains and if distribution of the assets of the debtor be made independently of action by creditors or a creditor, the hands of the creditors are tied, and the payment of their claims must await the event of distribution. Because of this it may well be a further policy of the bankrupt law not to permit any tribunal other than that constituted by the bankrupt law from thus taking it out of the power of creditors to enforce the payment of their claims. The bankrupt law may, in consequence, have the double purpose of taking over into its own hands the distribution, not only of the estates of insolvents, but also of those who have committed the distribution of their assets to a functionary constituted by themselves or by a state law. This narrows the inquiry to whether the bankrupt law was intended to serve one of these purposes or both.

A cursory reading of the Acts of Congress might produce the impression that bankruptcy proceedings were limited to insolvency. When more closely read, however, especially in the light shed by the opinion of the court in West Co. v. Lea Bros., 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, it is made clear that the attempt of a debtor through the operation of a general assignment for the benefit of creditors to place his property out of the reach of his creditors, even for the laudable purpose of assuring to them the ultimate payment of their claims, constitutes in itself an act of bankruptcy irrespective of a question of solvency. This case disposes of the legal question referred to, and makes further discussion useless.

At the argument, however, two facts, or at least possible state of facts, developed. One was the undoubted solvency of the debtor. The other was the distinction between the act set forth as a ground of bankruptcy having in fact been consummated, or in reality only attempted, and the attempt being subsequently abandoned, and of acts done toward its consummation withdrawn. The real facts may there-

fore change the legal situation.

In view of this the present motion is continued, and leave is granted to file a further or amended answer setting forth the facts as they really are. If the answer as thus filed, in the judgment of the peti-

tioning creditors, is insufficient, the present motion may be renewed; otherwise it may be withdrawn or called up and disposed of by the court.

In re SCHULTZ & GUTHRIE.

(District Court, D. Massachusetts. August 31, 1916.)

No. 23107.

1. BANKBUPTCY \$\infty 228-Findings of Referee-Review.

The evidence not being reported, the findings of the referee in bank-ruptcy must stand unless appearing on the face of his certificate to be plainly wrong; and it is not enough that a letter referred to is strong evidence of a conclusion contrary to a finding, where it cannot be said that it may not have been controlled by other evidence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig.

€===228.]

2. BANKBUPTCY \$\iiiis 348\$—CLAIMS—PRIORITY—COMPENSATION OF EMPLOYÉ.

That the compensation of an employé of bankrupt was more than \$1,500 per year does not of itself disentitle him to priority therefor under Bankr. Act July 1, 1898, c. 541, \\$ 64b (4), 30 Stat. 563 (Comp. St. 1913, \\$ 9648).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. \\$ 536; Dec. Dig. \iiiis 348.]

3. Bankbuptcy \$\iff 318(2), 345—Provable Claims—Future Damages for Breach of Contract of Employment.

Future damages for breach by the bankrupt of a contract of employ-

ment are a provable unpreferred claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469, 531; Dec. Dig. \$\sim 318(2), 345.]

In Bankruptcy. In the matter of the bankruptcy of Schultz & Guthrie. Order of referee affirmed.

Alexander Natanson, of New York City, for creditor.

Archibald M. Hillman, of Worcester, Mass., for alleged bankrupts.

MORTON, District Judge. [1] As the evidence is not reported, the findings of the referee must stand unless they appear upon the face of his certificate to be plainly wrong. The alleged bankrupts' letter to the claimant of January 1, 1916, in which they say in effect that they can no longer keep on with him under the contract of employment, is certainly strong evidence of a breach at that time. If so, it would follow that thereafter the claimant was entitled, not to wages, but to damages, which, of course, would not be entitled to priority. The learned referee has, however, found that the relation of employer and employé continued up to the filing of the bankruptcy petition, and I am unable to say that the letter referred to may not have been so controlled by other evidence not before me as to justify the finding.

[2] The fact that the claimant's compensation was more than \$1,500 per year does not of itself disentitle him to priority under section 64b(4). Blessing, Trustee, v. Blanchard, 223 Fed. 35, 138 C. C. A. 399, Ann. Cas. 1916B, 341, 35 Am. Bankr. Rep. 135 (C. C. A. 9th

Cir.); In re Gurewitz, 121 Fed. 982, 58 C. C. A. 320 (C. C. A. 2d Cir.)

It follows that the learned referee was right in allowing the claim for wages up to the date of bankruptcy as entitled to priority, and his

finding in respect thereto is affirmed.

[3] The learned referee further allowed, as an unpreferred claim, wages at the rate fixed in the contract from the date of the bankruptcy until the claimant secured other employment. This was evidently done upon the theory that the contract was broken by the bankruptcy, and as a convenient method of estimating the damages for the breach. The alleged bankrupts contend that such damages are not provable.

The claimant had the right to treat the bankruptcy as a breach of the entire contract. In re Swift, 112 Fed. 315, 50 C. C. A. 264 (C. C. A. 1st Cir.). Since the present case was argued, Central Trust Co. v. Chicago Auditorium Ass'n, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, has been decided, in which it is held that, when bankruptcy constitutes a breach of an executory contract to be performed in the future, damages covering the whole term of the contract are provable. The contract in that case was to pay for certain privileges; in this one it is to pay for personal services. I do not think that the distinction is material. It is true that such services are contingent on the employé's life, but that fact does not prevent damages for breach of contracts, like the one under consideration, from being proved in actions at law, and I see no good reason why a stricter rule should be applied in bankruptcy.

Notwithstanding the decision in D. Levy & Sons Co. (D. C. Md.) 208 Fed. 479, relied on by the alleged bankrupts, it seems to me that damages for the breach of the contract were provable and that in so ruling the referee was right. A similar result was reached in equity in Isaac McLean Sons Co. v. Butler (D. C. Mass.) 227 Fed. 325 (opinion Dodge, J., Oct. 31, 1914). See, too, Charles W. Miller (D. C.

Mass.) 225 Fed. 331.

The orders of the referee are affirmed.

In re HOWE.

(District Court, D. Massachusetts. August 30, 1916.)

No. 21674.

BANKRUPTCY \$\sim 152\text{—Recovery by Trustee}\$\text{—Check Given Before and Paid After Filing of Petition.}

Bankrupt's check given and deposited for collection before the filing of his voluntary petition in bankruptcy not having been paid till thereafter, though before any of the parties, except bankrupt, knew of the facts, the trustee can recover the money of the payee, though the payment was not a recoverable preference; delivery of the check not operating as an assignment or segregation of the funds on deposit, nor impressing them with any trust in favor of the payee, and the adjudication, which is considered as immediately following the filing of the petition,

placing the deposit in the complete custody of the bankruptcy court, after which it is no longer bankrupt's property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 194; Dec. Dig. € 152.]

In Bankruptcy. In the matter of Francis Howe, bankrupt. Order of referee vacated.

See, also, 229 Fed. 854.

Barton & Harding, of Boston, Mass., for trustee. Burdett, Wardwell & Ives, of Boston, Mass., for creditor.

MORTON, District Judge. The check for \$502.68 was delivered to the Edison Electric Light Company by the bankrupt, in good faith, and in order to prevent the light from being shut off in his hotel, two days before his voluntary petition in bankruptcy. It was not presented by the Edison Company directly to the drawee bank, but was deposited in another banking institution for collection and was presented through the clearing house. It was paid by the bank after the petition and adjudication, but before any of the parties, except the alleged bankrupt, knew of those facts. The institutions through which the collection was made acted, in so doing, as agents of the Edison

Company.

In legal effect the case is the same as if the Edison Company itself had retained the check and had not presented it for payment until after the drawer had been adjudicated bankrupt, and had then done so in good faith and without knowledge, either on its part or on that of the drawee bank, of such bankruptcy. Upon such facts, is the payee entitled as against the trustee in bankruptcy to retain the sum received on the check? The delivery of the check did not operate as an assignment or segregation of the funds on deposit, nor impress those funds with any trust in favor of the pavee. The check was a draft which it was the duty of the drawee to pay upon presentation as long as it had funds available therefor. Fourth Street Bank v. Yardley, 165 U. S. 634, 643, 17 Sup. Ct. 439, 41 L. Ed. 855; Holbrook v. Payne, 151 Mass. 383, 385, 24 N. E. 210, 21 Am. St. Rep. 456; Negotiable Instruments Act, Mass. Rev. Laws, c. 73, § 206. The delivery of the check was not a completed transfer of the debtor's property. By the general law it did not extinguish his liability to the Edison Company until it was paid. Downey v. Hicks, 14 How. 240, 14 L. Ed. 404; Segrist v. Crabtree, 131 U. S. 287, 9 Sup. Ct. 687, 33 L. Ed. 125; cf. Houghton v. Boston, 159 Mass. 138, 34 N. E. 93. The Edison Company acquired no rights in the money received on the check until the actual payment thereof. The effect of the transaction is to be determined as of that time.

Upon the adjudication—which in voluntary cases like this is to be considered as immediately following upon the filing of the petition (In re Hurley [D. C. Mass.] 185 Fed. 851)—the bankrupt's deposit came into the complete custody of the bankruptcy court. Thereafter it was no longer his property. 2 Remington on Bankruptcy, § 1274. The legal title was still in him, but he held it only for the trustee when one should be qualified; and he was unable to effect any valid transfer

of it, except possibly for full value, in the ordinary course of business. Certainly the estate could not be diminished by any act of his after that time. Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154; Pratt v. Bothe, 130 Fed. 670, 65 C. C. A. 48 (C. C. A. 6th Cir.); In re Waite-Robbins Motor Co. (D. C. Mass.) 192 Fed. 47; 1 Remington on Bankruptcy (2d Ed.) §§ 1120, 1121. If, instead of having delivered the check before the petition and adjudication, he had not done so until afterward, and the payee, in ignorance of the facts, had collected it, it is clear that the payee could not, as against the trustee in bankruptcy, retain the money so received. State Bank v. Cox. 143 Fed. 91, 74 C. C. A. 285, 16 Am. Bankr. Rep. 32 (C. C. A. 7th Cir.). The prior delivery of the check did not enlarge the payee's rights. The contrary view would open such a broad avenue of fraud that I should hesitate to take it unless compelled to do so. In Laclede Bank v. Schuler, 120 U. S. 511, 30 L. Ed. 704, a somewhat similar controversy between the holder of a check and a common-law assignee was resolved in favor of the assignee. The rights of a trustee in bankruptcy in the debtor's property as of the date of adjudication are at least as great as those of an assignee in possession. The money which the Edison Company received belonged to the trustee in bankruptcy, no consideration was at that time given for it, and it must be returned to him.

It may be that, as between the trustee and the bank, the latter would be protected by reason of the agreement under which deposits are customarily accepted. See In re Zotti, 186 Fed. 84, 108 C. C. A. 196; Reed v. Mattapan Del. & Tr. Co., 198 Mass. 306, 84 N. E. 469. No such question arises between the trustee and the Edison Company.

The learned referee's finding that the payment was not a recoverable preference is affirmed, but his further conclusion that the trustee was not entitled to recover seems to me to have been erroneous. The order of the referee dismissing the petition is vacated. The petitioner may present a draft decree in accordance with this opinion.

In re J. W. LAVERY & SON.

(District Court, D. Massachusetts. August 30, 1916,) No. 20338.

BANKRUPTCY 5-92-INVOLUNTARY PETITION-DISMISSAL.

The alleged bankrupt is not entitled as of right to dismissal of the involuntary petition in bankruptcy against him, though neither of the petitioning creditors appear to press it, as rights of other creditors may be affected thereby, the principal petitioning creditor having, contrary to the spirit of Bankr. Act July 1, 1898, c. 541, § 11, 30 Stat. 549 (Comp. St. 1913, § 9595), after the filing of the petition, brought suit and recovered judgment on his claim in a state court, without any suggestion of the bankruptcy proceeding, and this having been paid; as, in case of adjudication of bankruptcy, the estate is to be liquidated as of the date of the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 107, 108, 133-136; Dec. Dig. ⊕⇒92.]

In Bankruptcy. In the matter of J. W. Lavery & Son, alleged bankrupts. Dismissal of involuntary petition denied.

Stoneman, Gould & Stoneman, of Boston, Mass., for petitioning creditors.

Dolan, Morson & Stebbins, of Boston, Mass., for alleged bankrupts.

MORTON, District Judge. This involuntary petition has been pending since January 9, 1914. The respondents answered on March 23, 1914, denying the commission of the acts of bankruptcy alleged in the petition, denying insolvency, and denying that the petitioning creditors had provable claims to the amount of \$500. A trial by jury was claimed, but was subsequently waived. Nothing was done by the parties to bring the case to a hearing. In April, 1916, the referee to whom it had been referred assigned it for hearing in order to clear the docket.

From the referee's report it appears that, subsequent to the filing of the bankruptcy petition, the principal petitioning creditor brought suit against the bankrupts in the state court and recovered judgment there upon the very claim upon which it had proceeded in the bankruptcy petition, that this judgment has been satisfied in full, and that said petitioner does not desire to press the petition. Neither of the other petitioning creditors appeared to do so. The respondents have always resisted the bankruptcy proceedings, and now contend that they are entitled as of right to have the petition dismissed.

The Bankruptcy Act explicitly provides that:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition." Section 11.

This does not in terms cover suits begun after the filing of the petition; but it is obvious that such suits, in so far as they interfere with the bankruptcy administration, are inconsistent with its exclusive jurisdiction, and it is settled that when they do interfere they will be enjoined. Eastern Com. & Imp. Co. (D. C. Mass.) 129 Fed. 847; Remington on Bankruptcy (2d Ed.) § 359.

The plaintiffs in the action at law had alleged under oath in the bankruptcy proceedings that their debtor was insolvent and had committed acts of bankruptcy. On their own statements, they were, in effect, endeavoring to obtain a preference, and if an adjudication should be made have succeeded in doing so. See section 60a (Comp. St. 1913,

§ 9644).

It has been said as to third parties proceeding in this way against an alleged bankrupt that:

"Those who deal with bankrupts' property in the interval between the filing of the petition and the final adjudication do so at their peril, * * * and the moment it was suggested * * * that proceedings had been instituted in this court it was his duty to have paused, and ascertained the status of the matter." Adams, J., in Re Krinsky Bros. (D. C. N. Y.) 112 Fed. 972, 7 Am. Bankr. Rep. 535.

The bankrupts' estate will be liquidated, in case of adjudication, as of the date when the petition was filed. Since then their property

has, broadly speaking, been under the control of the bankruptcy court, pending the determination of the petition. This is a consequence of the in rem character of bankruptcy proceedings and is well established. Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275; Lazarus v. Prentice, 234 U. S. 263, 34 Sup. Ct. 851, 58 L. Ed. 1305. The respondents probably had the right to dispose of their property, bona fide, for fair consideration, in the ordinary course of business. In re Smith (D. C.) 113 Fed. 993. Beyond that they acted at their peril.

By permitting the action at law to go to judgment without suggesting the pendency of bankruptcy proceedings against them, they became at least assenting parties to what may in the event of adjudication be an unauthorized distribution of their estate. If the payment of the judgment was received with the intent on the part of the petitioning creditor to take no further action on the bankruptcy petition, it is a serious question whether the offense denounced by section 29b4 (Comp. St. 1913, § 9613) was not committed. After the filing of the petition, the alleged bankrupts had no right to use their property for that purpose, or to suffer it to be so taken as to accomplish that result.

It is clear that the rights of other creditors may be affected by the dismissal of this petition. The respondents are not, under these circumstances, entitled to have it dismissed as of right. They are directed to file within 10 days from this date a full and complete list of their creditors as of January 9, 1914, the date when the petition was filed.

FEDERAL CEMENT CO. v. SHAFFER.

(District Court, E. D. Pennsylvania, September 15, 1916.)

No. 1467, Sept. Sess. 1915.

INTERPLEADER 5-19-INTERVENTION-LEAVE.

Plaintiff issued bonds to which were attached interest coupons. The bonds provided that ownership could be evidenced by registration. Defendant was the registered holder of the bonds, but in a bankruptcy proceeding to which he was a party he disclaimed ownership. Plaintiff refused to pay interest on demand of defendant, and filed a bill to determine the ownership. Another moved for leave to intervene, asserting title to some of the bonds and interest coupons. *Held*, that as plaintiff's only interest was in determining the ownership of the bonds, so that it could with safety pay the interest and principal, the motion for intervention should be granted.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 41; Dec. Dig. \Longrightarrow 19.]

Bill by the Federal Cement Company against William B. Shaffer. Sur motion of the Bridgewater Estate to intervene. Leave to intervene granted.

Smith, Paff & Laub, of Easton, Pa., for plaintiff. Henry C. Thompson, Jr., of Philadelphia, Pa., for petitioner.

DICKINSON, District Judge. This controversy is of an unusual character. It is not a little difficult to divine just why there should be one. The plaintiff in this bill put out an issue of its bonds. The obligation to pay interest was evidenced by interest coupons attached to the bonds. There was the usual provision by which the ownership of the bonds could be evidenced by registration. This inured to the benefit of the corporation in that the registration indicated to whom payment of interest and, when the time came, of the principal could safely be made. The obligation of a debtor to pay what he owes and the agreed interest on deferred payments is one thing. The right to demand such payment or the ownership of the obligation is another. It would seem that the concern which the obligor has with the obligation after its issue is limited to the amount of the indebtedness and to receiving a good acquittance upon payment. He is clearly not concerned with any dispute there may be between rival claimants to the ownership of the obligation further than to be protected against any danger of double payment. It would appear that the bonds affected by this dispute were registered in the name of the present defendant as the owner. This simple condition of the facts bearing upon the question of to whom payment of interest might be safely made is complicated by these further at least averred facts: The defendant, although the registered holder of the bonds, in the bankruptcy proceeding, to which he was a party, disclaimed ownership, averring the real ownership to be in his wife; assignments of the bonds, or some of them, as collateral security were at times made; like absolute assignments were also made; the wife assigned her title to the bonds to the defendant, and there may have been other things done affecting the question of the real ownership of the bonds. The corporation refused the demand of the present defendant for payment of the inter-In consequence suit was brought to enforce payment. In such an action it is clear the issue would be whether the defendant therein owed the money. If the action was by the proper legal plaintiff, a dispute between the plaintiff and a third party over which of them was entitled to the fruits of the action would not avail the defendant as a defense. If the debt was admitted, all which belonged to the defendant was protection from another demand. This could be secured through any one of the provided means of notice to the other claimant to come in and defend, compliance with the requirements of any statutory interpleader proceeding there might be, or the filing of an interpleader bill, accompanied with payment of the disputed fund into court. The present proceeding is a rather belated adoption of this lastnamed course.

The present application is for the allowance of leave to the Bridge-water Estate, an alleged collateral holder of some of the bonds, to intervene as a party. The answer is, in effect, a denial of any right in the intervener to share in the fund in court. In the view of the present defendant such right would depend upon the fact of the assignment of these particular bonds, of whether the interest had accrued before or after the assignment, and of whether the accrued interest was represented by coupons which had been transferred along with the

bonds. The petition avers an interest. The answer does not deny this, except controversially. The facts must be found before the question of the interest of the intervener can be determined. The whole issue has now narrowed itself to this very question, To whom does the money in court belong? and the proceeding is for the very purpose of bringing in all claimants.

The leave to intervene prayed for is allowed.

THE JACOB N. HASKELL,

(District Court, N. D. Florida. June 21, 1916.)

Rev. St. § 4530, as amended by Act March 4, 1915, c. 153, § 4, 38 Stat. 1165, provides that "every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended: * * * Provided, such a demand shall not be made before the expiration of nor oftener than once in five days." Held that, where a vessel remains in a port five days after one payment has been there made, the seamen are entitled to demand and receive another payment, but such payment in any case need be of one-half only of the amount earned since the last previous payment, leaving in the hands of the master one-half the wages earned during the voyage until its termination.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 123-128; Dec. Dig. €=24.]

In Admiralty. Suit by H. T. Paulsen and Alfred Wellestine against the schooner Jacob N. Haskell. Decree for libelants.

B. R. Coleman, of Pensacola, Fla., for libelants. Sullivan & Sullivan, of Pensacola, Fla., for respondent.

SHEPPARD, District Judge. This is a libel brought by H. T. Paulsen and Alfred Wellestine, members of the crew of the American schooner Jacob N. Haskell, for the full amount of their wages earned on a voyage from Newport News to Guadaloupe to Pensacola, less the sums theretofore paid on account. The seamen, after arriving in Pensacola and receiving one payment in port, claim a right under section 4530, R. S. U. S., and section 4, c. 153, Act March 4, 1915, 38 Stat. 1165, to another partial payment of wages at the expiration of five days while the vessel remains in port. The master of the ship contends that the "half part" of the wages of the seamen under the provisions of the act are payable only once in each port where the vessel takes or delivers cargo after the voyage is commenced, and after the payment of one installment of wages no other payments are demandable in that port.

After sailing from Newport News, the master of the Haskell upon arrival at Guadaloupe paid to each of the libelants a "half part" of the wages then earned. Arriving at Pensacola, the seamen made an-

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other demand for wages payable under the statute. The master of the vessel, according to his construction of the act, paid the seamen, not only a "half part" of the wages earned since the payment at Guadaloupe, but in addition one-half of that portion of the wages theretofore withheld by him at the time of the payment in Guadaloupe.

After the expiration of about five days from the date of the last payment in Pensacola, the libelants made another demand for a partial payment of wages which the master refused, on the theory that the seamen were entitled to but one payment in port. Libelants construed this refusal as a violation of the act relieving them from the obligation of further service. They left the ship and libeled in rem for their wages, less the partial payments received.

This case presents the question of whether or not the seamen were entitled on demand to receive more than one partial payment of wages in any one port at which the vessel may stop for cargo purposes, and to answer it correctly the legislative intent must be ascertained. The

pertinent provisions of the act in question are as follows:

Sec. 4530. "Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void: Provided, such a demand shall not be made before the expiration of nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. * * *"

The peculiar nature of maritime commerce requires that there should be safeguards thrown around this service to protect shipping, and to insure performance by seamen of their contracts. I am of opinion that Congress in the passage of this statute intended that the master of the ship should at all times have in his hands to the credit of the seaman a sum equal to that which has been paid to him out of the wages earned until the end of the voyage.

The act provides against the seamen making demands at intervals of less than five days, the first of which can be made after the expiration of that interval at any port where the vessel loads or discharges

cargo, after the commencement of the voyage.

The libelants were entitled on demand to receive while in port after the expiration of five days a second partial payment of wages earned since the last payment. The method of computation used by the master as above referred to is not in the view of the court warranted by the statute, and he was not called upon to pay at Pensacola a sum greater than half of the wages earned by the seamen since the last payment at Guadaloupe. On the last demand made in Pensacola he was only required to pay a sum equal to one-half the wages earned since the last payment in port.

I conclude that the seamen were within their rights in demanding a second payment while in port. They were only in error as to the amount, as likewise was the master. In refusing the partial payment, the master violated the provisions of the act, which by its express terms relieves the seamen from further obligation to service, and they are therefore entitled to recover the amount of wages due up to the time of leaving the ship, less the sum total of the partial payments theretofore received.

A decree for libelants will be entertained.

In re BOSTON FRENCH RANGE CO.

(District Court, D. Massachusetts. August 10, 1916.)

No. 22550.

BANKRUPTCY \$\infty 348-Priorities-Wages.

Where five workingmen organized a corporation, each paying in a sum of money, one of them, who was treasurer and director and also labored in the shop is not, as to his claim for compensation for services rendered as treasurer and director, entitled to priority over corporate creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. &=348.]

In Bankruptcy. In the matter of the bankruptcy of the Boston French Range Company. Proceeding by claimant to review order of referee. Order affirmed.

Frederick W. Mowatt, of Boston, Mass., for trustee. Moses Caplan, of Boston, Mass., for creditor.

MORTON, District Judge. The evidence not being reported, the referee's findings of fact are conclusive, except so far as they appear to be erroneous on the face of his report. It does not appear that the referee was in error in his findings as to the amounts for which the claimant is entitled to prove.

The question whether the claimant is entitled to priority on his later claim is more doubtful. The bankrupt corporation had several points of similarity with co-operative enterprises. Apparently five workingmen got together to organize it. Each paid in the same sum of money, \$300, and each was to work for the corporation and to be paid by it, at the same rate as the others. The claimant was treasurer and director. He was also foreman of the shop. The compensation of the members was referred to as "salaries," and was expected to be paid weekly at the established union rate of wages for journeymen in that industry. No apportionment was made on the sums paid to, or due to, the claimant, between what was owed him for work at the bench and what was owed him for services as treasurer or foreman. The duties of those positions, while probably not onerous or extensive, must have occupied an appreciable part of his time. To that extent clearly his claim is not entitled to priority. There is no finding that the claimant received no compensation for his services as treasurer or director, as there was in Re Swain Co. (D. C.) 194 Fed. 749, 28 Am. Bankr. Rep. 66. It may well be doubted whether the claimant's relation to the bankrupt was of such a subordinate character as to constitute him a "workman" or "servant."

See In re Grubbs-Wiley Grocery Company (D. C.) 96 Fed. 183, 2 Am. Bankr. Rep. 444; In re Greenberger (D. C.) 203 Fed. 583, 30 Am. Bankr. Rep. 117. I think it doubtful, as was suggested in Re Grubbs-Wiley Grocery Company, supra, whether managers of a corporation can, by hiring themselves as workmen, obtain priority over persons from whom, as managers, they have purchased goods on the corporation's account. Upon facts rather close to those here it was held in Re Crown Point Brush Company (D. C.) 200 Fed. 882, 29 Am. Bankr. Rep. 638, in an exhaustive opinion, that the claimant was not entitled to priority. See, too, Remington on Bankruptcy (2d Ed.) § 2168 et seq.

The order of the referee is affirmed.

in re PEARCE.

(District Court, D. Massachusetts. May 4, 1916.)

No. 21677.

BANKRUPTCY \$\sim 476\to Costs\to Stenographer's Fees.

Before the hearings on a petition in bankruptcy began, and while they were in progress, the petitioning creditors and the alleged bankrupt agreed that the testimony should be taken by stenographers; each party paying one-half the expense thereof. The petition was dismissed, and the alleged bankrupt sought to recover as costs the one-half of the stenographers' bill which he had paid. Held, that though no such orders were entered, the agreement must be taken as having included an implied agreement that the entire amount of the costs, including stenographic hire, should be taxed against the losing party, but such implied agreement does not entitle the bankrupt to reimbursement for the expense of a transcript of the testimony for his own use.

[Ed. Note.—For other cases see Bankruptcy, Cent. Dig. §§ 898, 899; Dec. Dig. ← 476.]

In Bankruptcy. In the matter of the alleged bankruptcy of Arthur P. Pearce. The petition was dismissed, and respondent seeks a recovery of costs. From the clerk's taxation of costs in respondent's favor, petitioners appeal. Clerk's taxation modified, and, as modified, affirmed

Barton & Harding, of Boston, Mass., for petitioning creditors. Daniel J. Kiley, of Boston, Mass., for alleged bankrupt.

MORTON, District Judge. Before the hearings began, and while they were in progress, the petitioning creditors and the respondent agreed that the testimony should be taken by certain stenographers, and that each side should pay one-half of the expense thereof. This agreement was duly carried out, payments being made from time to time as the hearings progressed. No orders were entered by the referee adjudging the appointment of a stenographer necessary, or fixing his fee. The petition having been dismissed, the respondent now seeks to recover in the costs the one-half of the stenographer's bill which he

so paid. The clerk of this court allowed the item; this is an appeal from his taxation.

In Corporation of St. Anthony v. Houlihan, 184 Fed. 252, 106 C. C. A. 394 (C. C. A. 1st Cir.), the facts as to the employment and payment of the stenographer were almost identical with those in this case. The Court of Appeals inferred from them a tacit agreement between the parties that the stenographer should be considered as employed by the auditor, and the expense thereof taxed as costs. If the referee had been an auditor in an action at law, I should be compelled, under that decision, to infer such an agreement here. I cannot see that the inference is avoided by the fact that the parties were proceeding before a referee in bankruptcy. I think it must be assumed, as was done in the St. Anthony Case, that the parties impliedly agreed that the stenographer's bill should go into the costs against the losing party. The right to tax them rests on that agreement, and is not lost by the omission to enter the formal orders, which otherwise would be fatal. But I do not think that this implied agreement would generally be understood, or ought to be construed, to cover a transcript of the testimony ordered by a party for his own use; it covers only the cost of taking the testimony and furnishing a transcript of it to the referee.

As so modified, the clerk's taxation is affirmed.

HARRIS et al. v. TAPP.

(District Court, S. D. Georgia. September 6, 1916.)

1. BANKRUPTCY \$\sim 68\$—EXEMPTION FROM INVOLUNTARY PROCEEDINGS—DATE OF FIXING STATUS.

The status of an alleged bankrupt as to his occupation is to be determined as of the date when the acts of bankruptcy charged were committed, unless the application of a different rule is required to prevent fraud, as where the debts to be proved were contracted and the property to be administered was acquired while he was engaged in a recent nonexempt occupation, which he afterward changed to an exempt occupation, in which case he will be held estopped to set up the exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 18, 86, 87; Dec. Dig. ♦==68.]

2. BANKRUPTCY \$\sim 68\$—Persons Subject to Involuntary Proceedings—Principal Occupation—"Chiefly Engaged in Farming."

An alleged bankrupt committed the acts charged as acts of bankruptcy about October 1st. Until September he had been cashier of a bank at a salary of \$1,380 per year. During the season, as for the preceding four or five years, he had operated a farm of about 500 acres two miles from the town. Until about a year before, he owned 380 acres of the farm, which he then sold, reserving its use for the next season. On the farm he employed 12 men, including a manager, and owned the equipment for running the same, consisting of horses, mules, and implements, and also all of the property thereon, consisting of live stock, grain, hay, cotton, etc. He boarded in the town, but visited the farm once or more each week, and directed its management. He also owned an interest in two or three corporations or firms, but gave them little personal attention, and received no profit therefrom. Held, that such facts supported a finding by the referee that he was "engaged chiefly in farming," and was exempt

from involuntary bankruptcy proceedings, under Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (Comp. St. 1913, § 9588).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 18, 86, 87; Dec. Dig. &==68.]

3. BANKRUPTCY \$\infty 68\$—Persons Subject to Involuntary Proceedings—Principal Occupation.

Where an alleged bankrupt is engaged in several occupations at the same time, what constitutes his principal occupation is to be determined from all the circumstances of the particular case.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 18, 86, 87; Dec. Dig. \$\simes 68.]

In Bankruptcy. In the matter of E. A. Tapp, as involuntary bankrupt. Petition of W. M. Harris and others for the adjudication. On exceptions by petitioners to report of referee. Exceptions overruled, and petition dismissed.

On the 29th day of November, 1915, Mrs. W. M. Harris, W. M. Harris, and Sutton & Purvis filed an involuntary petition in bankruptcy against E. A. Tapp, alleging in brief that the said Tapp for the greater portion of six months next preceding the date of the filing of the petition had his principal place of business and resided in Ocilla, Irwin county, Ga., and that they had provable claims against him amounting in the aggregate, in excess of securities held by them, to more than \$500; the claim of Mrs. W. M. Harris consisting of a note for \$1,000, dated January 31, 1914, and due January 1. 1915, the claim of W. M. Harris consisting of an open account in the sum of \$45 against the defendant, assigned to him by one Thomas Cribb, and the claim of Sutton & Purvis consisting of a promissory note dated November 17. 1913, on which there was a balance due of \$97.20. Petitioners alleged that said Tapp was insolvent, and that within four months next preceding the filing of the petition he committed three acts of bankruptcy, to wit: That on the 28th day of September, 1915, he executed to the First National Bank of Ocilla a mortgage for the sum of \$7,166.44, principal, upon certain personal property, to wit, 12 mules and 3 horses (describing same), and also 20 head of stock cattle, and that on the 5th day of October, 1915, he transferred to one D. L. Rogers a certain automobile, and that on the 4th day of October, 1915, he transferred to the Irwin County Produce Company 2,000 bushels of corn and 100 tons of hay; that at the time of making said transfers said Tapp was insolvent, and that said transfers were made with intent to prefer said creditors over his other creditors, and with intent to hinder, delay, and defraud his other creditors. Petitioners further alleged that said Tapp on the 5th day of November, 1915, had absconded, and had since that time concealed himself, and that his whereabouts were unknown. They also alleged that "for the greater part of six months next preceding the date of the filing of the petition said Tapp was cashier of the First National Bank of Ocilla, and that during said period his principal occupation was being cashier of said hank, and that during said period the said Tapp was also engaged in the business of running a gristmill and in the mercantile business under the name of the Irwin County Produce Company, located in Ocilla, and that the said Tapp was also engaged in the fire insurance business in Irwin county during a greater portion of said period; that the salary of the said Tapp as aforesaid was more than \$1,500 per year, and that he was not and is not a wageearner or chiefly engaged in farming."

Subpoena issued for said Tapp, but he was not located by the marshal, but was served by publication. On November 29th petitioning creditors filed a petition for a receiver, alleging that the estate of the bankrupt consisted of 15 head of mules and horses, 2,000 bushels of corn, 100 tons of hay, 250 head of hogs, one automobile, and real estate in and near Ocilla; and a receiver was duly appointed on the same date to take charge of said estate and preserve same, as provided by law. On the 20th day of December, 1915, petition-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ing creditors and the receiver of Tapp's estate filed a petition, in which they alleged: That the receiver had ascertained that there was located upon the farm near Ocilla, Ga., which had been formerly owned by the said Tapp, and which had been operated and cultivated under his direction during the year 1915, certain property, to wit, 177 head of hogs, 12 head of stock cattle and 6 calves, 10 head of mules and 2 horses, 500 bushels of corn in the ear, 9 stacks of oats, 1,100 bales of oat straw in barn, three-fourths of an acre of sweet potatoes in the field, 16 sacks of guano, 1 threshing machine, one mowing machine, 3 two-horse wagons, 5 guano distributors, 8 one-horse disc turn plows, 8 plow stocks, 4 two-horse turn plows, 8 sets of plow harness, 3 sets of two-horse wagon harness, 1 mowing machine, 1 hay rake and 100 bales of hay in barn, 20 tons of hay in barn not baled, 100 stacks of hay in field, all of which was alleged to be the property of said Tapp. That on the 9th day of September, 1914, the said Tapp owned 24 shares of stock in the Farmers' Warehouse & Gin Company, a corporation at Lax, Irwin county, Ga., and also one-third interest in the Irwin County Produce Company, a partnership, and also certain live stock of the value of \$2,500, as described in the mortgage to the First National Bank of Ocilla above mentioned, and that he also owned one-half interest in certain city lots in Ocilla of the approximate value of \$800, also mortgaged to the First National Bank of Ocilla; also one-half interest in certain real estate, of the value of \$3,000, held by said Tapp under a bond for title, which was transferred to the First National Bank of Ocilia, and also certain other real estate, of the value of \$1,000, which was conveyed to the First National Bank of Ocilla: also a certain automobile of the value of \$200. They alleged that on the same day the said Tapp was also in possession of 1,000 bushels of corn in the ear, of the value of \$750, and 75 head of hogs, not above mentioned, of the value of \$750, which property the said Tapp had transferred to the Irwin County Produce Company. They further alleged that the corn, hay, and hogs, except those which had been delivered to the Irwin County Produce Company, were claimed by J. E. Howell, that the horses, mules, and cattle were claimed by the First National Bank of Ocilla, by virtue of a mortgage held by said bank against the same, that the 1,000 bushels of corn were claimed by the Irwin County Produce Company, and that the automobile was claimed by one D. L. Rogers. Petitioners further alleged that said various claimants to said property were preparing to dispose of same and place same beyond the reach of the receiver, and prayed for an injunction against said claimants restraining them from transferring, selling, or otherwise disposing of said property. A temporary restraining order was granted upon said petition.

Said Tapp never filed any appearance or defense to the involuntary petition in bankruptcy so filed against him, or against any of the other proceedings in the case. However, on the 15th day of December, 1915, certain creditors, to wit, the First National Bank of Ocilla, the McAllister-Cook-Branch Company, a corporation, J. E. Howell, and Mrs. Mary E. Howell, filed their answer to the petition in bankruptcy against said Tapp, and objected to his adjudication. They denied that said Tapp was insolvent, or that he had committed any of the acts of bankruptcy alleged against him. They admitted that said Tapp had absconded, and that his whereabouts were unknown. They admitted that for the greater part of six months next preceding the date of the filing of the petition said Tapp was cashier of the First National Bank of Ocilla, but denied that during said year his wages amounted to as much as \$1,500 per year, and denied that his principal occupation was that of cashier of said bank. They denied, also, that during the period aforesaid said Tapp was engaged in the business of running a gristmill, or in the mercantile business, or in the fire insurance business, as alleged in said petition. They denied that said Tapp "was not and is not a wage-earner," and denied that he "was not chiefly engaged in farming." They averred that Tapp's wages as cashier were \$115 per month, or \$1,380 per year, and that he was a wage-earner within the meaning of section 4b of the national Bankruptcy Act, and they also averred that said Tapp was engaged chiefly in farming or the tillage of the soil within the meaning of the same section, and that for said reasons he could not be legally adjudged a bankrupt upon the involuntary petition so filed against him. Said responding creditors also filed their answer to the petition for injunction above mentioned, in which they averred that the transfers which were attacked by the petitioning creditors were not preferential in their nature, and were not made to hinder, delay, or to defraud creditors, but were made bona fide for a present fair consideration; that the interest which said Tapp was alleged to have in the corporations mentioned in the petition was worthless, and that his interest in some of the real estate referred to in the petition was covered by outstanding valid mortgages and security deeds to the Calvert Mortgage & Deposit Company, of Baltimore, and other loan companies, and that his equity in same was valueless, and that he had no interest whatever in the remainder of the real estate described in the petition.

Thereafter the issue made by the involuntary petition in bankruptcy and the defense filed thereto by the objecting or responding creditors was referred to Jas. F. McCrackin, Esq., one of the referees in bankruptcy of the court, as special master, who had several hearings upon same. At one of these hearings, two other creditors of the alleged bankrupt, to wit, Wilcox, Ives & Co. and T. M. Purvis, duly filed their intervention, and were allowed to join in the involuntary petition aforesaid, asking for the adjudication of said Tapp. The said Wilcox, Ives & Co. held a note against said Tapp, dated April 29, 1914, upon which there was a balance due of \$400, and the said T. M. Purvis held a note against said Tapp for the sum of \$200, dated December 10, 1914.

The special master duly filed his report, accompanied by a transcript of the evidence in question and answer form, consisting of 157 typewritten pages, and also a summary of said evidence, consisting of 45 pages, together with the documentary evidence introduced on the hearing of the matter. The special master found with the petitioning creditors as to the insolvency of the defendant, and as to the right of the petitioning creditors to file the petition, and he also found that the mortgage upon the live stock executed by the defendant on the 28th day of September, 1915, to the First National Bank of Ocilla, was an act of bankruptcy; that the transfer by defendant of the automobile to D. L. Rogers on the 5th day of October, 1915, was not an act of bankruptcy; and that the transfer of the corn and hay to the Irwin County Produce Company on the 4th day of October, 1915, was an act of bankruptcy. However, the special master, after reviewing the evidence, concluded that the defendant was chiefly engaged in farming or the tillage of the soil within the meaning of section 4b of the Bankruptcy Act, and therefore was not subject to adjudication, and recommended that the objections of the responding creditors be sustained and the petition dismissed. To this report the petitioning and intervening creditors duly filed their exceptions, alleging that the special master erred in finding that the defendant, Tapp, was engaged chiefly in farming or the tillage of the soil, and contending that the evidence taken as a whole showed that the defendant was not chiefly engaged in farming or the tillage of the soil, either at the time when the debts of petitioning and intervening creditors were contracted, or at the time of the commission of the acts of bankruptcy, or at the time of the filing of the involuntary petition in bankruptcy against him.

Quincey & Rice, of Ocilla, Ga., and Patterson & Copeland, of Valdosta, Ga., for petitioning creditors.

E. K. Wilcox, of Valdosta, Ga., and Rogers & Rogers, of Ocilla, Ga., for objecting creditors.

LAMBDIN, District Judge (after stating the facts as above). This matter is now before me upon exceptions filed by the petitioning creditors to the report of the special master, in which he found that the alleged bankrupt was chiefly engaged in farming or the tillage of the soil, and therefore not subject to adjudication. The alleged bankrupt absconded about the 5th day of November, 1915, and has not since been heard from, and the involuntary petition in bankruptcy was filed against him on the 29th day of November, 1915, to which he made no

response, and the contest here is between two sets of creditors, one claiming that he is subject to adjudication upon their petition, and the other claiming that he is not—all the other questions in the case having been resolved by the special master in favor of the petitioning creditors.

The question raised by the exceptions is a close one and not free from difficulty. The evidence in the case disclosed the following facts: During the year 1915, the defendant, Tapp, had a great many "irons in the fire." He had been cashier of the First National Bank of Ocilla for four or five years, and had also owned and operated a farm for the same period, consisting of 380 acres, about two miles from Ocilla, Ga. In December, 1914, he had sold this farm, but had reserved the right to use and operate the same for the year 1915. In addition to this farm, he had rented for the year 1915 what is known as the Sintell place, consisting of 125 acres. The two tracts of land joined each other, and were operated during the year 1915 by an overseer under the direction and control of the defendant. He ran 10 plows, and regularly employed 11 laborers on this farm, and had ample farming implements, consisting of plows, both single and two-horse plows, wagons, hay rake, five guano distributors, stump pullers, a mowing machine, a threshing machine, and other necessary farming implements. There were six tenant houses on the farm, and two large dwellings; but the defendant, who was not a married man, boarded in Ocilla. He raised on this farm during the year 1915 the usual farm crops, including corn, cotton, oats, hay, peas, velvet beans, watermelons, cantaloupes, sugar cane, potatoes, etc. During said year, he raised 5,000 or 6,000 bushels of oats, from 900 to 1,500 bushels of corn, between 40 and 50 bales of cotton, some 600 or 800 bales of oat straw, a lot of peanuts, velvet beans, sugar cane, and potatoes, and he also raised and shipped 1½ cars of watermelons and 2½ cars of cantaloupes. He had on the farm over 200 head of hogs, 10 or 12 head of cattle, 10 mules, and 2 horses. After Tapp left the country, on November 5, 1915, all the hay, corn, and other stuff was still on the farm, except what had been sold to the Irwin County Produce Company, and likewise all the farming implements, mules, cows, horses, and hogs, which fact is also shown by the petition which the creditors filed, asking for the appointment of a receiver to take charge of said property. After Tapp left, there were also on hand some 8 bales of cotton, which had been picked out, and 1,900 or 2,000 pounds of seed cotton in the field, which were subsequently ginned and sold.

During the year 1915, he was also cashier of the First National Bank of Ocilla, as he had been for several years previously; but he resigned in August, and was relieved from his duties as cashier on September 7th. For the year 1914 he was paid a salary of \$150 per month, but on January 1, 1915, his salary was reduced to \$115 per month, and so remained until he left the bank in September. The defendant also had 24 shares of stock in the Farmers' Warehouse & Gin Company, of Lax, Ga., being treasurer of the company, but did not manage the business, or have anything to do with its management. He helped to finance the company by securing a loan to it from his

bank. The stock in the company was worthless. It does not appear

when this company was organized.

Tapp was also a member of a firm called the Irwin County Produce Company, the other members being D. L. Rogers and J. R. York. This company was formed on March 1, 1915, and the real purpose of the company, as shown by the evidence, was to handle the produce from Tapp's farm. Each partner paid in \$50 apiece. The company also handled guano, taking same on consignment from the wholesale dealers. and selling same to farmers, about \$9,000 or \$10,000 worth of guano being thus sold. Mr. York managed the business entirely, and no profits were ever made by the company. In August, 1915, Tapp sold his interest in the Irwin County Produce Company to J. R. York, with the exception of his responsibility to the guano companies; but afterwards he transferred a lot of corn and hay to the Irwin County Produce Company in consideration of their relieving him of responsibility to the guano dealers. After Tapp severed his connection with the bank, the only service he rendered the Produce Company was to aid in the collection of the outstanding guano notes. He stated to Mr. York, the manager of the company, that he would be in Ocilla for something like two or three months, and he agreed to aid in the manner aforesaid at a nominal salary of not over \$40 per month.

He was also connected with what was known as the City Loan & Insurance Company, which was a partnership composed of Tapp and one Roy Cadwell. This company acted as agent in writing insurance and in negotiating loans, but only made a few loans, not over 10 or 12. The company did not do much business, and Mr. Tapp gave no

attention to the business, and received no income from same.

[1] 1. Such in brief were the pursuits and activities of the defendant, and the question to be decided by the court is whether the defendant was a wage-earner, or chiefly engaged in farming or the tillage of the soil, so as to exempt from adjudication, within the meaning of section 4b of the Bankruptcy Act. The first question is as to when the status of the alleged bankrupt is to be determined, whether at the time the petition was filed, or at the time the acts of bankruptcy were committed, or at the time the debts of the petitioning creditors were contracted. The language of section 4b of the Bankruptcy Act is as follows:

"Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act."

This section is silent as to when the status of the person proceeded against in involuntary proceedings is to be determined, and the authorities are not uniform on this point—some courts holding one way and some another. See Collier on Bankruptcy (10th Ed.), pages 127, 128 and 129, and cases cited in notes. Some courts of high authority hold that the liability of the defendant to adjudication in involuntary proceedings depends upon his occupation at the time his indebtedness

was contracted. The District Court in Pennsylvania in the very well reasoned case of Tiffany v. La Plume Condensed Milk Co., 141 Fed. 444, 15 Am. Bankr. Rep. 413, took this position, as also did the District Court in California (In re Wakefield, 182 Fed. 247, 25 Am. Bankr. Rep. 118), and the District Court in Alabama (In re Crenshaw, 156 Fed. 638, 19 Am. Bankr. Rep. 502, and In re Burgin, 173 Fed. 726, 22 Am. Bankr. Rep. 574). There is much force in the reasoning of these distinguished courts in each of the cases above cited, and in the particular cases there involved, no doubt the decisions rendered were sound. As stated by Judge Grubb (In re Burgin, supra):

"The status of an alleged bankrupt as to his occupation is to be determined as of the period when he contracted the debts to be proved and acquired the property to be administered, and, where he was at that time engaged in mercantile pursuits he cannot defeat the operation of the law by thereafter engaging in an exempt occupation."

The view that the status of the alleged bankrupt is to be determined as of the date when his debts were contracted is not, however, the general rule on the subject, but is, in our opinion, only to be adopted when the equities of the case require such a construction, being based on the equitable idea that the exemption from involuntary proceedings allowed by the statute was not intended as a "means of escape for insolvents whose property was acquired and whose debts were incurred" in a recent nonexempt occupation. In such a case, upon the doctrine of estoppel, the bankrupt should not be heard to set up such exemption. The bankruptcy law should not be made an instrument of fraud. However, in this case under consideration, it does not appear that the debts owed by the defendant were contracted or the property sought to be administered was acquired while Tapp was pursuing a nonexempt occupation.

Bankruptcy proceedings are drastic in their nature, as they consign the bankrupt to a civil death and then administer the estate of the deceased, and therefore the jurisdiction of the court over the alleged bankrupt should be made clearly to appear before an adjudication can be made. The burden is on the petitioning creditors to show that the defendant is subject to adjudication. So far as appears to the court from the evidence in the case, the property which the court is asked to administer consists chiefly, if not entirely, of property connected with the farming operations of the defendant, namely, a lot of horses, mules, hogs, cattle, corn, hay, oat straw, and other farm produce, and a large lot of farming implements, etc. Nor does it appear that the debts contracted by the defendant were contracted while he was engaged in a nonexempt occupation or in the furtherance of such an occupation. The purpose for which the debts of the original petitioning creditors were incurred does not appear from the evidence, nor does it appear why the defendant incurred the indebtedness due to T. M. Purvis, one of the intervening creditors. It appears from the evidence that the debt due to Wilcox, Ives & Co. was for guano, and that onehalf of this guano was used on defendant's farm. It appears from the evidence that the indebtedness due to the McAllister-Cook-Branch Company, one of the responding creditors, was for farming implements bought by defendant for use on his farm, and the indebtedness due to the First National Bank of Ocilla was for a shortage while he was cashier of that bank, and the other debts appearing in the record against the defendant were for various forgeries and defalcations committed by him, and for which indictments were found, but it does not appear how the money raised by these illegal acts was used. In order for the petitioning creditors to take advantage of the equitable principle of estoppel laid down by Judge Grubb in the Burgin Case, it is necessary for them to show clearly that the defendant contracted the debts due by him and acquired the property sought to be administered by the court while he was in a nonexempt occupation, and this, in the opinion of the court, they have failed to do.

The court is of the opinion, however, that, as a general rule, the status of an alleged bankrupt should be determined with reference to his occupation at the time the alleged act of bankruptcy is committed. Such is the ruling of the Circuit Court of Appeals of the Sixth Circuit in the case of Flickinger v. First National Bank of Vandalia, 145 Fed. 162, 76 C. C. A. 132, 16 Am. Bankr. Rep. 678, in which Circuit

Judge Severens, speaking for the court, said:

"A majority of the court is inclined to think that the statute should be regarded as having reference to the conditions existing at the time when the act of bankruptcy is committed."

The Circuit Court of Appeals in this case reversed on appeal an order of the District Court below, adjudging Flickinger a bankrupt. The petitioning creditors applied to the Supreme Court of the United States for a writ of certiorari to the Circuit Court of Appeals, which writ was denied, as may be seen by reference to First Nat. Bank of Vandalia v. Flickinger, 203 U. S. 595, 27 Sup. Ct. 783, 51 L. Ed. 332. The law on this point may therefore be regarded as settled, as the above-stated ruling of the Circuit Court of Appeals of the Sixth Circuit had the sanction of the Supreme Court of the United States.

The Circuit Court of Appeals of the Fourth Circuit laid down the same rule in the case of Counts v. Columbus Buggy Co. et al., 210 Fed. 748, 127 C. C. A. 298, in which Circuit Judge Pritchard said:

"The matter must be determined solely as respects the time of the commission of the alleged act of bankruptcy."

The Circuit Court of Appeals of the Fifth Circuit seem to have had the same idea in mind in its decision in the case of Olive v. Armour & Co., 167 Fed. 517, 93 C. C. A. 153, 21 L. R. A. (N. S.) 109. See also In re Folkstad (D. C. Montana) 199 Fed. 363, 29 Am. Bankr. Rep. 77; Virginia Chemical Co. v. Shelhorse, et al. (C. C. A. 4th Cir.) 228 Fed. 493, 143 C. C. A. 75, 35 Am. Bankr. Rep. 720.

Indeed, counsel for the petitioning creditors in the very able brief which they filed in this case seem to concede that the status of the defendant was to be determined as of the time of the alleged acts of bankruptcy. This may, therefore, be regarded as the general rule on the subject, and we see nothing in the evidence to take the case out of this general rule.

[2] 2. The next question, therefore, in this case, is whether or not the defendant at the time of the commission of the acts of bankruptcy,

to wit, on September 28 and October 4, 1915, was a wage-earner or was chiefly engaged in farming or the tillage of the soil, within the meaning of section 4b of the Bankruptcy Act. On a review of the entire evidence in the case, and considering all the pursuits and activities of the defendant, the special master came to the conclusion that the defendant was chiefly engaged in farming, and therefore not subject to adjudication. It has not been made to appear to the court that this finding was erroneous.

From the facts stated in the first part of this opinion it appears that while the defendant was connected with the City Loan & Insurance Company, the Farmers' Warehouse & Gin Company, and the Irwin County Produce Company, he devoted very little time to these business ventures, and derived no income from same. These ventures seem to have been entirely "side lines" with him. They were managed entirely by other persons, and the defendant took no part in the management of same. During the first part of the year 1915, and up to September 7th, he was employed by the bank as its cashier at a salary of \$115 per month, which was at the rate of \$1,380 per year, and in this capacity was a wage-earner, as defined by section 1 (27) of the Bankruptcy Act, which defines a wage-earner to be:

"An individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year." (Comp. St. 1913, § 9585.)

As such wage-earner, under the provisions of said Bankruptcy Act, he would not be subject to adjudication. However, while he was thus engaged as cashier, he was at the same time engaged in the farming operations above described, which must be conceded to be on a somewhat large scale, and he continued to be engaged in these farming operations after he left the bank and up to the time he absconded, on November 5, 1915. It is true he did not live on his farm, but boarded in town. Yet he kept in constant touch with his farm, and it was under his active supervision. It is true he had an overseer employed, who looked immediately after the farming operations, yet this overseer reported to the defendant, and kept him informed of what was going on at the farm, and took his orders from Tapp. The evidence shows that Tapp went out to the farm every Sunday, and walked over and inspected the same, and would also go out on holidays, and would sometimes go out during the week, before or after banking hours. He was in constant communication with his overseer also by telephone, and he saw after buying the supplies for his farm, and paid off his laborers on orders from the overseer, and he also bought all the machinery, supplies and farming implements. These farming operations also had the element of permanency, as he had been operating this farm for four or five years. The overseer testified as to the visits of the defendant to the farm and how he supervised same; and Mr. Cross also testified that he went with the defendant to the farm about once a week, often before and after banking hours during the week, and that they went together nearly every Sunday morning, and that Tapp would then walk over the farm and inspect it and instruct the overseer; that some weeks he went two or three times during the week, and at other

times once: that he went either early in the morning or late in the afternoon, out of banking hours, and that the overseer was not on the farm every time Mr. Tapp visited same. Mr. Austin, the mayor of Ocilla, also testified that he went to the farm a great many times during the week with Mr. Tapp after the bank closed, and heard him give directions as to the farming operations; that he went once a week during the week in the summer and fall, and that in October, after he left the bank, the defendant was having a large barn, 50 by 100 feet, built on the farm, for the purpose of storing hay and other farm produce. J. A. Wyche, who ran a garage in Ocilla, testified that he went with the defendant to his farm nearly every Sunday for the past two years, and that the last time he went Mr. Tapp was giving instructions to his overseer for sowing oats for the year 1916, which was after he left the bank, and just before he absconded. It appears that after he left the bank and until he absconded he was giving continual attention and oversight to his farming operations, gathering, storing, and selling his cotton, hay, corn, and other produce, and that all his farming implements and live stock, in the way of horses, mules, hogs, cattle, etc., were still on the place when he left, as well as a lot of hay and a lot of cotton and potatoes in the field. The defendant's farming operations, considering the number of acres cultivated, the number of hands hired, the number of mules and horses used, the number of live stock on the place, and the amount and value of the crops, etc., were upon quite a large and extensive scale, and the investment of money made by him in his farming operations, agricultural implements, live stock, and other property connected therewith, as disclosed by the evidence, was very much larger than his investment in all his other ventures put together. Indeed, his other investments outside of his farm were quite insignificant in comparison. So far as shown by the evidence, the entire property sought to be administered by this court consists of the crops raised on the farm, the farming implements, the horses and mules used on the farm, and the cattle and hogs on same. and the alleged acts of bankruptcy were with reference to transfers of this property.

In view of all this evidence, the court is of the opinion that the special master did not err in finding that the defendant was chiefly engaged in farming or the tillage of the soil at the time of the commission of the acts of bankruptcy. The special master had the witnesses before him, and received his impressions as to their credibility from their manner of testifying, etc., and his finding is therefore entitled to great weight with the court. In the Flickinger Case cited above, 145 Fed. 162, 76 C. C. A. 132, 16 Am. Bankr. Rep. 678, the facts were somewhat similar, as the defendant did not live on his farm, but only visited same once or twice a week, and also occasionally telephoned his directions to the manager, being engaged at the same time in the business of manufacturing wheels, and after he ceased his manufacturing business he continued to look after his farm in the same way, and the Circuit Court of Appeals there held that he was "chiefly engaged in farming." within the meaning of the statute.

[3] No single factor or element is determinative of the question, and yet each must be given due weight in arriving at a conclusion. The

amount of money invested in the enterprise, the time given to same, the amount realized therefrom, the permanency of the business, the reliance placed upon the business as a means of livelihood, etc., are all elements entering into a decision of the case, but no one of them is decisive of the question. Each case must be decided upon its particular facts. Where the defendant is engaged in several occupations at the same time, as stated by the Circuit Court of Appeals of the Ninth Circuit in the case of American Agricultural Chemical Co. v. Brinkley, 194 Fed. 411, 114 C. C. A. 373, 27 Am. Bankr. Rep. 438:

"All the debtor's activities and pursuits must be considered as a whole in passing upon the question."

In this case, therefore, keeping all the circumstances surrounding the debtor in mind, and considering all his activities and pursuits as a whole, the court is of the opinion, from the evidence appearing in the record, which it has carefully read, both in the question and answer form and in the narrative form prepared by the special master, that the defendant was chiefly engaged in farming or the tillage of the soil, within the meaning of the Bankruptcy Act, and therefore not subject to adjudication. Gregg v. Mitchell, 166 Fed. 725, 92 C. C. A. 415, 20 L. R. A. (N. S.) 148, 16 Ann. Cas. 510; Sutherland Medicine Co. v. Rich, 22 Am. Bankr. Rep. 85; In re Terry (D. C.) 208 Fed. 162; In re Dwyer (C. C. A. 7th Cir.) 184 Fed. 880, 107 C. C. A. 204; Wulbern v. Drake (C. C. A. 4th Cir.) 120 Fed. 493, 56 C. C. A. 643; Couts v. Townsend (D. C.) 126 Fed. 249.

- 3. Even if the defendant should not be considered as being chiefly engaged in farming, it appears from the evidence that up to September 7th he was a wage-earner, being employed until that date in the First National Bank of Ocilla at a salary of less than \$1,500, and that after September 7th he worked with the Irwin County Produce Company, according to the testimony of its manager, Mr. York, during the period when he is alleged to have committed the acts of bankruptcy declared upon in this case and up to the time he absconded, as an employé of the Irwin County Produce Company at a salary of \$40 per month, and assisted in collecting the guano notes due that company, while at the same time he was winding up his farming operations for the year. This would also make him a wage-earner from the time he left the bank until the time he left the country, if his farming operations are to be ignored, his other lines of business being entirely negligible, as above stated.
- a. It would seem, also, that petitioning creditors and interveners should be bound by the allegations of their petition. In their petition they allege that:

"For the greater part of six months next preceding the date of the filing of the petition the said Tapp was cashier of the First National Bank of Ocilla, and during said period his principal occupation was being cashier of said bank, but during said period the said Tapp was also engaged in the business of running a gristmill and the mercantile business under the name of the Irwin County Produce Company. * * * He was also engaged in the fire insurance business during the greater portion of said period. The salary of said Tapp as aforesaid was more than \$1,500 a year, and he was not and is not a wage-earner or chiefly engaged in farming."

It appears from this quotation from the petition that petitioners depended for their case upon establishing the allegation that for the greater portion of six months prior to the filing of the petition the defendant's occupation was being cashier of a bank at a salary of more than \$1,500 per year, and therefore they expected to secure his adjudication by proving this fact. It developed on the trial, however, that at no time during the year 1915 did the defendant receive a salary of more than \$115 per month, which was at a rate of less than \$1,500 per year. They therefore failed to prove their case as laid. However, it is the view of the court that in no event, under the pleadings and the evidence, is the defendant subject to adjudication as a bankrupt, and an order may therefore be taken dismissing the petition, with costs against the petitioning creditors and interveners.

AMERICAN SPECIALTY CO. v. COLLIS CO.

(District Court, S. D. Iowa, Davenport Division. August 24, 1916.)

1. Sales \$\iiiisthermoldsymbol{\iiiist} 417\top-\text{Failure to Deliver} \topDamages \top \text{Evidence} \top \text{Sufficiency.} In an action for damages for failure to deliver goods according to contract, where plaintiff asserted that defendant's breach caused it to cancel a number of orders and plaintiff was entitled to recover only for some of the orders canceled, damages cannot be awarded on evidence as to the gross sum lost on all the orders canceled.

In the case of infringement of a technical trade-mark, the intention of the infringer is immaterial as fraud will be presumed, but in case of unfair competition the intent is essential; the gist of the action being fraud on the part of defendant in attempting to beguile the public into buying his goods as those of his rival.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 1041/2; Dec. Dig. \$23(1).]

3. Trade-Marks and Trade-Names 579-Registration-Effect.

Where, after institution of a suit for unfair competition, plaintiff registered its trade-mark, any rights acquired by virtue of the trade-mark must be asserted in a separate suit.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 89, 90; Dec. Dig. \$\$79.]

4. TRADE-MARKS AND TRADE-NAMES \$\infty\$11—Expiration of Patent—Name of Patented Article.

On expiration of a patent, the patentee is not entitled to the exclusive use of the name of the patented article, where such name is descriptive of the article, for that would, in effect, be continuing the monopoly of the patent; therefore, where plaintiff's patent for drills, known to the trade as "Use-Em-Up" drills, which term was descriptive, had expired, plaintiff has no exclusive right to the use of the term.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 15; Dec. Dig. ⊗ 11.]

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes $235~\mathrm{F.}{-}59$

5. Thade-Marks and Trade-Names \$\infty 77\to Unfair Competition\to What Constitutes.

An employe of plaintiff, the manufacturer of a patented article, was dismissed shortly before the patent expired. He thereupon entered the service of defendant, which, on expiration of the patent, began manufacturing the article, and, using knowledge gained while in the employ of plaintiff, such employe made sales to plaintiff's old customers. Held that, while an employe cannot, having left his employment, use, in competition with his old employer, a list of patrons secured by means of the employment, where the employer has expended time, money, and labor in securing the patrons, yet as it must be presumed that the manufacturer of a patented article, having a monopoly, secured all the customers for that article, such employe may approach plaintiff's old customers.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 87; Dec. Dig. & 77.]

6. TRADE-MARKS AND TRADE-NAMES \$\infty 77\to Unfair Competition\to What Constitutes.

Where defendant wrote letters to the trade before the expiration of plaintiff's patent, urging them by means of mysterious and veiled allusions not to further patronize plaintiff, such letters, although defendant might have stated that the patent was soon to expire and it was about to enter into the business of manufacturing the patented article, constitute unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 87; Dec. Dig. ⊗ 77.]

7. Trade-Marks and Trade-Names —98—Unfair Competition—Damages.

Though letters written by defendant to the trade, urging persons not to patronize plaintiff, were unfair, substantial damages cannot be awarded without proof of the injuries flowing from such letters, for a party, to recover damages, must not only show injury, but prove the amount of the damage.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. ⊗ 98.]

8. TRADE-MARKS AND TRADE-NAMES \$\iiing\$ 98—Unfair Competition—Accounting

Despite defendant's unfair methods, an accounting will not be directed, where there is no evidence indicating a possibility of tracing out and ascertaining the effect of such unfair methods and the amount of the damage.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. \$ -98.]

In Equity. Suit by the American Specialty Company against the Collis Company. Decree for complainant for nominal damages as to some of the items in suit.

Lane & Waterman, of Davenport, Iowa, and Wm. R. Rummler, Charles W. Hills, and Frederic R. De Young, all of Chicago, Ill., for complainant.

L. F. Sutton and Wolfe & Wolfe, all of Clinton, Iowa, for respondent.

WADE, District Judge. There are several separate, independent causes of action presented in the plaintiff's bill and amendments thereto. These may be designated as: First, an action for damages based upon the failure of the defendant to deliver goods, as required by the contract between the parties; second, an action to enjoin the defendant

ant from the use of the term "Use-Em-Up" as descriptive of the drill sockets to be manufactured and sold by it; third, an action to enjoin the defendant, based upon the claim of unfair competition in the use of the term "Use-Em-Up" and in the service of one C. M. Weaks, a former employé of the plaintiff, and in the use of certain letters, and in the use of the names of the customers of the plaintiff; fourth, action for accounting based upon the alleged unfair competition.

[1] First. As to the damages claimed because of failure to deliver goods under contract. In my view of the record, it is needless to go into the terms of the contract, or the question of the termination thereof, or the other questions relating to nondelivery, or the reasons therefor. Under the peculiar conditions in this case, as shown by the evidence, I am satisfied that for a large part, if not during all of the period claimed for, it was the duty of the plaintiff, upon failure of delivery, to have procured the drill sockets from some one else, if possible, with reasonable effort. There is no showing but what they could have been procured somewhere else. In fact it affirmatively appears that, during part of the period claimed for, the plaintiff was procuring them from some other manufacturer, and there is no explanation offered as to why sufficient were not procured to fill orders so as to prevent cancellation thereof, as claimed. Even if the evidence showed, as to part of the period, that the articles could not be procured, there is no proof from which the court could determine the amount of damages for any particular order; the testimony as to damages being a gross sum for the entire number of orders claimed to have been canceled.

Then, again, a number of the orders claimed for were taken long after the termination of the relations of the parties under the contract,

upon any theory of the case.

I am satisfied that the plaintiff had no right to rely upon the defendant to furnish drill sockets after the expiration of the period of 60 days after the August letter; yet some of the orders claimed to have been canceled are in November and December, 1915, and January and February, 1916; and, as above stated, the only damage testified to was the gross amount of profits on a certain number of orders, for many of which, under any theory of the case, the defendant would not be liable. So, without discussing or determining the exact time when the obligation of the defendant to deliver expired, or the alleged justification for refusal to deliver, relied upon by defendant, there can be no recovery in this case for failure to deliver in accordance with the terms of the contract.

[2-4] Second. Can the defendant be enjoined from the use of the term "Use-Em-Up"? I have again reviewed the authorities upon this question. Counsel in argument confuse the question of unfair competition and infringement of a trade-mark. This distinction is well stated in Goldsmith v. Savage, 229 Fed. 623, 144 C. C. A. 33, in which the court says:

"In the case of infringement of a technical trade-mark the intention of the infringer is immaterial, as the essence of the wrong lies in the injury to a property right; while in the case of unfair competition the intention is ma-

terial, to establish fraud on the part of the defendant in the use of the imitative device to beguile the public into buying his goods as those of his rival. In the former case fraud, if material, is presumed; while in the latter the complainant must prove a fraudulent intent, or show facts and circumstances from which it may reasonably be inferred. In either case, however, it must be shown that the dress or device employed by the defendant is such that it has deceived, or is calculated to deceive, ordinary purchasers, buying with usual care, and that they have purchased, or will probably purchase, the goods of the defendant under the mistaken belief that they are those of the plaintiff, to the serious damage of the latter. McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828; Regis v. Jaynes, 185 Mass. 458, 460, 70 N. E. 480; Paul on Trade-Marks, §§ 196, 280."

There is no question in this case of trade-marks except in so far as it is sought to be injected by a motion to permit proof of the opinion of the Commissioner of Patents of date June 30, 1916. But there is no issue in the pleadings as to any rights arising under a registered trade-mark. The rights of the parties must be determined with relation to the facts as they existed prior to the registration of the trademark, and if the plaintiff has acquired any rights by virtue of the trade-mark registered since the commencement of this action, they will have to be asserted in a separate suit, founded upon rights since accruing. The motion for leave to introduce the opinion is therefore denied. In fact I apprehend that the court will take judicial notice of the opinions of the Commissioner without any proof.

I still adhere to the views I held when I made the interlocutory order; that the expiration of the patent, not only gave the public the right to manufacture the drill socket, but also gave it the right to use the name by which, according to the record, it was known to the trade. I think the principle involved is forcibly set forth by Justice White in Singer Manufacturing Co. v. June Manufacturing Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. So far as the record shows, this drill socket had, during the life of the patent, no other designation by which the public became familiar therewith, except the term "Use-Em-Up." From the nature of the article and its use, the term has some significance.

The monopoly of the patent having terminated, it is the policy of the law that the monopoly should terminate, and that the public should have freedom to manufacture, purchase, or use the drill socket. The term "Use-Em-Up" being the only one, so far as the record shows, by which the drill socket has been designated and known to the trade, if the plaintiff can retain the exclusive use of the term, it may be a long period before the public can acquire knowledge of the fact that others are manufacturing the same drill socket. The very purpose of the plaintiff in its attempt to protect itself in the exclusive use of the term is to enable it to continue the monopoly which it has had under its patent, at least for a period of time. Quoting from Singer Manufacturing Co. v. Stanage (C. C.) 6 Fed. 279, Justice White, in Singer Co. v. June Co., supra, says:

"The plaintiff and its predecessors had, in connection with others, through patents, a monopoly as to certain sewing machines, known as the 'Singer' machines. When these patents expired every one had an equal right to make and vend such machines. If the patentees or their assignees could assert

successfully an exclusive right to the name 'Singer' as a trade-mark, they would practically extend the patent indefinitely."

Justice White further says:

"It equally follows, from the cessation of the monopoly and the falling of the patented device into the domain of things public, that along with the public ownership of the device there must also necessarily pass to the public the generic designation of the thing which has arisen during the monopoly, in consequence of the designation having been acquiesced in by the owner, either tacitly, by accepting the benefits of the monopoly, or expressly, by his having so connected the name with the machine as to lend countenance to the resulting dedication. To say otherwise would be to hold that, although the public had acquired the device covered by the patent, yet the owner of the patent, or the manufacturer of the patented thing, had retained the designated name which was essentially necessary to vest the public with the full enjoyment of that which had become theirs by the disappearance of the monopoly. In other words, that the patentee or manufacturer could take the benefit and advantage of the patent upon the condition that at its termination the monopoly should cease, and yet when the end was reached disregard the public dedication and practically perpetuate indefinitely an exclusive right. The public having the right on the expiration of the patent to make the patented article and to use its generic name, to restrict this use, either by preventing its being placed upon the articles when manufactured, or by using it in advertisements or circulars, would be to admit the right and at the same time destroy it. It follows, then, that the right to use the name in every form passes to the public with the dedication resulting from the expiration of the patent. Nor is this right governed by different principles where the name, which has become generic, instead of being an arbitrary one, is the surname of the patentee or original manufacturer. It is elementary that there is a right of property in a name which the courts will protect. But this right, like the right to an arbitrary mark or any other, may become public property by dedication or abandonment."

The court, in Buffalo Specialty Company v. Van Cleef, 227 Fed. 391, 142 C. C. A. 87, relied upon by counsel for plaintiff, expressly recognizes the rule announced by Justice White, and points out the distinction in the following language:

"Since the bill does not admit, and the answers to interrogatories do not affirm, that the genus or appellant's species was patented, or that no other makers were in the market, it must be taken, as against the motion to dismiss, that every one was free to manufacture and sell tire fluids, even appellant's, if the secret formula could be learned, and that many brands under distinctive names and marks were on the open market during this period. So it is evident that appellant acquired a property right in the use of 'Neverleak,' and still has it, unless it has been forfeited by appellant's subsequent conduct."

The distinction between this case and the one at bar is that the name "Neverleak" was applied to a substance which never was patented, and the name was the only monopoly which the producer had. The government had granted him no monopoly, and there was no dedication of the name to the public which could be used by the public after the expiration of a patent.

I, therefore, hold that, inasmuch as this term is the only one by which the patented article was known to the public, and the only term by which the public, inquiring for the article, could describe it, the public has the right to use the name, and that the termination of the plaintiff's monopoly under the patent, terminated his monopoly under the name by which alone the patented article was known.

Of course this use of this name must be restricted as indicated in Goldsmith Co. v. Savage, supra. It cannot be used in such a manner as to deceive the public into believing that it is purchasing an article produced by the plaintiff, and this, I think, has been done in the form in which they are advertising the drill socket. It clearly appears that it is not produced by the plaintiff, and it does not appear that the form used resembles in any manner any form heretofore used by the plaintiff.

[5] Third. As to unfair competition. I have already disposed of

the question as to the use of the term "Use-Em-Up."

As to the employment of Weaks, it must be borne in mind that it is the policy of the law to permit the greatest freedom of employment and service possible, consistent with honesty in dealing with competitors. It is common practice, which has never been condemned by the court, for men employed in certain lines of activity to seek to better their condition by entering the employment of competitors of their employers; and it is also common practice, which has not been condemned, that men who acquire a certain knowledge and efficiency in a certain employment do make efforts to get established in a business of their own. To do this, they frequently associate with them men who furnish the capital, while the experienced men furnish the ability; and, in the absence of contract with his employer, there is no reason why, when such opportunity appears, an employé should not seek that advancement in life, without opportunity for which ambition would die, and progress in the commercial and industrial world cease. The employé who leaves one employer to work for a competitor, or who leaves an employer to establish a business of his own, carries with him much knowledge which he acquired in his former employment, and carries with him an acquaintance with the business world which is an asset to him; and it has never been held, so far as I know, that he cannot utilize this knowledge and acquaintance in his new employment.

There are certain restrictions, however, which common honesty imposes, and one is that he cannnot take the trade secrets of his former employer and use them to his own advantage, or to the advantage of his new employer. And lists of customers have, in certain cases, been held to be within the rule prohibiting the use of trade secrets, but they are exceptional cases—cases in which the customers have been secured by special effort, as in the sale of tea or coffee direct to the consumer. Tea and coffee are staple articles sold everywhere; but the usual method is for the purchaser to go to the seller. Other systems have been adopted which reverse the usual order, where a seller goes to the buyer with his goods, and it takes time and effort to establish this new method, and apparently only a comparatively small number of people are converted to this new method and become regular customers of the seller. The time and effort exerted, and the money expended in culling out of a neighborhood or community those who will adopt this manner of purchase, is an investment by the man who does it, and the results belong to him, and the employé who in his employment acquires his knowledge of these particular persons has no right, after the work has been done and the money expended, to go out and for himself or some one else take advantage of the knowledge thus acquired, to destroy the established business of his former employer.

But this is a different case. Here is a patented article which has not been sold, so far as the evidence shows, direct to the user, but has been sold in the ordinary course of business to the jobbers of the country. The record does not disclose that the means employed to procure customers were different from those of the ordinary manufacturer. He advertises his goods; sends out traveling men to the trade; in case of a patented article, the manufacturer has the exclusive field, so that every one who is to use the article must buy from him or from some one who has bought from him. The time and effort expended is not expended directly in getting customers—it is expended in trying to prove the value of the thing manufactured. He has all the customers there are in existence, and we may assume, where, as in this case, the article has been upon the market for a large number of years, and advertised and "pushed," as claimed by the plaintiff, that he has all the customers there will be. In the nature of things, he probably has covered the field, and has probably upon his list of customers all those jobbers whose trade extends into communities where these drill sockets are of particular advantage. The drill socket is not like tea or coffee, an article which is used everywhere, and where it is merely a question of competition between dealers as to who shall get the trade.

Now in this case, if we should bar the defendant from soliciting business from the customers of plaintiff, we would practically prohibit the defendant from doing any business. We would still leave the plaintiff with the monopoly which he possessed, because it is fair to assume that he has reached practically the entire field of jobbers who can profitably buy the drill socket and sell it. Such a ruling would practically continue the monopoly which the plaintiff had under its patent. Now, in the very nature of things, Weaks, the former employé of plaintiff, knew these customers; he acquired such knowledge in the ordinary course of business, not in going out and soliciting, but in receiving orders and shipping the goods; he knew who was buying them from the plaintiff; he was under no contract, and no restrictions as to time of service or as to future employment. He was discharged by the plaintiff; he had to acquire employment somewhere, and naturally he would seek employment in the field where he had formerly worked. The value of his service would depend, to a considerable extent, upon his knowledge of the trade. The evidence does not disclose that he took any list of the customers, although he had planned to do so; but the evidence does show that, after he entered the employment of defendant, he made a list of the customers, in part at least. from his own recollection, aided by the commercial reports, and the evidence does disclose that he visited some of these customers, and sought their business for the defendant.

But I cannot hold, under all the circumstances in this case that his knowledge of the list of jobbers with whom the plaintiff did business, was such a trade secret as that he could be restricted from using it in

the employment of the defendant, or from seeking them as customers for the defendant. I feel that the distinction between the facts in this case and the facts in the cases cited by counsel is clear. I believe that principles of public policy require that when a patent expires the fullest freedom should be given to old customers and new customers to purchase the article from those who will produce it at the lowest cost. I cannot accede to a rule which would say to a traveling man in the grocery line, who has been discharged, that he cannot accept employment by another wholesale house, and visit the customers to whom he had sold goods for many years, and solicit their business. I do not believe that when all interests are consulted, it comes within the rule prohibiting unfair competition. The tendency of the times is rightly toward an extension of the field of competitive effort, especially in the commercial and industrial world.

Nor do I feel that the circumstances attending the employment of Weaks by the defendant are such as to entitle the plaintiff to relief. It must be a matter of common occurrence in the business world that where an employé with special skill is sought, those in the employment of others will be consulted, and inducements offered which

may cause them to transfer their service.

[6] There is only one element which I consider as coming within the rule of unfair competition, and that is the writing of the letters of date November 20 and November 27, 1915. I cannot approve of those letters. I have no doubt that the defendant had the right to write to the trade, explaining that it had been manufacturing these goods for the plaintiff. The defendant might also frankly state to the trade that the patent was about to expire, and it might, as held in Victor Co. v. Vitaphone Co. (C. C.) 191 Fed. 987, advertise "that after that date it will manufacture and supply the trade." I would find nothing unfair in any actual statement of the facts. The public has the right to know when the patent expires, that they may govern themselves accordingly; and, if these letters had frankly stated the facts, there could be no criticism, but they did not frankly state the facts. The vice of these letters is in their apparent purpose to directly induce the customers of the plaintiff to refrain from purchasing from the plaintiff, and to attain this end, the statements go to the verge of false representations, and resort to mysterious signs and tokens, which, with some of the plaintiff's customers, might have far more significance than the actual facts if they had been presented.

A hurried reading of the letter of November 20th might leave the impression that the Collis Company had really been selling to the customers of plaintiff the sockets all the time, and the warning to watch for the next letter and for "inside information" was a direct appeal to withhold purchasing from the only person who then had them to sell. And the letter of November 27th was a direct request not to purchase. In other words, the plaintiff was the sole dealer in these sockets, and mysterious letters are written by the defendant actually in effect, urging the plaintiff's customers not to buy from the plaintiff, and mysterious expressions are used and promises made which might have a very serious effect upon the plaintiff's business:

in fact a far more serious effect than if the defendant had frankly stated what it had, as expressed in one of the letters, "up its sleeve."

I do not believe a court can sustain that method of business.

[7] So that I must hold that the defendant was guilty of unfair competition. But there is no evidence in the case which would justify any court in saying that it has been proven that any particular loss or damage was sustained by reason of this unfair competition. To recover damages, the party must not only show that he was damaged, but he must prove the amount of the damage; and as the direct result of the sending out of these letters, there is no evidence in the case to indicate any damage, and nothing in the case to indicate that it would be possible to prove any damage.

If it were permissible, I would impose a fine for this violation of law, but as the law is, I can do no more than allow nominal damages, which I shall designate as \$1, as representing the violation of

a legal right for which no actionable damages can be proven.

[8] Fourth. The question as to whether plaintiff is entitled to an accounting based upon unfair competition is disposed of by the foregoing. No basis for an accounting, so far as the one particular element of unfair competition, has been established. There is no evidence in the case indicating a possibility of tracing out and ascertaining the psychological effect of the letters, and there is no proof that any order was canceled upon receipt of them, and no proof that any person, contemplating an order, changed his plans, and no proof that the plaintiff would have sold goods which he did not sell if the letters had not been written.

There will be a decree in accordance with this opinion. Counsel for defendant will prepare decree, and submit it to counsel for plaintiff, who will have five days in which to make objections thereto;

such decree to reserve proper exceptions.

As to costs, while nominal damages generally carry the costs of the trial, in view of the different causes of action presented, and in view of the fact that the principal part of the costs related to the questions decided in favor of the defendant, I feel that as far as the court should go is to tax one-half the costs to the defendant; and the decree will so provide.

In re COLLINS.

(District Court, E. D. Louisiana. July 6, 1914. On Application for New Trial, July 28, 1916.)

No. 1661.

1. BANKRUPTCY € 226 DECISION BY REFEREE—CONCLUSIVENESS—MATTERS CONCLUDED.

Where other creditors were not parties to a petition by a trustee for leave to transfer a portion of the bankrupt's property pursuant to contract made before bankruptcy, such creditors, though they did not appeal from the decision of the referee wherein he found that one objecting to the

order had a lien on the property, are not bound, and may subsequently question the objector's interest.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. 226.]

2. BANKRUPTCY \$\igcress 342-Claims-Motion to Expunde.

Under Bankr. Act July 1, 1898, c. 541, § 57k, 30 Stat. 560 (Comp. St. 1913, § 9641), General Order 21 (81 Fed. ix, 32 C. C. A. xxii), a claim which has been allowed may be reconsidered and rejected on the petition of a creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 529; Dec. Dig. ⇐⇒342.]

3. BANKRUPTCY \$\sim 331\to Claims\to Proof of Claim by Agent.

A claim will be disallowed where proof is made by an agent as principal without disclosing the agency, for it is false.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 520; Dec. Dig. €⇒331.]

4. MECHANICS' LIENS \$295-RIGHT OF LIENHOLDER-MORTGAGES.

Under Civ. Code La. §§ 3267, 3268, relating to mechanics' liens, laborers and materialmen who have furnished labor and materials for the erection of a building on mortgaged property may enforce their liens by having the land and improvements separately appraised and sold.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 619; Dec. Dig. &=295.]

5. Vendor and Purchaser \$\iff 266(1)\$—Vendor's Lien\$—Estoppel to Assert.

One holding a vendor's lien on land agreed to lend the owner, who was erecting buildings thereon, a sum of money, provided the owner would have a surety company execute a builder's bond for the value of the buildings. To obtain the surety bond, title in the property was transferred to a third person; the act of sale being executed before the lender, who was a notary public. The sale purported to be for \$7,500, \$900 cash and the balance in three notes of \$2,200 each. The lender subsequently liquidated, and in his notarial capacity canceled his note secured by a vendor's lien on the property. Held that, as against the materialmen and laborers furnishing the material and labor for the building, the lender could not assert the validity of the vendor's lien notes given on the simulated sale, for, if it had not been executed, the laborers and materialmen might under Civ. Code La. §§ 3267, 3268, have compelled a separate appraisal of the land and improvements and sale of the same to satisfy their claims.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 713, 715, 719, 722-732; Dec. Dig. \Longrightarrow 266(1).]

In such case, as a notary is a high official whose records import verity, it is against public policy that the notary should profit by falsifying his record so as to show a simulated sale.

[Ed. Note.—For other cases, see Notaries, Dec. Dig. 5.3]

7. VENDOR AND PURCHASER \$=256-VENDOR'S LIEN-RECORDATION.

Under Civ. Code La. § 3271, registration is necessary to the validity of a vendor's lien, as against the creditors of the owner, and, where the lien is canceled, it is not good against such creditors.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig.

8. BANKRUPTCY 5-192—TRUSTEE—RIGHTS OF—INSTRUMENTS REQUIRED TO BE RECORDED.

Under Bankr. Act July 1, 1898, c. 541, § 47a, 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), declaring that the trustee shall be deemed vested with all the rights, remedies, and powers of a judgment debtor holding an execution return-

ed unsatisfied, the title of the trustee is not restricted to the title of the bankrupt, and hence those holding a vendor's lien on property of the bankrupt, which was not registered as required by Civ. Code La. § 3271, take no priority over general creditors of the bankrupt; the title to the property having passed to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 294; Dec. Dig. ⊗ 192.]

9. Vendor and Purchaser @==261(4)—Vendor's Lien—Sale of Vendor's Lien Notes.

A notary public having a vendor's lien on land agreed to make a further loan to the owner, who was erecting huildings thereon. To obtain a builder's surety bond, the owner made a simulated conveyance of the property; the act of sale being acknowledged before the notary who was making the loan. Purported vendor's lien notes were received by the notary, who disposed of them to an innocent purchaser. Held that, the vendor's lien not being perfected by proper registration, the holder of the notes was entitled, first, to enforce the claim against the proceeds of the notes in the hands of the notary, and then to assert any remaining claim against the property.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 680, 690; Dec. Dig. &= 261(4).]

On Application for New Trial.

to. Bankruptcy ==331-Claims-Proof of Claims.

While the statutes allow proof of claim to be made by an agent, it is not contemplated that proof of claim can be made by an agent when the principal is present and able to file his own proof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 520; Dec. Dig. €⇒331.]

11. ESTOPPEL \$\infty 74(2)\$—EQUITABLE ESTOPPEL—RIGHT TO ASSERT.

A notary who had a vendor's lien on land required the purchaser, before he made a further loan, to acknowledge a simulated sale so that a builder's bond could be procured. Laborers and materialmen served and recorded their claims on the record owner within 45 days after the work was finished. Held that, as they in that manner secured a lien if the claims were served on the record owner, the notary and owner are estopped from denying that the sale was bona fide for the purpose of defeating the liens.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 190, 191; Dec. Dig. \rightleftharpoons 74(2).]

12. BANKRUPTCY 5339—CLAIMS—EXPUNGING CLAIMS.

A creditor cannot object to the allowance of claims of other creditors, where he did not move to expunge them and took no exception to the decision of the referee allowing them.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 526; Dec. Dig. €=339.]

13. Subrogation €==7(1)-Principal and Surety.

Where a surety on a builder's bond paid claims of laborers and materialmen who had liens, it is subrogated to the liens of such persons.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17, 92; Dec. Dig. & 7(1).]

14. PRINCIPAL AND AGENT = 137(1)—AUTHORITY OF AGENT—FRAUD.

An agent of a surety company is not an agent for the purpose of perpe-

An agent of a surety company is not an agent for the purpose of perpetrating a fraud on the company, and the company is not estopped from denying, as against persons who were parties to the fraud, that the agent's participation therein was without the scope of his authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 492, 494; Dec. Dig. &=137(1).]

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In the matter of the bankruptcy of John Dillard Collins. Accounting by A. G. Gugel, trustee, in which the claim of Isabel Danziger was allowed. Proceeding to review order of the referee sustaining the accounting, and opposition of Isabel Danziger asking attorney's fees. Reversed and remanded.

On May 16, 1912, John D. Collins, a builder, was adjudicated a bankrupt on his voluntary petition. He surrendered as part of his assets certain real estate in New Orleans standing in the name of Isidore Singer against which was registered two acts of sale to Isidore Singer with mortgages and vendor's liens in favor of Collins for \$2,600 and \$6,600 registered, respectively, February 9 and February 26, 1912; an agreement to sell part of the property to W. A. Yochim registered May 11, 1912; and various liens of materialmen registered on divers dates, none earlier than April 1, 1912.

On July 5, 1912, the trustee, A. G. Gugel, petitioned for leave to transfer part of the property to Yochim in conformity with the agreement. To this Miss Isabel Danziger objected, claiming to be the holder and owner of the vendor's lien mortgage notes of the Singer transaction, and later, on January 24, 1913, she filed a proof of debt in the usual form by affidavit before A. D. Danziger, notary. Singer offered no objection, and on June 20, 1912, he executed a notarial act before Danziger disclaiming ownership of the property

and declaring it was placed in his name for convenience only.

The trustee's petition lay in abeyance until August 2, 1913, when Yochim filed an intervention asking to have the agreement carried out. There was then a hearing before the Honorable Wm. A. Bell, referee, at which all parties in interest, including the lien creditors, appeared. The referee denied Yochim relief, but on appeal this ruling was reversed, and the trustee was directed to make title to Yochim on his complying with the agreement. This Yochim failed to do, and the property was then sold at auction free of all liens and incumbrances which were refereed to the proceeds.

In due time the trustee filed an account on which he placed Miss Danziger as holder of the said mortgage notes to be paid in full with interest and placed the various lien creditors as inferior in rank and to be paid 50.6 per cent. of

their claims.

Various lien creditors opposed the account, especially the allowance of the Danziger claim, on the grounds that the sale and mortgage was a simulation and without consideration, and that even if valid it was subordinate to the liens for material. Miss Danziger opposed the account, asking for 10 per cent. attorney's fees in addition to the amount allowed.

The referee sustained the opposition of Miss Danziger, and overruled all other oppositions. The lien creditors have brought the matter up for review

of the referee's order.

Yochim also opposed the account, but has not appealed. His claim is only material because considerable of the testimony now before me was taken on the trial of his intervention.

Saunders & Morphy, of New Orleans, La., for bankrupt.

Grant & Grant and Dart, Kernan & Dart, all of New Orleans, La., for William Kernan Dart and others.

Alfred D. Danziger and Howe, Fenner, Spencer, & Cocke, all of New Orleans, La., for Felix J. Dreyfous.

FOSTER, District Judge (after stating the facts as above). There is little or no dispute as to the material facts in this case, though it has been somewhat difficult to extract them from the voluminous transcript owing to the acrimony of the trial before the referee, the many objections repeatedly dictated into the record by counsel for all parties, and the failure of the stenographer to index the testimony as required by rule 20 of this court.

[1, 2] The referee in passing on the oppositions held that all questions as to the validity of the mortgage were closed by his former ruling on the petition of Yochim, and that no creditor had petitioned

to have Miss Danziger's claim expunged. In both of these assumptions he is in error. If the judgment on the Yochim petition is resjudicata as to anybody, it is not as to the lien creditors now opposing the account, as they were not parties to the proceeding; in fact, were expressly excluded by the referee. A claim which has been allowed may be reconsidered and rejected on the petition of a creditor. Bankr. Act, § 57k, General Order 21 (89 Fed. ix, 32 C. C. A. xxii).

The procedure adopted in the instant case is usual in the settlement of estates in Louisiana in succession, receivership, and bankruptcy matters, and has all the elements necessary to comply with the law. The pleadings are filed in full, and the creditor whose claim

was attacked evidently had ample notice and his day in court.

[3-5] The fight centered on what is known as the Belmont Place property. The facts regarding it are as follows: Collins bought the real estate from Elias Pailet on February 9, 1912, by act before Felix J. Dreyfous, notary, for \$3,100, paying \$400 cash and giving his note secured by vendor's lien and mortgage for \$2,700. He immediately proceeded to build several houses on the lots, and, when they were practically completed, he applied to Dreyfous for a loan to pay his debts growing out of their erection. Dreyfous visited the property, observed their state of completion, and agreed to lend Collins—how much is not definitely shown. He exacted that Collins have a surety company execute a builder's bond provided for by the Louisiana statute for the full value of the buildings, \$6,600.

The agent of the surety company, Mr. Ross, was called in and agreed to write the bond if Collins would transfer the property to some one else, as he did not think he could write a bond for a man who was both owner and builder. Ross testifies that he was not told and did not know that the buildings had been started at that time.

An act of sale was executed before Dreyfous from Collins to Singer purporting to be a sale for \$7,500; \$900 cash and the balance represented by three notes each for \$2,200 secured by mortgage and vendor's lien.

This act was purely a simulation. No cash was paid, and it was not intended to transfer the title. Ross testifies he did not know it was a simulation. The bond transaction is not material, except that there is testimony to the effect that the only reason for the sale was to secure the bond. Dreyfous took the three notes. He testifies he retained one and sold two to a client, a Mrs. Tujaque, and credited Collins' account with the proceeds. He liquidated, and in his notarial capacity canceled, the \$2,700 vendor's lien note which he held for his own account and paid out \$625 in cash, including the premium on the builder's bond. The balance of the proceeds he still has in his possession, and it is credited on the proof of claim filed by Miss Danziger.

It is evident that the transaction was entirely for Dreyfous' personal account, and Miss Danziger, who was his clerk, is absolutely without interest in the notes. Her proof of debt is not in the form required as agent, and in making it her agency is not disclosed.

Technically, it is false and should be expunged and disallowed.

On the merits, her principal is in no better position. The sale was a simulation. As there was no sale, there was no vendor's lien, and the mortgage was not granted by the owner of the property. It is true there are Louisiana cases holding that, under similar conditions, the notes in the hands of innocent third persons are to be considered as mortgage notes issued by the owner and enforceable as such against the property; but Dreyfous is not an innocent third person. He had full knowledge of the viciousness of the purported sale, and in fact counseled and executed the transaction for his own benefit. He was the holder of a vendor's lien on the ground. However, as to the buildings subsequently erected, the liens of the materialmen were superior without being recorded and might have been enforced coequally with the vendor's lien by having the property separately appraised and sold. C. C. 3267, 3268; Johnson v. Weinstock, 31 La. Ann. 698; City of Baltimore v. Parlange, 23 La. Ann. 365. By executing the subsequent simulated sale and mortgage he practically prevented this being done. Conceding that knowledge is not equivalent to registry in Louisiana and that prima facie the purported sale and mortgage would prime the material liens, then unrecorded, still Dreyfous knew the liens existed, and as against the materialmen he would be estopped to claim a preference for his pre-existing debt of \$2,700.

[6] But the principle to be considered is more important and goes further. Notaries in Louisiana are high officials and granted extraordinary powers and authority. Their records import verity, and it is against public policy that a notary should profit to the injury of

others by his willful falsification.

[7, 8] Though there are no such claims on file, I am not unmindful of the suggestion in the record that Dreyfous held a valid vendor's lien note of \$2,700, and that two of the notes in controversy are now held by an innocent third person. If this is so, as to the first proposition, registration was necessary to the validity of the lien. C. C. 3271. Dreyfous canceled this registration before bankruptcy, and the title of the trustee has now intervened. It was clearly the intention of Congress in adopting the amendment of 1910 to paragraph 47, cl. A, of the Bankruptcy Act, that thereafter the trustee should not stand in the shoes of the bankrupt with regard to unrecorded liens depending for their validity upon registration, and that, as to the general creditors, such liens should be void.

[9] With regard to the second proposition, Dreyfous still has in his possession a part of the proceeds of the notes. If the two notes are held by innocent third persons, their claims should first be enforced against this fund to its extent and against the proceeds of the property

as mortgage creditors for the balance.

With regard to the real estate known as the Louisiana avenue property against which Miss Danziger claims a vendor's lien and mortgage of \$2,600 by virtue of the simulated sale of February 9, 1912, but which is also the property of Dreyfous, it is not shown that any consideration whatever was paid, and the same principle applies to it as to the nullity of the act.

The judgment of the referee will be reversed, and the claims of Miss

Isabel Danziger expunged and rejected, reserving to Felix J. Dreyfous the right to prove his claim against the estate as an ordinary creditor within 10 days.

The rights of the trustee to recover of Felix J. Dreyfous the balance of the proceeds of said notes to satisfy the claims of innocent

third holders of same is also reserved.

Reversed and remanded for such further proceedings as may be necessary, and in conformity to this opinion.

On Application for New Trial.

An application for a new trial has been filed in this case by Mr. Dreyfous and Mrs. Miller, née Danziger, and all questions extensively re-

argued.

[10] On their behalf it is contended that Miss Danziger, as the holder of the notes, was entitled to file the claim in her own name, and, if the proof filed is not in correct form, she should be allowed to amend and file proof as agent of Dreyfous and Mrs. Tujaque. The "holder" of a promissory note is one who has a legal interest in it. A mere dummy cannot be considered the holder of a note for the purpose of proving it in bankruptcy. Besides, the proof sets up ownership. For obvious reasons, well illustrated by this case, it is essential that a proof of debt in bankruptcy show on its face the true interest of the person presenting it. The Supreme Court has prescribed the form to be used by an agent, and it provides for a disclosure of the principal. The opinion heretofore rendered recognizes the rights of Dreyfous and Mrs. Tujaque to prove up their claims. However, it is not contemplated by the rules that debts be proved by an agent when the principal is present and able to file his own proof.

It is also contended that, while the transaction between Dreyfous and Collins was not a sale, it was intended to secure Dreyfous and should be considered a mortgage, good as to third persons. In support of this, the following cases are cited: Parmer v. Mangham, 31 La. Ann. 348; Wang & Cottam v. Finnerty, 32 La. Ann. 94; Nuss v. Nuss, 112 La. 265, 36 South. 345. These cases are not in point. The first-named case tends to support my previous ruling. A debtor was fraudulently trying to deprive his creditor of the security he had given him, and the court condemned the attempt in strong language. See page 354 of 31 La. Ann. In the second case, there was a sale with a counter letter. The debtor was in possession of the property under the recorded deed. The judgment sought to be enforced against the property was rendered long after the transaction between the parties. The last case was a transaction between husband and wife and

other relatives. No rights of prior creditors were involved.

[11] Since the rendition of the decree herein, the Supreme Court of Louisiana, in the case of Brown v. Staples, 138 La. 602, 70 South. 529, has decided that where the contract is for more than \$1,000 and, together with the bond, is recorded within the time fixed by Act 134 of 1906—say seven days—the lien of the materialmen is not governed by article 3274, C. C., and their liens will prime a pre-existing mortgage if attested accounts are served on the owner and recorded within

45 days after the work is finished. The claims of the materialmen herein were so served and recorded. As to this, it is contended the materials were furnished to the owner, and not the contractor, and that the said decision has no application. This argument overlooks the fact that Dreyfous and the bankrupt created the situation for their own benefit, and they are estopped to deny it to the prejudice of the materialmen.

[12-14] While the objections are not formally presented by the pleadings, it is urged there should be no decree in favor of the materialmen, as some of the claims are not proven; that some have been paid by the surety company; and that one creditor has agreed not to oppose Dreyfous' priority. The claims were all allowed by the referee both on filing and in his ruling denying them priority. No exceptions have been taken and no attempt has been made to expunge any of them. If the surety company has paid any of the lienholders, it is subrogated to their rights. It is suggested that the surety company would be estopped by the knowledge of its agent regarding the simulated sale. Mr. Ross, the agent, testifies that he did not know the sale was simulated or that construction of the houses had been started. He is not impeached or discredited, and it is so improbable that he would have written the bond had he known the true conditions, his evidence is entitled to great weight. But, in any event, he was not the agent of the surety company for the purpose of perpetrating a fraud upon it, and the company would not be estopped as against Collins and Dreyfous by any action of Ross without the scope of his authority. Miss Danziger also claimed to be the agent of the surety company. If so, it is unnecessary to discuss her power to bind it in this transaction. In this proceeding the court is not concerned with agreements between the creditors postponing the one debt to the other.

There seems to be some doubt as to the correctness of the judgment denying Miss Danziger a lien on what is called the Louisiana avenue property. This transaction was clearly a simulation, but it is contended the matter has been settled and no one is objecting. Proof of settlement does not appear in the record; but, if the facts are as stated in the argument, the decree may be amended.

On the whole, I see no reason to change my views heretofore expressed. The application for a new trial will be denied. The parties may submit an amended decree in conformity with this and the original

opinion.

UNITED STATES v. MISSOURI PAC. R. CO. (District Court, D. Colorado. June 19, 1916.) No. 6431.

1. MASTER AND SERVANT \$\insigma 13\$—HOURS OF SERVICE—DEFENSES—"CASUALTY AND UNAVOIDABLE ACCIDENT"—"EMERGENCY."

Under Hours of Service Act March 4, 1907, c. 2939, 34 Stat. 1415 (Comp. St. 1913. \$\\$ 8677-8680), declaring, save in the case of casualty or unavoid-

8t. 1913. §§ 8677-8680), declaring, save in the case of casualty or unavoidable accident, or the act of God, that no telegraph operator or train dispatcher shall be required or permitted to be, or remain, on duty for longer

than 13 hours in towers, offices, and stations operated only during the daytime, except in case of emergency, when such employés may be permitted to be and remain on duty for 4 additional hours in any 24-hour period not exceeding three days, it is no defense that a telegraph operator remained on duty longer than allowed, in order to prevent cars loaded with live stock, which he had neglected to direct another train to take out, from being delayed; for, while there is a distinction between "casualty and unavoidable accident" and "emergency," the former being associated with the superhuman, the ordinary mishaps of railroad operation of a comparatively trivial nature do not constitute an emergency.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. € 13.

For other definitions, see Words and Phrases, First and Second Series, Emergency.]

2. MASTER AND SERVANT \$\infty 13-Hours of Service Act-Defenses.

That a telegraph operator remained on duty longer than allowed by the act to facilitate the operation of a valuable silk train is no defense; there being no emergency.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⊗ □13.]

3. MASTER AND SERVANT \$\infty 13-Hours of Service Act-Defenses.

Where the draw bar of the tender of a train pulled loose and the telegraph operator remained on service for a period longer than allowed by the act until the train reached his station, there was no emergency, and the railroad company is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⊗ □ 13.]

4. MASTER AND SERVANT \$\infty 13-Hours of Service Act-Defenses.

Where a train was delayed on account of broken packing rings in one of the cylinders of the locomotive, and a telegraph operator was kept on duty beyond the time allowed by the Hours of Service Act until the train reached his station, there was no emergency warranting a violation of the act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⇐=13.]

5. MASTER AND SERVANT \$\infty 13-Hours of Service Act-Defenses.

That a telegraph operator was kept on duty until a delayed passenger train, carrying mail, reached his station is no defense of a violation of the act, though he was held on duty to care for the mail and passengers. [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ©=13.]

6. MASTER AND SERVANT \$\ightharpoonup 13-Hours of Service Act-Defenses.

Where, because of the failure of an air pump on the engine, a passenger train was delayed and the telegraph operator was held on duty beyond the time allowed by the act, there was no emergency warranting a violation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ©=13.]

7. MASTER AND SERVANT \$\ightharpoonup 13-Hours of Service Act-Defenses.

Where the failure of a telegraph operator to order coal chutes filled delayed a train, and he thus remained on duty beyond the time allowed by the act, there was no emergency warranting a violation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. € 13.]

8. MASTER AND SERVANT @=13-Hours of Service Act-Defenses.

Though a train was delayed by the loss of the relief valve of the superheater on the engine, and also by heavy wind, snow, and cold weather and a badly clinkered fire, a telegraph operator should not, for

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that reason, be required to remain on duty beyond the time fixed in the act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. € 13.]

9. MASTER AND SERVANT \$\infty 13-Hours of Service Act-Defenses.

That a train was delayed through the bad working of steam heating connections, the thawing out of such connection, and of the ash pan, and because of another delayed train, coupled with adverse weather conditions, does not warrant the keeping of a telegraph operator on duty for a period beyond that authorized by the act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. € 13.]

10. Master and Servant @=13-Hours of Service Act-Defenses.

Where, because of a wreck, a train was delayed and a telegraph operator was kept on duty beyond the time allowed by the act, there was an emergency which justified the violation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. \rightleftharpoons 13.]

11. MASTER AND SERVANT @=17-Hours of Service Act-Violation.

In an action for violations of the act, where it was claimed that intermissions broke the continuance of service, but the intermissions were short, and the evidence varied as to when they were taken, it is a question of fact whether they were not mere subterfuges, resorted to to evade the act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. 2-17.]

12. MASTER AND SERVANT 5-13-Hours of Service Act-Violation.

In an action for the penalty prescribed by the act, the 24-hour period of the act begins when the employé begins duty, and the government cannot, for the purpose of showing a violation, select as the beginning of the period any time while the employé is at work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. € 13.]

Action by the United States of America against the Missouri Pacific Railroad Company, to recover the penalty imposed by the Hours of Service Act of March 4, 1907. On demurrer to special pleas of defendant. Overruled as to certain of the pleas and sustained as to others.

Harry B. Tedrow, Dist. Atty., and Jno. A. Gordon, Asst. U. S. Dist. Atty., both of Denver, Colo.

Devine & Preston, of Pueblo, Colo., for defendant.

LEWIS, District Judge. This action is brought to recover the penalty imposed by act of March 4, 1907 (34 Stat. 1415). The complaint contains 12 counts, each of which charges a violation of the act in that the defendant required and permitted its telegraph operator and employee, whose duty it was to transmit, receive, and deliver orders pertaining to and affecting the movements of trains engaged in interstate commerce, to remain on duty overtime—some charging that the particular office at which the operator was employed was a station operated only during the daytime, while others charge that it was one continuously operated night and day, and in each instance that the maximum of hours respectively limited by the act were exceeded. The

overtime stated in each count did not exceed four hours, which is per-

mitted by the act in an emergency.

There was a demurrer to the complaint which was overruled. The defendant has answered, and in addition to a general denial, has set up special pleas to all of the counts except the fourth and ninth, to all of which the district attorney has demurred, and this raises the questions for present consideration.

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[1] 1. The first count charges a violation in retaining the operator on duty at the defendant's office and station at Arlington, operated only during the daytime, for a longer period than 13 hours on August 22, 1914, to wit, from 8 a. m. to 11:10 p. m., a total of 15 hours and

10 minutes within the 24-hour period beginning at 8 a. m.

The defendant in its special plea to this count sets up what it claims constitutes an emergency under the second section of the act, by reason of which it asserts it had the right, under the act, to retain the employee for an additional 4 hours. The emergency, as alleged, consisted in the fact that three carloads of live stock were delivered to defendant at Arlington that morning for transportation to Denver. Defendant's dispatcher intended to have the three cars taken into a train passing through Arlington about 10 a. m., but he forgot and failed to order the cars picked up by that train, and in order to avoid holding the live stock until the following day, the dispatcher ordered another train to pick up the cars of live stock, and in consequence the operator could not leave his duties until that train had taken the cars out, which was about 11:10 p. m. on said day.

The demurrer attacks the sufficiency of these facts to constitute an emergency within the meaning of the act. The defendant's counsel points out that the conditions which constitute an emergency within the meaning of the act are necessarily of far less import and seriousness to the railroad than "any case of casualty or unavoidable accident" named in the third section of the act, which latter would entirely exempt defendant from the act and relieve it from the penalty. And thus proceeding with the two provisos in hand, one emergency and the other casualty or unavoidable accident, and matching one against the other, coupled with the definitions that he chooses to apply, he easily reaches the conclusion that it does not require much to constitute an emergency. The comparison is apt and logical. The two conditions are separate and in practice are intended to be kept sharply distinct. They can not be made to overlap. Still they are not necessarily so wide apart. The words of exemption quoted above from the third section are coupled with the superhuman, and perforce imply unexpected and unforeseen disaster. There is obviously a wide field between such extraordinary events which wholly relieve from the rule of law, and mischances and mishaps of a comparatively trivial nature which constantly arise and are dealt with in every line of action. I conceive the field to be one in which the emergencies provided for in the act may occur—such as the unanticipated loss of a train dispatcher (United States v. So. Pac. Co., 209 Fed. 562, 126 C. C. A. 384; United States v. D. & R. G. Co., 220 Fed. 293, 136 C. C. A.

275), or the necessary and unexpected movement of a train carrying troops or large bodies of laborers pressingly needed. Other conditions of equal or similar import might be studied out. Many will in time come to pass. With the context and purpose of the act in mind, it is unreasonable to believe that the ordinary and everyday ups and downs of railroad operation should be considered emergencies. Such a conclusion would bring within its scope a vast multitude of unexpected and unanticipated minor predicaments and contingencies constantly arising. The term emergency as here used is of greater moment than this, though of less significance than the terms used in the third section. The same word may be applied with appropriateness in innumerable instances in a variety of different bearings and relations. So we can not stop with its abstract meaning. The context determines its particular significance. A definition that would override and defeat the plain purpose of the act must be rejected. It is believed that the facts pleaded do not show such an unusual and extraordinary condition in railroad operation as to constitute an emergency within the meaning of the act. United States v. B. & O. R. Co. (D. C.) 226 Fed, 220, 223; United States v. C. & N. W. Ry. Co. (D. C.) 219 Fed. 342; United States v. K. C. S. Ry. Co., 202 Fed. 828, 121 C. C. A. 136; United States v. D. & R. G. Ry. Co., 233 Fed. 62, — C. C. A. — (recent unpublished opinion Eighth Circuit).

[2] 2. The special plea to the second cause of action admits that the operator was employed at a day and night station, and that he was detained in service more than nine hours, but it sets up as an emergency the fact that there was a trainload of silk delivered to the defendant by a connecting carrier at Pueblo; that the time of delivery at the connecting point had been erroneously reported to the defendant's dispatcher; that the transportation of silk is very profitable to the carrier; that it is of great value, is an easy subject of theft and can not be permitted to stand on sidings; and that these facts brought about a contingency which required the holding of the operator over

the permitted time.

[3] The special plea to the third count setting up a claimed emergency is based on the fact that a train pulled loose from the tender a drawbar which delayed it in reaching the station where the operator was engaged, and it is claimed that that rendered it necessary to hold the operator overtime until the train had reached his station.

- [4] The special plea to the sixth count alleges that the emergency consisted in the fact that a train was delayed on account of broken packing rings in one of the cylinders of the engine which was hauling the train, which in turn required the holding of the operator at the particular station named in that count until the delayed train reached his station.
- [5] The special plea to the seventh count sets up as a claimed emergency facts showing that a passenger train carrying mail was delayed in reaching the station at which the operator was held overtime on account of various and sundry reasons at different stations en route, and that the operator was held until it arrived to handle mail and care for passengers.

[6] The special plea to the eighth count sets up facts showing another delayed passenger train assigned as an emergency for holding the operator overtime. The delay was caused by the failure of an air

pump on the engine hauling the train.

[1] The special plea to the tenth count sets up facts showing the holding of the operator overtime on account of a delayed train due to the fact that the coal chutes at the station in question were nearly out of coal, that the train dispatcher forgot and overlooked his duty in ordering the chutes filled, and that this neglect on the part of the dispatcher brought about the delay which required the holding of the operator overtime.

[8] The special plea to the eleventh count discloses another delayed train as the claimed emergency for holding the operator. The delay was caused by losing the relief valve of the superheater on the engine, and also to heavy wind, snow, and cold weather and badly clinkered

fire.

[9] The special plea to the twelfth count discloses another delayed mail and passenger train due to various causes, to wit, bad working of steam heating connections, thawing out steam heating connections, thawing out ash pan, meeting another delayed train, cold, snow, and wind and badly clinkered fire due to weather conditions.

All of these pleas are likewise held to be bad as not stating facts

showing in either instance an emergency.

[10] 3. The special plea to the fifth count of the complaint sets up as a claimed emergency for holding the operator overtime a delayed train in reaching his station on account of a wreck which it could not pass until the track had been cleared. This plea is believed to be good as stating facts which entirely relieve the defendant from the penalties denounced in the act. United States v. Missouri Pacific Ry. Co., 213 Fed. 169, 130 C. C. A. 5.

The demurrer of complainant to the special pleas set up in the answer to the first, second, third, sixth, seventh, eighth, tenth, eleventh, and twelfth counts will therefore be sustained, and overruled as to the special plea set up against the fifth count.

II.

[11, 12] In passing on some of the foregoing special pleas it was said that the defendant in the plea admitted that the operator was held overtime. These admissions, however, were conditional. In some of the pleas it is stated that the hour at which it is charged in the complaint the operator went on duty is not the true hour at which said operator went on duty; that the prosecution has selected a time during the usual hours of service in which the operator worked and counted from the arbitrary hour so selected through the succeeding 24-hour period, instead of beginning with the time at which the operator went on duty each day from which to calculate the 24 hours. The admission is on the complainant's hypothesis, which is said to be false. And so the defendant has put in separate defenses in its answer to the third, fourth, fifth, ninth, tenth, eleventh, and twelfth causes of action, therein claiming that the 24-hour period must in each instance

be calculated from the time at which the operator went on duty each

day.

The complainant's demurrer also challenges the sufficiency of these defenses. The attitude of the complainant's counsel in this respect impresses me as an attempt to evade the effect of United States v. A., T. & S. F. Ry. Co., 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361. Though this point was not in controversy there, no one appears to have challenged the proposition that the 24-hour period must be counted from the time the operator goes on duty. It was only determined in that case that the hours of service within the statutory limit need not be continuous. To now hold that the prosecution may arbitrarily select any point during the regular hours of service for the purpose of reckoning time of employment appears to me to have the necessary effect in many instances of indirectly evading the rule there announced. For instance, it is permissible under the holding in that case for an operator to enter on his duties every day at 6 a. m. and work to noon, then go on duty again at 3 p. m. and work to 6 p. m., but on every other day instead of beginning at 3 p. m. and working to 6 p. m. he might begin at 4 p. m. and work to 7 p. m. Under the ruling of the Supreme Court there would be no violation of the act. But if the prosecution can arbitrarily select the initial point it can bring the railroad company within the act on every alternate day, thus: Four p. m. to 7 p. m. is 3 hours; 6 a. m. to noon is 6 hours, and 3 p. m. to 4 p. m. is 1 hour, making 10 hours. However, I am not prepared to say that the defenses thus pleaded to the third, fourth, fifth, seventh, eighth, ninth, tenth, eleventh, and twelfth counts constitute good and complete defenses as a matter of law and come within the rule laid down in the case in 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361. Indeed, some of them concede overtime employment, and those that do not so show seem to present questions of mixed law and fact. They each start out with the time at which the operator went on duty and the time at which he ceased according to his regular hours, but in each instance there was a short intermission, varying from one hour to two hours in the different defenses, and then his hours extended for a period equal to the intermission. Of course, that renders the situation wholly unlike the facts presented in the case in 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361. There the time of employment was not continuous, but it was fixed and regular for each day, and so understood by the operator before he went on duty. The intermissions on each day were of the same hours and at the same time. Where the time is so short, as is stated in these defenses (one to two hours), and is variant as to when the intermission is taken, it becomes a question of fact as to whether or not such intermissions were not mere subterfuges and resorted to for the purpose of evading the act and not really for the purpose of giving the operator time off duty.

But a singular situation presents itself in this respect under the pleadings. That is, assuming that defendant's claim as to when to begin counting time is correct, but that these defenses should be resolved against the defendant on the facts, it is a question of some moment whether that conclusion would establish the particular of-

fenses charged in the different counts of the complaint to which they are directed. The charges in most of the counts, as already said, start from an arbitrary point during the employee's hours of service from which to reckon the 24-hour period, which is a different point from that set up in these defenses. That question, however, need not be determined at this time, for it is not now presented.

The demurrer to these defenses will be overruled.

UNITED STATES v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(District Court, D. Minnesota, Fourth Division. May 19, 1916.)

1. Costs \$\infty\$=16-Action to Recover Penalties-Violation of Hours of Service Act.

An action to recover penalties under Hours of Service Act March 4. 1907, c. 2939, § 3, 34 Stat. 1416 (Comp. St. 1913, § 8679), is a civil action, in which on recovery plaintiff is entitled to tax its costs and disbursements.

|Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 26, 30–35; Dec. Dig. ♦==16.]

2. United States = 147-Actions by-Recovery of Costs.

The United States, when the prevailing party plaintiff in an action at law, is entitled to recover costs and disbursements, usually in conformity to the state practice, when no specific provision is made therefor by a federal statute.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 148; Dec. Dig. ⊗ 147.]

3. Costs = 146-Taxation-Discretion of Court.

Courts exercise a discretion in the taxation of costs and disbursements in determining what are necessary and reasonable items.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 567–569, 572–574; Dec. Dig. € 146.]

 Costs 37—Action for Violation of Hours of Service Act—Disbursements.

Conformably to the Minnesota statute and practice, which allow recovery by the prevailing party of "disbursements necessarily paid or incurred," where the United States, in an action to recover penalties for violation of the Hours of Service Act, includes a number of independent and unrelated causes of action, and recovers on but one, it is not entitled to tax as disbursements fees of witnesses who testified only in relation to causes of action on which it was defeated.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 101, 102; Dec. Dig. \Longrightarrow 37.]

5. Costs \$\infty 32(2)\to "Prevailing Party."

The prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment entered.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 109, 111; Dec. Dig. ©=32(2).

For other definitions, see Words and Phrases, First and Second Series, Prevailing Party.]

6. Costs \$\isim 169\to Amount\to "Disbursements Necessarily Paid or Incurred." The expression "disbursements necessarily paid or incurred," as used in Gen. St. Minn. 1913, \$ 7976, relating to allowance of costs, means paid

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

or incurred in connection with the cause of action upon which the verdict is based.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 652; Dec. Dig. ⊕ 169.]

At Law. Action by the United States against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. From the clerk's taxation of costs, defendant appeals. Modified.

R. V. Gleason, of Minneapolis, Minn., for appellant. Alfred C. Jaques, of Duluth, Minn., for the United States.

BOOTH, District Judge. This action was brought by the United States against the defendant railway company, alleging a violation of the Hours of Service Act (34 Stat. 1415). Thirteen causes of action were united in the complaint. The first had reference to an alleged offense at Winger, Minn., on the 21st of November, 1914, in connection with a certain employé named Sprague. The other 12 causes of action were in connection with alleged offenses at Thief River Falls, Minn., in connection with other employés. In other words, the first cause of action was with reference to a different offense, alleged to have been committed at a different time, in connection with different employés, from those of the other 12 causes of action. On the trial the court found in favor of the plaintiff on the first cause of action, and in favor of the defendant upon all the remaining causes of action. Judgment for \$100 and costs was ordered in favor of the plaintiff.

In presenting its bill of costs for taxation, plaintiff included two items, of \$30 each, as witness fees, for witnesses who did not testify relative to the first cause of action, upon which the plaintiff recovered, but did testify relative to the remaining causes of action, or some of them, upon which causes of action the court found in favor of the defendant. Defendant objects to these two items, of \$30 each, and has appealed from the clerk's taxation which included these items.

[1] 1. The first claim of the defendant is that the statute under which the action was brought is a penal statute, and that such costs, if authorized at all are authorized by virtue of section 974, R. S. (Comp. St. 1913, § 1615), which reads as follows:

"When judgment is rendered against the defendant in a prosecution for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs."

Defendant further contends, inasmuch as each cause of action in the complaint was for a separate and distinct violation of the act in question, that to allow the items of disbursements incurred in connection with the causes of action upon which plaintiff did not recover judgment would be in effect to impose a penalty upon the defendant for offenses of which it has been acquitted. This contention of the defendant, at least as to the nature of the action, cannot be sustained. While it may be true that the statute in question is in some aspects a penal or quasi penal statute, nevertheless the actions brought under it for the recovery of fines, are civil actions.

Actions to recover penalties under this statute and under similar statutes, have long ago been held to be civil actions, and the question

is no longer an open one. For cases under the Alien Immigration Act, see United States v. Regan, 232 U. S. 37, 34 Sup. Ct. 213, 58 L. Ed. 494; Hepner v. United States, 213 U. S. 103, 29 Sup. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960. Under the Safety Appliance Act, see C., B. & Q. Ry. Co. v. United States, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582; United States v. Cent. of Ga. Ry. Co. (D. C.) 157 Fed. 893. For cases under the Twenty-Eight Hour Law, see Atchison Rv. Co. v. United States, 178 Fed. 12, 101 C. C. A. 140; M., K. & T. Ry. v. United States, 178 Fed. 15, 101 C. C. A. 143; United States v. Southern Pac. Co. (D. C.) 157 Fed. 459: United States v. Baltimore & O. S. W. R. Co., 159 Fed. 33, 86 C. C. A. 223; United States v. Phila. & R. Ry. Co. (D. C.) 160 Fed. 696; United States v. Southern Pac. Co. (D. C.) 162 Fed. 412; Mont. Cent. Ry. Co. v. United States, 164 Fed. 400, 90 C. C. A. 388; New York Cent. H. R. R. Co. v. United States, 165 Fed. 833, 91 C. C. A. 519; United States v. Southern Pac. Co. (C. C.) 172 Fed. 909. For cases under the Hours of Service Act, see St. Louis, etc., Ry. v. United States, 183 Fed. 770, 106 C. C. A. 136; United States v. Kansas City & Southern Ry. Co., 202 Fed. 828, 832, 121 C. C. A. 136; United States v. St. Louis, etc., Ry. (D. C.) 189 Fed. 954. It has also been held:

"That, if not directed otherwise, such an action is to be conducted and determined according to the same rules and with the same incidents as are other civil actions." United States v. Regan, supra.

Among the incidents to such an action are costs and disbursements. Grant Bros. v. United States, 232 U. S. 647, 665, 34 Sup. Ct. 452, 58 L. Ed. 776.

2. The question of costs and disbursements must therefore be decided upon the same principles as are involved in other civil actions. Even though it may be conceded that authority to impose costs is found in section 974, R. S., still that section does not provide what the items of costs are which may be imposed, and resort must be had elsewhere. At common law, originally, no costs could be recovered by either party, and costs, as such, are either creatures of statute, or of usage now long established. Antoni v. Greenhow, 107 U. S. 769, 781, 2 Sup. Ct. 91, 27 L. Ed. 468; Lowe v. Kansas, 163 U. S. 81, 85, 16 Sup. Ct. 1031, 41 L. Ed. 78; Railway v. Ellis, 165 U. S. 150, 166, 17 Sup. Ct. 255, 41 L. Ed. 666; United States v. Davis, 54 Fed. 147, 153, 4 C. C. A. 251.

The right of the prevailing party in civil actions at common law to recover costs in the federal courts is now firmly established. Kittredge v. Race, 92 U. S. 116, 23 L. Ed. 488; United States v. Schurz, 102 U. S. 378, 407, 26 L. Ed. 167; Trinidad Asphalt Co. v. Robinson (C. C.) 52 Fed. 347; Primrose v. Fenno et al. (C. C.) 113 Fed. 375; Fenno et al. v. Primrose, 119 Fed. 801, 56 C. C. A. 313; Western Coal & Mining Co. v. Petty, 132 Fed. 603, 65 C. C. A. 667; Scatcherd v. Love, 166 Fed. 53, 55, 91 C. C. A. 639; Corporation of St. Anthony v. Houlihan, 184 Fed. 252, 255, 106 C. C. A. 394. But the exact basis upon which this right rests is not uniformly agreed upon by the courts. It is probably safe to say that such right rests partly upon almost uni-

versal usage, partly upon statutory provisions of the United States. such as sections 823-857, R. S., and partly upon state statutes construed in connection with sections 721 and 914, R. S. U. S. (Comp. St. 1913, §§ 1537, 1538). Primrose v. Fenno et al. (C. C.) 113 Fed. 375; Fenno et al. v. Primrose, 119 Fed. 801, 56 C. C. A. 313; Western Coal & Mining Co. v. Petty, 132 Fed. 603, 65 C. C. A. 667; Scatcherd v. Love, 166 Fed. 53, 55, 91 C. C. A. 639; Corporation of St. Anthony v. Houlihan, 184 Fed. 252, 255, 106 C. C. A. 394.

[2] The right of the United States, when the prevailing party plaintiff in a law action, to recover costs, is also well established, even though, in many such cases, costs could not be recovered by the defendant, though the prevailing party, against the United States. right on the part of the United States in many cases rests rather upon long-established recognized usage than upon statutory enactment. See United States v. Sanborn, 135 U. S. 271, 10 Sup. Ct. 812, 34 L. Ed. 112; Pine River Logging Co. v. United States, 186 U. S. 279, 296, 22 Sup. Ct. 920, 46 L. Ed. 1164; Grant Bros. Construction Co. v. United

States, 232 U. S. 647, 665, 34 Sup. Ct. 452, 58 L. Ed. 776.

In determining the question of what items of costs and disbursements may be taxed, the federal courts follow state practice and state statutes, when practicable, except when an act of Congress makes definite provision for specific items; and the language used in section 983, R. S. U. S. (Comp. St. 1913, § 1624), "in cases where by law costs are recoverable in favor of the prevailing party," would seem to authorize this method of procedure. Grant Bros. Construction Co. v. United States, 232 U. S. 647, 665, 34 Sup. Ct. 452, 58 L. Ed. 776; Shreve et al. v. Cheesman, 69 Fed. 785, 788, 16 C. C. A. 413; Primrose v. Fenno et al (C. C.) 113 Fed. 375; Fenno et al. v. Primrose, 119 Fed. 801, 56 C. C. A. 313; Scatcherd v. Love, 166 Fed. 53, 91 C. C. A. 639. But items of necessary expense may be allowed to be taxed as disbursements, though no provision is found therefor in state or federal statutes. Fenno et al. v. Primrose, 119 Fed. 801, 56 C. C. A. 313.

3. There is no act of Congress touching the exact question involved in the case at bar, and the question whether a plaintiff, being the prevailing party upon one only of the several causes of action in the complaint, may nevertheless tax disbursements incurred in connection with those causes of action upon which he has not prevailed, has been decided differently in different states. In many of the states the question is determined by the express provisions of the statutes themselves. Such is the case in New York, Missouri, Michigan, Connecticut, Indiana, Massachusetts, and probably other states. In the absence of such a statute, providing what costs and disbursements may be taxed in such cases, it has been held in some states that the plaintiff may tax disbursements paid or incurred in connection with all the causes of action, though he prevail upon only one. See Empire State Surety Co. v. Moran Bros., 71 Wash. 171, 127 Pac. 1104. cases might be cited. On the other hand, that the plaintiff should not be allowed to tax disbursements as to the causes of action upon which he has not prevailed, although he has prevailed upon one, see Lewis v. Watkins, 3 Lea (71 Tenn.) 174; Railway v. Cofer, 110 Ala. 491, 18

South. 110. Other cases might be cited.

The Supreme Court of the state of Minnesota, so far as I have been able to learn, has not passed upon this precise question. Section 7976, Gen. St. Minn. 1913, contains the following provision:

"In every action in a district court, the prevailing party shall be allowed his disbursements necessarily paid or incurred."

[5] The prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment entered, and there can be no doubt that in the case at bar the plaintiff is the prevailing party, within the meaning of the statute, although recovery was had upon one cause of action only. In Johnson v. Railway Co., 29 Minn. 425, 13 N. W. 673, the court used the following language:

"The chief purpose of the allowance of costs is compensation or indemnity for expenses incurred in enforcing a legal, or resisting an illegal, claim."

The language is quoted approvingly in the case of McKinley v. Bank, 127 Minn. 212, 149 N. W. 295.

[3] 4. The Supreme Court of the state of Minnesota has also expressly held that the language of the statute calls for the exercise of discretion and judgment in the taxation of costs and disbursements, using the following language:

"It is the province of the trial court to determine whether these were disbursements 'necessarily paid or incurred.' Section 7976, Gen. St. 1913. To a large extent this involves an exercise of discretion and judgment." Salo v. Railway Co., 124 Minn. 361, 145 N. W. 114. See, also, Thompson v. Insurance Co., 97 Minn. 89, 94, 106 N. W. 102.

That judgment and discretion must be exercised in the taxation of costs and disbursements is also the holding in the federal courts. Unnecessary and unreasonable items are not to be allowed. Necessary and reasonable items are to be allowed. United States v. Sanborn, 135 U. S. 271, 285, 10 Sup. Ct. 812, 34 L. Ed. 112; Pine River Logging Co. v. United States, 186 U. S. 279, 297, 22 Sup. Ct. 920, 46 L. Ed. 1164; Tyler Min. Co. v. Sweeney et al., 79 Fed. 277, 24 C. C. A. 578; Primrose v. Fenno et al. (C. C.) 113 Fed. 375; Fenno et al. v. Primrose, 119 Fed. 801, 56 C. C. A. 313; Houlihan v. Corporation of St. Anthony (C. C.) 173 Fed. 496; Corporation of St. Anthony v. Houlihan, 184 Fed. 252, 106 C. C. A. 394. The same rules of construction apply in taxing costs under section 974, R. S. U. S. United States v. Wilson et al. (C. C.) 193 Fed. 1007.

[4] 5. The question remains whether the items of disbursements objected to by the defendant in the case at bar were "necessarily paid or incurred" by the plaintiff, within the meaning of those words, as used in the Minnesota statute. Bearing in mind the language above quoted from Johnson v. Railway Co., 29 Minn. 425, 13 N. W. 673,

to wit:

"The chief purpose of the allowance of costs is compensation or indemnity for expenses incurred in enforcing a legal, or resisting an illegal, claim."

And applying the rule to the case at bar, it seems clear that the items objected to should not be allowed. The causes of action upon which

the plaintiff failed to recover were not legal claims, and this was so held by the court. The only legal claim set forth in the complaint was the first cause of action, and the plaintiff was entitled to tax costs and disbursements necessarily incurred in enforcing this legal claim. If the other 12 claims had been sued upon separately, the plaintiff would not have prevailed in any, and would not in that event have been allowed to tax costs and disbursements against the defendant as to any of those claims.

The inclusion of illegal claims with a legal claim in the same complaint ought not to give the plaintiff any greater right to tax costs and disbursements than if the legal claims should be prosecuted in a separate suit. To hold otherwise would be to encourage the inclusion of illegal claims. In case of Ballard Transfer Co. v. Railway Co., 129 Minn. 494, 152 N. W. 868, plaintiff brought an action for damages, defendant interposed a counterclaim for damages, and verdict was in favor of defendant, but without damages. The clerk taxed costs and disbursements in favor of the defendant, except disbursements incurred by the defendant in connection with its counterclaim. The trial court, upon appeal from taxation of costs, disallowed costs or disbursements to either party. The Supreme Court upon appeal held that the taxation as made by the clerk was correct. The reason why the clerk disallowed the disbursement incurred in connection with the counterclaim was that this was a disbursement unnecessary to the defeating of plaintiff's claim, and this was approved by the Supreme Court.

[6] In view of the decisions of the Minnesota Supreme Court, it seems clear, first, that the expression "disbursements necessarily paid or incurred" means paid or incurred in connection with the cause of action upon which the verdict is based; and, second, that it is incumbent on the trial court to exercise its judgment and discretion in disallowing disbursements not necessarily incurred in connection with the cause of action upon which the verdict is based.

It seems to me to follow logically that if the court is to exercise its judgment and discretion in disallowing disbursements unnecessarily incurred in connection with a cause of action upon which the verdict is based; a fortiori, should the court exercise its judgment and discretion in disallowing items of disbursements not connected in any way with the cause of action upon which the verdict is based.

In re EVANS.

(District Court, D. Idaho, S. D. October 4, 1916.)

1. Public Lands = 140—Desert Lands—Entries.

An entry under the desert land laws, on which final proof has not been made, is property subject to the payment of the entryman's debts, and on his bankruptcy may be subjected to payment of such debts, whether the bankruptcy be voluntary or involuntary, for under Act March 3, 1891, c. 561, 26 Stat. 1095, and Act March 28, 1908, c. 112, 35 Stat. 52 (Còmp. St. 1913, §§ 4681–4683), the entry may be assigned before perfected,

and assignments may be voluntary or involuntary, while the purpose of the desert land laws is not, as in the case of homesteads, to encourage citizens to establish themselves, but requires the payment of substantial consideration.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 377–382; Dec. Dig. 🖘 140.]

2. BANKRUPTCY \$\igcup 143(1)\$—Property Subject to Payment of Debts.

Under Bankruptcy Act July 1, 1898, c. 541, § 70a, subds. 1, 5, 30 Stat. 565 (Comp. St. 1913, § 9654), declaring that the trustee succeeds to all documents relating to property and to property which prior to the filing of the petition could have been by any means transferred, a desert entry, though not completed, is subject to sale by the trustee in bankruptcy, for it might be assigned, and the bankrupt had a right which will be protected by law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 194; Dec. Dig. ← 143(1).]

3. BANKRUPTCY \$\infty 4\to STATUTES\to Construction.

The Bankruptcy Act should receive a construction which will effectuate its purpose, and not permit debtors to retain their property free from the claims of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 3, 4; Dec. Dig. ← 4.]

4. Public Lands \$\infty\$ 140—Desert Entries—Liability for Entryman's Debts.

By express statute, homestead, pre-emptions, and timber culture entries pass on the death of the entryman before patent to his heirs, not by succession or inheritance, but as purchasers from the United States. Rev. St. § 2448 (Comp. St. 1913, § 5098), declares that, where an entryman dies before patent is issued, the patent title shall inure to and become vested in the heirs, devisees, and assigns of such deceased patentee, as if the patent had been issued to the entryman during life. Held, that while the statute is broad enough to include desert entries, it manifestly refers only to the death of the entryman after final proof, etc., and does not indicate an intention on the part of Congress to exempt desert entries from payment of the entryman's debts.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 377–382; Dec. Dig. €=140.]

In Bankruptcy. In the matter of the bankruptcy of Herbert L. Evans. On petition to review orders of referee, authorizing and confirming a sale of lands on which the bankrupt had entered under the desert entry laws. Orders affirmed.

- J. W. Stauffer and D. A. Dunning, both of Boise, Idaho, for bank-rupt.
 - D. L. Young, of Boise, Idaho, for trustee.
 - B. F. Neal, of Boise, Idaho, pro se.

DIETRICH, District Judge. [1] On June 16, 1916, Herbert L. Evans was adjudged a voluntary bankrupt. In his petition he stated that he was "willing to surrender all his property for the benefit of his creditors, except such as is exempt by law." He was at the time entryman under public land laws of the United States of desert entry No. 011795, embracing 160 acres of land in the Boise land district, in Idaho. He had not yet made final proof. The referee, adopting the

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

view that the entry was subject to administration, directed the trustee to sell it. The bankrupt is here seeking a review of the proceedings authorizing and confirming the sale, upon the theory that a desert entry prior to final proof does not constitute a part of the insolvent entryman's estate. The question, of course, involves a consideration of the provisions of both the Bankrupt Act and the desert land laws. No decided case has been found directly in point.

In the first place, there are obvious distinctions to be made between a desert entry and a homestead entry. A homestead is in the nature of a bounty, and, having in mind that the underlying purpose of the Homestead Act is to encourage citizens to secure for themselves and their families homes upon the public domain, Congress prescribed appropriate conditions and limitations: A certain period of actual residence is required, transfers are prohibited, the entry is protected against the claims of creditors, and in case of the death of the entryman it passes, not to the creditors, but to those for whose benefit the bounty is intended, namely, the family of the deceased. An entirely different purpose underlies the desert land laws. The title thus acquired is not a gratuity. In the purchase price of \$1.25 per acre the government directly receives a substantial consideration, if not the full value of the lands as they exist in their natural condition. And. of course, it receives the further indirect benefit arising from the reclamation of unproductive lands. In administering these laws it does not concern itself primarily with the contribution which the entry may make to the well-being of the entryman and his family. No condition of residence or tenure is imposed, nor is there any provision safeguarding the entry, either in the hands of the entryman or of his heirs, against the claims of his creditors. The government requires the payment of the purchase price and a measure of reclamation before it will pass title, but whether the money is paid and the acts of reclamation performed by the entryman, or by his successor in interest, is to it a matter of indifference. The entry may be assigned at any time, and the assignee acquires all the rights of the entryman. Amendatory Act of March 3, 1891, 26 Stat. 1095, and the further Amendatory Act of March 28, 1908, 35 Stat. 52. The entryman thus has a vendible interest, which is always of substantial value, and which, shortly before final proof, is likely to be worth but little less than the complete equitable and legal title would be. Why should such a property right not be appropriable to the payment of the entryman's debts? Without strain, the language of the law is comprehensive enough to permit of such appropriation:

"'Assigns,' or as the word is more commonly spelled, 'assignees,' are of two classes, depending on their creation: First, voluntary assignees, who are created by act of the parties; and, second, assignees created by operation of law." Hoffeld v. United States, 186 U. S. 273, 22 Sup. Ct. 927, 46 L. Ed. 1160.

I am aware that in Young v. Trumble, 35 Land Dec. 515, the Honorable Secretary of the Interior, while recognizing the validity of a transfer effected through a judicial proceeding in the nature of a mortgage foreclosure, declined to uphold a sale upon execution in an ac-

tion at law, but I am unable to appreciate the validity of this distinction. The question there and the one here are substantially different from that which was involved in the Hoffeld Case, supra, upon which much reliance seems to have been placed. In the Hoffeld Case it appears to have been assumed that the execution sale operated to transfer to the purchaser the entryman's right in the entry and the lands covered thereby, and nothing else is here involved. But, however that may be, under the principle that a valid transfer may be effected by foreclosure proceedings, which was recognized in the Young-Trumble decision, and unequivocally enunciated in the case of United States v. Commonwealth T. I. & T. Co., 193 U. S. 651, 24 Sup. Ct. 546, 48 L. Ed. 830, a sale and transfer in a bankruptcy proceeding, at least in a voluntary proceeding like this, should be upheld. Administration in bankruptcy proceeds in a court of equity, where there is ample power to require the bankrupt to deliver up all title papers, and hence in such a proceeding one of the objections on which the Hoffeld decision seems to have been predicated is easily obviated; and, in a voluntary proceeding, the bankrupt expressly agrees to turn over all his property to his creditors. In order to avail himself of the high privilege of securing a discharge from all of his debts, the bankrupt here expressed his willingness "to surrender all his property for the benefit of his creditors, except such as is exempt by law," and it is conceded that the entry in question is not exempt by law. Hence, as in the mortgage foreclosure, the sale by the trustee merely consummated the entryman's voluntary act of assignment.

[2] Putting aside this consideration, and assuming that a voluntary proceeding in bankruptcy is not different from an involuntary one, the bankrupt urges that he has no vested interest, but only an inchoate right in the entry. We must deal with the substance of things, and not with the mere terms by which they may be called without changing their real nature. If by an inchoate, nonvested right it is meant that the entryman's right is such that against his will, and while he is fully and seasonably complying with the conditions prescribed by law, the entry may be taken from him without compensation and without due process, either by private individuals or by the government itself, I am unable to adopt the view. The entryman is not vested with the title, to be sure, but he is vested with the right to acquire the title by complying with the prescribed conditions. Moreover, the Bankruptcy Act is very comprehensive in the terms it employs to describe that which is subject to administration. The trustee succeeds—

"to all (1) documents relating to * * * property; * * * (5) property which prior to the filing of the petition he [the bankrupt] could by any means have transferred or which might have been levied upon and sold under judicial process against him." Bankruptcy Act, § 70a, subds. (1), (5).

It is not necessary that the property or right be subject to judicial process. Was this desert entry "property," and could the entryman by any means have transferred it? That he could have transferred it by voluntary assignment is conceded, and that it is of substantial value both to the entryman and to his transferee, and is "property" in a very real sense, seems scarcely open to question.

[3, 4] Finally there is the contention that the purpose of Congress not to make such an entry appropriable to the payment of the entryman's debts during his lifetime should be inferred from the fact that it is provided that upon his death it shall go not to his estate, but to his heirs. That it goes to the heirs and not to the estate seems to be the holding of the Idaho Supreme Court in Powell v. Powell, 22 Idaho, 534, 126 Pac. 1058, but with all due respect, I am not convinced of the correctness of the conclusion there reached. It is said by the court that:

"While no case has been brought to our attention involving the right and title to a desert entry where the title has been perfected and patent has issued subsequent to the death of the entryman, our attention has been called to cases involving homestead, pre-emption, and timber culture entries [citations omitted], and it has been uniformly held, so far as we are advised, that in all such cases the heirs take title—not by succession or inheritance, but as purchasers from the United States."

But such succession is expressly provided for by law in the case of homestead, pre-emption, and timber culture entries. For homesteads see Revised Stat., §§ 2291, 2292 [Comp. St. 1913, §§ 4532, 4543]; for pre-emption see section 2269; for timber culture entries see Act of June 14, 1878, §§ 2, 4, 20 Stat. 113. Whereas there are no such provisions relative to a desert entry. Standing alone, it is true the language of section 2 of the Timber Culture Act is not free from ambiguity, but clearly under section 4 the entry is exempt from claims against the estate, for such claims would necessarily arise before the death of the entryman, and hence by hypothesis before the issuance of final certificate, and therefore could not becomes charges against the entry.

Section 2448 of the Revised Statutes, cited by the Idaho court, while broad enough to cover a desert entry, seems to be applicable only to cases where the entryman dies after final proof and before patent. And besides it in no wise supports the proposition that the entry passes to the heirs free from the debts of the deceased, for it provides that the patent title—

"shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life."

Now manifestly if patent to a desert entry issues to the entryman during his lifetime, upon his death the land, if still held by him, will become vested in his heirs or devisees, subject, however, to the payment of his debts, and therefore subject to the administration of his estate, and that is precisely the contention which the trustee here makes touching the status of this entry.

In conclusion it may be suggested that it would be an anomalous condition, and it would tend to bring the bankruptcy law into disrepute, if, as would be entirely possible under the contention which the bankrupt makes, a debtor could, while residing upon and claiming the exemption of his homestead, put upon his desert entry improvements of great value, and, after incurring large indebtedness for that purpose, resort to the bankruptcy court just before it becomes necessary for him to submit his final proof, and in that way secure a discharge from

his debts while withholding property which, if sold, would realize an amount sufficient for their payment in full. It is easy to conceive of an entry of this character having a salable value of \$25,000 or \$30,000, and yet if the present contention is sustained, the bankrupt could, while possessed of such an estate in addition to his exemptions, demand that he be discharged from his debts, and thus leave his creditors, less affluent than he, to swallow their chagrin and charge their claims to profit and loss. In the absence of the most cogent reasons the law ought not to be so construed as to make possible such an incongruous, if not monstrous, result.

The orders complained of will be affirmed.

UNITED STATES v. PENNSYLVANIA CO.

(District Court, W. D. Pennsylvania. June 1, 1916.)

No. 3.

1. Animals \$\infty\$=29—Constitutional Law \$\infty\$=62—Division of Powers—Legislative Authority.

Act Feb. 2. 1903, c. 349, 32 Stat. 791 (Comp. St. 1913, §§ 8098-8700), authorizing the Secretary of Agriculture, for the purpose of suppressing and preventing the spread of contagious diseases of livestock, to establish rules and regulations concerning the transportation of such live stock, and to make such regulations as may be deemed proper to prevent the introduction and dissemination of such diseases in interstate commerce, as well as to seize, quarantine, and dispose of hay, straw, fodder, or other animal products coming from infected foreign countries, or from one state to another when advisable, is valid, not being an improper delegation of legislative functions; for as new conditions arise from time to time, and prompt and stringent measures may be necessary to stamp out an epidemic, it is proper for Congress to give to executive officers authority to establish regulations to prevent the spreading of such diseases.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 79: Dec. Dig. \$29; Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. \$2.]

2. Animals @31—Diseases—Regulation—Interstate Shipment—Reasonableness.

Pursuant to such act, an order of the Bureau of Animal Industry defined quarantined areas as those portions of states quarantined for foot and mouth diseases, and closed areas as those portions of quarantined areas where interstate and foreign transportation of domestic animals is prohibited, and that of animal products is restricted. General regulations authorize shipment of hides which have received an ante mortem or post mortem federal inspection without disinfection, where the shipper makes an affidavit certifying to such fact, and further provide that during the existence of the quarantine, hides taken from animals prior to a fixed date, which have been stored away from cattle, might, on affidavit to that fact, be shipped without disinfection. Held, that in view of the statute, the regulations were reasonably intended to fulfill its purpose.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 81; Dec. Dig. \$31.]

3. Animals \$\infty 31-Diseases-Regulation-Intrastate Commerce.

In such case, in view of the purpose of the act under which the regulations were made and the terms of the orders themselves, it is to be

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presumed that they were adopted to carry out only the provisions of the act, and are not invalid as applying to intrastate shipments of stock and hides, etc.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 81; Dec. Dig. **€**==31.]

4. Animals \$\infty 34\to Animal Products\to Transportation\to Offenses.

Under Act Feb. 2, 1903, c. 349, 32 Stat. 791 (Comp. St. 1913, §§ 8698-8700), authorizing the Secretary of Agriculture to make the rules and regulations for the transportation of animals and animal products, to suppress and extirpate communicable diseases, and section 3 (section 8700), making a violation of its provisions or any of the rules a misdemeanor, one violating rules of the Secretary of Agriculture is, despite the prohibition against delegation of legislative authority, guilty of an offense; the offense being declared by the act and the Secretary of Agriculture merely filling in the details by means of his regulation.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 93; Dec. Dig. **\$**34.1

The Pennsylvania Company was charged with violating Act Feb. 2, 1903, c. 349, 32 Stat. 791 (Comp. St. 1913, §§ 8698-8700), by transporting in interstate commerce a quantity of cattle hides in violation of the rules of the Department of Agriculture, and demurs to the information. Demurrer overruled.

E. Lowry Humes, U. S. Dist. Atty., of Pittsburgh, Pa. Dalzell, Fisher & Hawkins, of Pittsburgh, Pa., for defendant.

THOMSON, District Judge. By leave of court, the United States attorney filed an information against the defendant, charging transportation from Beaver county, Pa., into the state of West Virginia of a quantity of cattle hides without first having been disinfected under the supervision of an inspector of the Bureau of Animal Industry, or without a certificate furnished to the carrier at the point of shipment, certifying that the hides had been removed from the animals prior to August 1, 1914, and had been stored away from such animals. The information is made under Act Feb. 2, 1903, 32 Stat. 791. The act is entitled "An act to enable the Secretary of Agriculture to [more] effectually suppress and prevent the spread of contagious and infectious diseases of live stock, and for other purposes." By the first section it is provided that in order to enable the Secretary of Agriculture to effectually suppress or extirpate contagious foot and mouth diseases and other dangerous contagious and communicable diseases in cattle and other live stock and to prevent the spread of such diseases, the Secretary of Agriculture is authorized and directed from time to time to establish such rules and regulations concerning the transportation of live stock in interstate commerce as he may deem necessary, and all such rules and regulations shall have the force of law.

The second section provides that the Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction and dissemination of the contagion of any contagious, infectious or communicable diseases of animals in interstate commerce and to seize, quarantine, and to dispose of any hay, straw, fodder, or other similar material, or any meat,

hides, or other animal products coming from infected foreign countries to the United States or from one state to another "whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion."

The third section provides:

"That any person, company, or corporation knowingly violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor."

By order No. 231 of the Bureau of Animal Industry "to prevent the spread of foot and mouth diseases in cattle, sheep and other ruminants and swine, effective on and after January 1, 1915," the Secretary defined quarantine area as "Any state or portion thereof quarantined for foot and mouth diseases in live stock," and closed area as:

"Those portions of quarantined area from and to which interstate and foreign movement of cattle, sheep and other ruminants and swine is absolutely prohibited and the movement of the dressed carcasses of such animals, hides, skins, wool, hair, horns or hoofs of such animals and of hay, straw, or similar fodder, manure or litter is restricted."

The entire state of Pennsylvania is quarantined and certain counties, among others Beaver county, is nominated as "closed area"; that is, the transportation of cattle is absolutely prohibited from these counties, and hides, etc., can be removed only subject to the restrictions imposed.

Section 9 of the General Regulations is to the effect that hides, etc., which have received ante mortem or post mortem federal inspection, may be shipped without disinfection—

"provided the owner or assignor shall first file an affidavit with the transportation company at the point of shipment certifying that the said hides, etc., are from animals which have received federal inspection as aforesaid."

Section 7 provides that during the existence of the quarantine, hides, etc., taken from such animals prior to August 1, 1914, which have since that date been stored away from cattle, etc., may be shipped without disinfection in interstate and foreign commerce, provided that the owner or consignor shall file an affidavit with the transportation company at the point of shipment so certifying.

The defendant demurred to the information, denying: First, the power of the Secretary of Agriculture to prescribe regulations, placing restrictions upon the interstate transportation of hides; second, that the Secretary of Agriculture, by his order No. 231, placing certain restrictions on the movements of hides, etc., for closed areas, has not limited such regulations to interstate movements of hides, etc.; and, third, that the matters complained of in the information do not constitute the violation of any act of Congress.

[1] As to the first question: There is no mistaking the purpose of the act of Congress. It is to prevent the spread of diseases of live stock. To this end the first section aims to prevent the transportation in interstate commerce of animals actually diseased. The second section seeks to prevent the introduction or dissemination of the contagion of any communicable disease of animals from foreign countries or from one state to another, and, to accomplish this beneficent end, au-

thorized the Secretary of Agriculture to make such regulations and take such measures as may be deemed proper. It may be wholly impracticable for Congress to determine what measures should be taken to prevent the spread of animal diseases. New conditions arise, and not infrequently an epidemic breaks out, requiring prompt and stringent measures in order to successfully combat it. Evidently this can best be accomplished by the employment of some executive agency under such restriction as Congress may see fit to impose. Nor is it necessary or reasonable that a quarantine should be no reason for restricting interstate movement of live stock or animal products. That Congress may delegate to an executive officer the power to determine facts and conditions upon which the operation of the statute depends, without violating the prohibition against the delegations of legislative functions, is clearly settled. Mutual Film Corp. v. Industrial Commission of Ohio et al., 236 U. S. 230, 35 Sup. Ct. 387, 59 L. Ed. 552, Ann. Cas. 1916C, 296; Red "C" Oil Co. v. North Carolina, 222 U. S. 380, 394, 32 Sup. Ct. 152, 56 L. Ed. 240; St. Louis, Iron Mountain & S. Ry. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; Union Bridge Co. v. U. S., 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; Bates & Guild Co. v. Payne, 194 U. S. 106-109, 24 Sup. Ct. 595, 48 L. Ed. 894.

- [2] Are the regulations of the Secretary reasonable and within the scope of the statute? I think so. That Congress was of opinion that hides may be the means of conveying animal diseases is shown by the fact that in section 2 it is provided that the Secretary of Agriculture may seize, quarantine, and dispose of any hides while in transit from one state to another, if necessary to guard against the spread of dis-There is always the possibility that such hides may have been removed from animals in some stage of the disease, and hides removed from healthy cattle in infected or exposed areas may readily become the media for transmission of disease. I am of opinion that the regulations in question are reasonable and designed to carry out the purposes of the law. The authorities show that rules and regulations made under expressed or implied authority, by an officer charged with the duty of administering the statute are valid, if adapted to fulfill the object of the statute. United States v. Lewis, 235 U. S. 282, 35 Sup. Ct. 44, 59 L. Ed. 229; United States v. Antikamnia Chemical Co., 231 U. S. 654, 34 Sup. Ct. 222, 58 L. Ed. 419, Ann. Cas. 1915A, 49; West v. Hitchcock, 205 U. S. 80, 27 Sup. Ct. 423, 51 L. Ed. 718; Caha v. United States, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415; United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563.
- [3] Nor do I think that the second cause of demurrer can be sustained. The act of Congress authorizes the Secretary of Agriculture to make such regulations as he may deem proper to prevent the introduction or dissemination of the contagion of any communicable disease of animals from a foreign country into the United States, or from one state or territory to another. It is to be presumed that the regulations adopted were to carry out only the provisions of the act, and not to embrace matters not covered, nor intended to be covered, thereby. The orders and regulations in question seem to be in strict conformity

with the act. "Closed areas" referred to in order 231, are "those portions of the quarantined area from and to which interstate and foreign movements of cattle," etc., is absolutely prohibited. And so also orders 6, 7, 8, and 9 distinctly refer to interstate and foreign shipments. It would be a strained and unnatural construction, considering the act and its objects, the purpose of the regulations, and the language used, to hold that the regulations in reference to the shipment of hides, etc., in section 9 are not limited to interstate movements.

[4] It is claimed, in the third place, that the particular acts alleged in the information do not constitute the violation of any act of Congress. Under the third section of the act, knowingly violating the provisions of the act, "or the orders or regulations made in pursuance thereof," is declared to be a misdemeanor, and punishable by fine or imprisonment. In United States v. Grimaud, supra, it is held that, while Congress cannot delegate legislative power, the authority to make administrative rules is not a delegation of legislative power, and such rules do not become legislation because violations thereof are punished as public offenses: that while it is difficult to define the line which separates legislative power to make laws and administrative authority to make regulations, Congress may delegate power to fill up details where it has indicated its will in the statute, and it may make violations of such regulations punishable as indicated in the statute. We think this decision controlling, in the case at bar, so far as the third cause of demurrer is concerned.

The demurrer is therefore overruled.

UNITED STATES v. NORTHWESTERN PAC. R. CO.

(District Court, N. D. California, Second Division. July 31, 1916.)

Nos. 15897, 15952.

1. RAILROADS \$\infty 229-SAFETY APPLIANCE ACT-LOGGING CARS.

While the federal Safety Appliance Act of March 2, 1893, c. 196, § 6, 27 Stat. 532, as amended by Act April 1, 1896, c. 87, 29 Stat. 85 (Comp. St. 1913, § 8610), declares that nothing in the act contained shall apply to trains composed of four-wheel cars, or to trains composed of eight-wheel logging cars, where the height of such cars from the top of the rail to the center of the coupling does not exceed 25 inches, the act applies to standard eight-wheel flat cars, though used exclusively for the transportation of logs, where the height of such cars from the top of the rail to the center of the coupling exceeds 25 inches.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. \$229.]

2. Railboads \$\iiiistar{2}\$254(2)—Safety Appliance Act—Construction—"Permit."

Where a railroad company engaged in interstate commerce allowed a lumber company to operate over a portion of its tracks lumber trains, which were not equipped in accordance with the federal Safety Appliance Act, imposing penalties on railroad companies engaged in interstate commerce which haul, or permit to be hauled over their tracks defectively equipped trains, the railroad company is liable for the penalty, though trains were under the exclusive control of the servants of the lumber company, and it exercised no supervision other than to control the movement

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of such trains by its own dispatchers, and to require those in charge to acquaint themselves with the company's time-table, for the word "permit" should not be construed in its ordinary significance as implying knowledge of the thing permitted, as the statute, being remedial, should be given such a construction as will give effect to the intention of Congress.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 765, 766, 768; Dec. Dig. \$\infty 254(2).

For other definitions, see Words and Phrases, First and Second Series, Permit.]

At Law. Actions by the United States of America against the Northwestern Pacific Railroad Company. Judgments for plaintiff.

E. F. Jared, Asst. U. S. Atty., of San Francisco, Cal., and Roscoe F. Walter, Sp. Asst. U. S. Atty., of Washington, D. C., for the United States in No. 15897.

E. F. Jared, Asst. U. S. Atty., of San Francisco, Cal., and Monroe C. List, Sp. Asst. U. S. Atty., of Washington, D. C., for the United States in No. 15952.

Stanley Moore and C. J. Goodell, both of San Francisco, Cal., for defendant.

VAN FLEET, District Judge. These cases involve alleged infractions by the defendant of the federal Safety Appliance Act of March 2, 1893 (27 Stat. L. 531 [Comp. St. §§ 8605-8612]), as amended Act April 1, 1896 (29 Stat. L. 85 [Comp. St. 1913, § 8610]), and Act March 2, 1903 (32 Stat. L. 943 [Comp. St. 1913, §§ 8613-8615]). While not tried together, they have been submitted on the same argument and briefs, and as the principal question in each is common to both, they may be disposed of in one opinion.

There is no controversy as to the defendant being a corporation engaged in interstate commerce and subject to the requirements of the act, nor as to the fact of the existence of the several defects in the equipment as alleged and counted upon in both actions, the only controversy arising over the questions: (1) Whether it was being employed for a purpose such as to bring it within the act; and (2)

in a manner to render defendant responsible for such use.

[1] 1. The first three counts in case No. 15897 cover the use on defendant's road of three of its own cars under these circumstances: The Bayside Lumber Company, a patron of defendant, with its mills near Eureka, carried on logging operations about 3 miles from defendant's line, with which they connected by their own service track at a point called Mannons Creek, about 25 miles from Eureka; the cars in question were part of a number set aside by defendant to the lumber company for its use in hauling logs from the logging camp; they were not regular logging cars, but flat cars of standard gauge and make, equipped, while so used, with transverse "cradles," or "bumpers," for holding logs. The defendant would deliver these cars empty to the lumber company at Mannons Creek, where the latter would receive, load, and return them to the junction, and the defendant would then take and deliver them over its line at the mills near Eureka. It was while in pursuance of this arrangement between the lumber company and the defendant the cars in question were being hauled over defendant's line in one of its own trains, and in control of its employés, that the defects counted upon were shown to exist.

The only thing in the nature of a defense advanced by defendant to shield itself from liability for use of these three cars in the defective condition shown is the claim that, as they were being used exclusively at the time for the transportation of logs, they were exempted from the operation of the Safety Appliance Act by the proviso to section 6 (as amended in 1896, 29 Stat. L. 85), which reads:

"Provided, that nothing in this act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed 25 inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."

But the statement of the claim, in view of the language of the proviso, discloses its utter futility. The fact that the cars were at the time being used for the transportation of logs is not enough. statute excludes only "standard logging cars where the height of such car from top of rail to center of coupling does not exceed 25 inches." These cars, as noted, were not of that character, but were standard flat cars having, as the evidence shows, a height in the respect mentioned of 34 inches. The act makes the one condition as essential to the exemption as the other, and it is not for the court to give it a construction which would defeat the legislative intent so plainly and explicitly expressed. Assuming, therefore, that the character of use here being made of these cars was such as would bring them within the category of cars "exclusively used for the transportation of logs," within the contemplation of the act (see Spokane, etc., R. R. Co. v. United States, 241 U. S. 344, 36 Sup. Ct. 668, 60 L. Ed. 1037, United States Supreme Court, June 5, 1916), a thing it is not necessary to decide, the lack, in the essential feature pointed out, must necessarily exclude them from the protection of the proviso.

[2] 2. The remaining six counts in No. 15897 and the first five counts in No. 15952 (No. 6 not being involved) fall within one and the same category under the defense made. They all cover the use of defective cars, excepting only No. 9 in 15897, which alleges the movement of a defectively equipped train. For the reason above stated it is not essential to specify the character of the various defects alleged, there being no controversy as to their existence; the defense involving solely a question of defendant's responsibility therefor by reason of the circumstances. Excepting as to the particular equipment specified in each, all these counts are precisely similar in their purport, charging that the defendant on the particular date "permitted to be hauled," as alleged in some, or "permitted to be used or hauled," as charged in others, "over a part of a through highway of interstate commerce," etc., the particular unit of equipment counted upon. The movement of all the equipment covered by these counts at the dates alleged was had under and in pursuance of an operating or traffic agreement between the defendant and the Pacific Lumber Company, whereby the latter was permitted to use the main line of defendant's road between the stations of South Bay and Scotia, a distance of some 22 miles, for the passing back and forth to and from its mills of the trains of the lumber company in the transportation of its products. These trains carried no passengers, the lumber company not being a common carrier of either passengers or freight, but were made up exclusively of standard flat cars used in carrying its own output of lumber. The cars, engines, and other equipment were the property of the lumber company, and were operated immediately by its employés, but in the movement of its trains over defendant's line they were at all times under the control and direction of the latter's dispatchers and operating officials, and were required to acquaint themselves with the time-table issued by the defendant for the government of its own employés, and to follow the rules, orders, and directions contained therein; and no train of the lumber company could move over defendant's line without first receiving authority therefor from defendant's operating officials, but when not on such line were wholly within its own control.

The lumber company maintained its own yards and repair shops, and its equipment was not inspected by defendant's operatives, but exclusively by its own servants. It ran regularly about two trains a day each way over the part of defendant's line covered by the contract. The defendant's contention is that under these facts it is not to be held responsible for the defects complained of, its theory being that the act in question is intended only for the protection of employés of common carriers, and that the provision of section 6, "that any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act shall be liable," etc., has reference solely to such acts when done, or permitted to be done, by the carrier on its own road and through its own employés, over whom it has control, and does not include acts done on its line by one over whose equipment and employés it has no such control. In this respect it is urged:

The theory of the act and the intention of Congress was that the railroads should be held liable for any failure to render the employment of their trainmen as safe as possible. In all the decisions which have been rendered under this act the railroads directly operating the trains of cars in which the equipment was found were held liable for the defect. It was their employés who were exposed to the risk.

And it is further said:

A corporation can act only through its officers, agents, and employés. It can prevent defective cars from being hauled only by reason of the diligence and care of its employés. When the care and control of the equipment is in the hands of another company, whose employés make up the train, inspect the cars, and have entire charge of their operation, the first company, which merely owns the tracks, has not the power to prevent the second carrier from using defective equipment. There is nowhere in the act any provision giving one carrier the right of control over the employés of another, and the purpose of the act is not to make one carrier responsible for the dangers to which another carrier's employés might be exposed.

But this narrow view of the purpose of the act does not accord with the construction given it by the Supreme Court. Johnson v. Southern Pacific Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. The

dangers to be apprehended from defective equipment reach beyond the immediate operatives and employés of a carrier. They include as well the safety of the traveling public. While the first consideration may have largely actuated the enactment of the law, the latter was not lost sight of by Congress, and the language of the act clearly sustains this view. It is sufficiently broad to comprehend both. When Congress forbade the "hauling or permitting to be hauled or used" any such defective equipment, it very evidently intended to exclude any permissive use in derogation of the dangers sought to be guarded against, not only as to employés, but to the public, and to make the carrier permitting such use responsible therefor. And certainly there is no hardship in imposing such responsibility in an instance like the present. It is not the case of one common carrier permitting the use of its lines by another carrier equally answerable for a violation of the act, but a permission to one not itself subject to the law to employ the same dangerous instrumentalities free from any responsibility for their defective character. For the lumber company, not being a common carrier, is not within the category of those subject to respond for its violation. It would have been a very reasonable and proper precaution for the defendant in its contract, not only for its own protection but that of the public as well, to have provided for its right to inspect the cars and other equipment of the lumber company, to the end that their condition and appliances could be known to it to be such as to conform to the law. But it did not do so, and it is invoking no harsh rule to say that under such circumstances it should be held responsible for the defects complained of. In other words, the circumstances are such that, if necessary, the equipment of the lumber company must, for the purposes of this act, be deemed the equipment pro hac vice of the defendant. Certainly it would be a strong thing to say that responsibility for the violation of this act could be so readily evaded as by an arrangement such as here shown.

It is further strenuously urged at considerable length that the verb "permit" as employed in the phrase "hauling or permitting to be hauled," etc., in section 6, is to be construed in accord with the popular and common use of the word as implying knowledge of the thing permitted, and that accordingly the act should be understood as requiring knowledge by the carrier "that the cars hauled over its rails are in fact defective"; in other words, that the statute should be read as if the qualifying word "knowingly" were inserted therein just before the word "permitted." It is sufficient to say in response to this contention, without following the argument in all its ramifications or specially noticing the citations in its support, that it is definitely met and concluded by the authoritative construction heretofore given the statute. St. Louis, Iron Mountain Ry. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; C., B. & Q. Ry. Co. v. United States, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582. These cases hold that the duty of carriers to exclude the use on their lines of defective equipment is absolute, and not limited to the exercise of reasonable care for the purpose, and that the question of knowledge of such defects is wholly immaterial; that, as stated in the last case:

Where a statute commands that an act be done or omitted which in the absence of such statute might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation.

And statutes of similar purpose have received like construction. United States v. Oregon-Washington R. R. & Nav. Co. (D. C.) 213 Fed. 688, affirmed on appeal 223 Fed. 596, 139 C. C. A. 142. And see Commonwealth v. Curtis, 9 Allen (Mass.) 266.

The act is highly remedial, and should be construed with the degree of liberality which will tend to effectuate rather than defeat the intent of Congress and its beneficent purpose. Johnson v. Southern Pacific Co., supra.

In accordance with these views, judgment must go for the plaintiff in each case upon the counts involved therein, respectively, and for its costs.

Special findings, having been requested, may be prepared and presented in due course.

In re LUTZ & SCHRAMM CO., Inc.

(District Court, W. D. Pennsylvania. July 24, 1916.)

No. 7941.

BANKRUPTCY \$318(1)-CONTRACT FOR SALE OF ACCOUNTS-ENFORCEMENT.

A bankrupt corporation sold a large amount in accounts to petitioner under a contract by the terms of which petitioner advanced 77 per cent. of their face value. They were guaranteed, and to be collected by bankrupt, and remitted to petitioner, which was then to pay back the remaining 23 per cent., less any shortage, and an attorney's fee and commission agreed upon. At the time of the bankruptcy petitioner had received less than the amount advanced, but still retained accounts considerably exceeding the difference. Bankrupt's receiver continued to collect the accounts and to retain the proceeds. Held, that the contract was not terminated by the bankruptcy, but should be settled in accordance with its terms, and that petitioner was entitled to the stipulated commission and attorney's fee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 469; Dec. Dig. €=318(1).]

In Bankruptcy. In the matter of the Lutz & Schramm Company, Incorporated, bankrupt. On review of decision of referee allowing claim of the Commercial Credit Company. Affirmed.

Edmund K. Trent, of Pittsburgh, Pa., for petitioning creditor. Weil & Thorp, of Pittsburgh, Pa., for bankrupt. Joseph Stadtfeld, of Pittsburgh, Pa., for claimant. James Francis Burke, of Pittsburgh, Pa., for trustee.

THOMSON, District Judge. William R. Blair, Esq., referee, has certified for the opinion of the court whether, according to the facts and circumstances set forth in the report and opinion of the referee, the Commercial Credit Company is entitled to recover from the estate of the bankrupt certain compensation and attorney's fees, amounting to the sum of \$7,677.29.

The case was argued ably and at length by counsel on both sides, and elaborate briefs submitted. I have considered with much care

the report of the referee, the exceptions filed thereto, and the position of counsel as elaborated in their oral and written arguments. After much examination, I am not convinced that the referee erred in awarding the Credit Company the amount of its claim. It would serve no useful purpose in this opinion to state in detail the terms of the contract, as they have mainly been embodied in the report of the referee. Very generally, the case may be stated as follows:

Under the contract of June 17, 1915, the Commercial Credit Company purchased from Lutz & Schramm accounts receivable amounting to \$278,636.94, upon which they had advanced \$206,748.22, of which there had been repaid to the Credit Company \$143,943,13, leaving a balance due the Credit Company of \$62,805.09 on account of principal. As these accounts were purchased, they were ear-marked on the books of the vendor, so that no question is raised as to the validity of the sale and transfer of the accounts. It appears, further, that at the time of the institution of the bankruptcy proceedings on September 20, 1915, the Commercial Credit Company under the contract was the owner of uncollected book accounts amounting to \$132,-595.18, on account of which it had advanced principal \$62,805.09, and charged compensation amounting to \$3,554.26, or a total of \$66,359.35, leaving a balance due Lutz & Schramm Company on said accounts of \$66,235.83. It also appears that at that time 77 per cent. of the face value of the accounts so owned by the claimant was \$102,098.28, while the Credit Company in fact had only advanced \$66,359.35, leaving the amount due Lutz & Schramm, over and above the 23 per cent. retained under the contract, \$35,862.45.

Correspondence passed and negotiations were had as to the settlement of the account between the parties. This correspondence was all submitted to the court at the oral argument, and is filed among the papers of the case. The correspondence began on September 22d, on the appointment of the receiver, by a demand on its part for a substantial payment and a statement of how the account stood between them. This was followed by a reply by the Credit Company that they would have a tabulated list of all accounts purchased made up; that it was their invariable rule to at once notify the debtors and take over all accounts direct, but, as there was such a volume of small accounts in the case, if they should do this it would probably injure the firm's business, which they understood to be solvent, and make reorganization less attractive; that, if the receiver would agree to send promptly the original checks on all accounts to them, they would not take the collections over, but permit them to be collected as theretofore. was further stated that under the agreement they had the right to retain any moneys which they then held, on account of breach of warranties in the agreement, and in view of this they would not care to make any more payments on accounts purchased, until there was sufficient to close the account with the firm, when their interest in all accounts unpaid at that time would cease and such accounts would be reassigned.

This was followed by a number of telegrams and considerable correspondence, which resulted in a petition to this court by the Commercial Credit Company for an order on the receiver to turn over to the Credit Company the proceeds of all accounts purchased by the petitioner which may come into the hands of the receiver. An answer was filed, and a stipulation embodying the status of the account between the parties, and thereupon an order was made by the court, directing that the receiver pay to the Commercial Credit Company the sum of \$62,805.09, being the amount of principal due to it at the time of the bankruptcy. It was further ordered that the sum of \$8,000 be held to meet the claim of the petitioner for compensation and attorney's fees. Under the stipulation it was agreed that the compensation due to the Credit Company up to September 20, 1915, amounted to the sum of \$3,554.26, and that the compensation estimate according to the terms of the contract, from September 20, 1915, to November 20, 1915, amounts to \$3,123.03, in addition to which the claim of \$1,000 for attorney's fees is made.

There is no objection to the first claim—the last two being objected to on the ground that the receiver never accepted the said contract, and is not bound by its terms for any period subsequent to its appointment; that the Credit Company did not fulfill the provisions of its contract, and therefore can claim no compensation subsequent to the appointment of the receiver; and that the delay in the payment of the principal sum owing to the Credit Company was due to the negligence of the said company in failing to pursue its legal remedies and in failing to submit to the receiver in proper form the amount of its claim. While the compensation claimed may seem large for the service rendered, it is the compensation provided for in the contract. The question of usury cannot arise, as under the ninth clause of the contract its provisions are to be construed and interpreted under the laws of the state of Delaware, and in that state under such contracts the parties may charge "such amounts as may be agreed upon by the respective parties."

The court's duty is in no sense to revise the contract, but to give it effect according to its terms. Santa Fé Ry. Co. v. Grant, 228 U. S. 177, 33 Sup. Ct. 474, 57 L. Ed. 787. Under the terms of the contract, the Credit Company was the absolute owner of the accounts. They had been duly transferred to that company. Seventy-seven per cent. of the net face value was to be paid in cash when the accounts were accepted, and the remaining 23 per cent., less charges, upon payment of the accounts to the vendor. The vendor was made the collecting agent of the vendee and it was its duty to collect the bills and pay them over to the Credit Company. It is true that at the time of the bankruptcy proceedings, the Credit Company owed a balance of over \$35,000 on account of the 77 per cent.; but it is also true that at that time under the terms of the contract there was a very large balance due to the Credit Company which was afterwards adjudicated by the court in its favor. It is also true that Lutz & Schramm had by the fifth clause of the contract warranted that the—

"first party and each debtor named in an account is solvent and will remain so until maturity thereof; there will be no suspension of business, request for general extension, bankruptcy petition, nor any act amounting to a business failure by or against first party or any debtor." When proceedings in bankruptcy had started against Lutz & Schramm, it could not be expected that the Credit Company would pay the balance it owed to the receiver when the estate was at that time indebted to it in a very much larger amount. The contract provided that:

"Either party here shall have the right at any time to cancel this agreement as to future transactions."

This, it will be observed, related to future transactions alone. So far as the accounts already purchased were concerned, their status was definitely fixed. As to them the receiver would have had no power to cancel the contract or strike down the rights of the purchaser thereunder. When the receiver took possession of the assets, it found that certain accounts had been duly sold and assigned on the books of the bankrupt to the Credit Company, and were duly earmarked as their property. With knowledge of this fact, the receiver subsequently received into its hands funds belonging to the Credit Company on account of the accounts so assigned. These funds belonged to the Credit Company. The moving consideration for the purchase of the accounts was the compensation to which the company was entitled. It is, no doubt, true that the contract contemplated a going concern, and would naturally terminate so far as future purchases of accounts are concerned; but the money which is now claimed as compensation is for accounts that were already purchased prior to the bankruptcy proceedings. And under the authority of the court the receiver continued the operation of the business of the bankrupt concern in order to preserve its good will. In connection therewith, it collected the accounts which had been sold to the Credit Company. If that be material, to that extent at least the receiver affirmed the contract pro tanto. The collection of the accounts by them was for the benefit of the bankrupt estate, so as not to interfere with the preservation of the good

The receiver represents the estate of Lutz & Schramm, and its rights are no broader than those of the bankrupt. The bankrupt and its receiver must at all times have been in possession of the information necessary to determine the amount due the company and the rights of the parties in the premises. The amount of compensation depended upon the time of payment. Under all the circumstances of the case, I can see no legal reason why the claimant is not entitled to the compensation provided in the contract. As the contract provides for attorney's fees, and the amount charged is not claimed to be out of proportion to the services rendered, I am also of opinion that this claim should be allowed.

The report of the referee is therefore affirmed.

In re MASON-SEAMAN TRANSP. CO.

(District Court, S. D. New York. September 30, 1916.)

1. BANKRUPTCY \$\infty 92-Petition-Sufficiency.

A motion to dismiss is the proper means to test the sufficiency of a petition in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 107, 108, 133-136; Dec. Dig. \$\simeg 92.]

2. BANKRUPTCY \$\sim 92\$—Motion to Dismiss—Laches.

A motion to dismiss a petition in bankruptcy will not be denied on the ground of laches, though an answer had been filed and the case noticed before the referee, where there had been no hearing and the case had only recently come to issue; it appearing that when the matter came up before the referee, counsel for the alleged bankrupt then moved for a dismissal of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 107, 108, 133–136; Dec. Dig. ⇐ 92.]

3. BANKRUPTCY \$\sim 92\$—Motion to Dismiss—Notice to Creditors.

Under Bankruptcy Act July 1, 1898, c. 541, § 59g, 30 Stat. 561 (Comp. St. 1913, § 9643), providing that a voluntary or involuntary petition shall not be dismissed by the petitioners, or by consent of the parties until after notice to the creditors, and that the court shall, before entering an application for dismissal, require the bankrupt to file a list of creditors, to whom notice shall be sent, the hearing being delayed for a reasonable time to allow them an opportunity to be heard, notice of motion to dismiss need not be served on all the creditors, where it was opposed by the petitioning creditors, who were few in number and were not joined by the vast majority of the creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 107, 108, 133-136; Dec. Dig. € 22.]

4. BANKRUPTCY \$\infty 81(4)-Petition-Sufficiency.

A petition in bankruptcy, alleging that the bankrupt had made payments in unknown amounts to unknown creditors within four months preceding the filing of the petition, which operated as preferences, and that the bankrupt had made payments to a named bank in excess of \$5,000, the exact amount of which was unknown, with intent to prefer such creditor, is insufficient, not apprizing the bankrupt of what contention it should meet, and it being possible that the payments did not constitute acts of bankruptcy, and the petition is particularly vulnerable to attack where a receiver had been appointed for the bankrupt and was conducting its business for the benefit of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 118; Dec. Dig. \$\sim 81(4),]

In Bankruptcy. In the matter of the alleged bankruptcy of the Mason-Seaman Transportation Company. On motion to dismiss. Motion granted.

Henry B. Twombly, of New York City, for Mason-Seaman Transp. Co.

William Lesser and James B. Stephens, both of New York City, for petitioning creditors.

MANTON, District Judge. This is an application by the alleged bankrupt for a dismissal of the petition filed against it on the 30th of May, 1916. On the 31st of March, 1916, in a creditors' action, a

bill of complaint was filed in this court against the Mason-Seaman Transportation Company, and on said date an order and decree of this court was made, appointing two receivers, with full powers to administer all the property of said company, which they are now engaged in doing. Its business is operating taxicabs in the city of New York. One of the receivers appointed was a man of experience, who had formerly been associated in the operation of the business. The other receiver was appointed by the court as the "ear of the court." Subsequently a foreclosure action was brought by the Columbia Trust Company and participated in by the Empire Trust Company, and the same receivers were appointed in said action. A sufficient bond has been given by the receivers which indemnifies the creditors from loss through the receivers, and it would seem that the full protection has thus been accorded the creditors. Two months later three petitioning creditors, having an aggregate claim of \$1,315, out of a list of creditors representing about \$200,000, filed this petition in bankruptcy. These petitioning creditors represented about one-third of 1 per cent. of the total amount. The petition alleges:

"And petitioners further represent that the said alleged bankrupt is insolvent, and that within four months next preceding the date of filing this petition the said alleged bankrupt committed acts of bankruptcy while so insolvent as follows: During said period said alleged bankrupt paid to certain creditors whose names are unknown to petitioners certain sums in cash and by check, the amounts of which are unknown to petitioners, in settlement or on account of antecedent indebtedness, with intent to prefer such creditors over and above other creditors of the same class. During said period said alleged bankrupt paid to the Broadway Trust Company, and other persons or parties whose names are unknown to your petitioners, but being parties who held certain notes or obligations of the above-named alleged bankrupt, the particulars of which are unknown to your petitioners, certain sums of money, amounting to the sum of \$5,000 and upwards, the exact amount of which your petitioners have been unable to ascertain in settlement of said notes and obligations of said alleged bankrupt, with intent to prefer the holders of said notes and obligations over and above other creditors of the same class, and also with intent on the part of said alleged bankrupt corporation to prefer William H. Barnard and J. W. Salisbury over and above other creditors of the same class, being, respectively, the president and treasurer of said alleged bankrupt corporation, who, at the time of said payments, were the indorsers or guaranters of said notes and obligations, and who, by the payment thereof to the holders thereof, were relieved from liability thereunder."

An answer has been filed in which the foregoing allegations are denied.

[1-3] This motion to dismiss seems to be the proper remedy. Matter of Mary Jones (D. C.) 209 Fed. 717, 31 Am. Bankr. Rep. 693. But it is urged on behalf of the petitioners that this application is late, and the right to make it has been waived by the alleged bankrupt. In support of this claim counsel cite In re Walter R. Cliffe (D. C.) 94 Fed. 354, and In re Rosenblatt, 193 Fed. 638, 113 C. C. A. 506, 28 Am. Bankr. Rep. 401.

In the first case, an answer was interposed, and there was a trial of the issues, after which a motion to dismiss was made. The court held the motion late and the petitioner guilty of laches. In the case at bar the case is but recently at issue, and while it was noticed be-

fore the referee in bankruptcy, there have been no hearings. In fact, counsel for the alleged bankrupt did move, when the matter came up before the referee, to dismiss the petition, and it was not heard for the reason that the referee stated that he was without jurisdiction to hear it, and has resulted in this application. Section 59—G of the Bankruptcy Act as amended in 1910 provides:

"A voluntary or involuntary petition should not be dismissed by the petitioner or petitioners or by consent of parties until after notice to the creditors, and to that end the court shall, before entering an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard."

In the Rosenblatt matter, Judge Lacombe said:

"At about the time demurrers were filed the bankrupts gave notice of motion to dismiss the proceedings, and complied strictly with the provisions of this section requiring notice of such application to be given all creditors."

I do not think that the Circuit Court of Appeals intended to hold that under this provision of the Bankruptcy Act it was requisite for the alleged bankrupt to serve notice of this application upon all the creditors. The application in the Rosenblatt Case was practically upon the consent of all the creditors. The court said:

"At the hearing it appeared that the total indebtedness * * * was in round numbers \$690,000, owing to 191 creditors. Seventy creditors whose claims amounted to \$22,000 were secured. Only 4 creditors, exclusive of Phillips, had failed to consent to the dismissal, their claims aggregating \$3,668.44. Of these 4 2 had attached credit balances in certain banks in Europe subsequent to the filing of the petition, and accordingly could not come into the bankruptcy proceedings without surrendering their preferences. The 2 remaining nonassenting creditors (their claims amounted to \$239.71) appeared at the hearing and consented to the dismissal. This left Phillips, with a disputed claim, standing alone. There were no longer 3 bona fide creditors whose claims amounted to \$500 insisting on the prosecution of bankruptcy proceedings."

Apparently the dismissal was practically on consent of the parties, including the petitioning creditors and alleged bankrupt, and made it necessary within section 59—G of the Bankruptcy Act to serve notice of application on all the creditors.

In the present case, however, there is neither an application by the petitioner for the dismissal nor is there the consent of any of the parties, and the application is opposed by the petitioning creditor. As I read this section, under these circumstances, I think that notice of this application, served upon the petitioning creditors, who have appeared in the proceeding, is sufficient, and I, therefore, find against the claim of the petitioning creditors that notice should be served upon all the creditors of the alleged bankrupt.

[4] The question is therefore presented whether the statements in the foregoing petition are sufficient under the authorities to require the alleged bankrupt to answer, or whether the petition as filed is insufficient. As the petition stands, the allegations are wholly indefinite as to time, place, and circumstances of the payments made to the Broadway Trust Company. No statement is made as to the exact

amount of the notes of the Broadway Trust Company, except the amount alleged to have been paid is stated as "\$5,000 and upwards." No facts are stated which would definitely appraise the bankrupt what he is required to answer. For example, any payment to the trust company would be legal if made within four months, and even, with knowledge on the part of the trust company of the insolvency of the bankrupt, if payments were made out of the funds of the company in the hands of the trust company regularly deposited in a deposit account. Amer. Bank & Trust Co. v. Coppard, 227 Fed. 597, 142 C. C. A. 229. Payment may be made for money borrowed in order to keep the company in business, or for current rent, neither of which would constitute an act of bankruptcy. In re Perlhefter (D. C.) 177 Fed. 299; In re Barrett, 6 Am. Bankr. Rep. 199.

In re Blumberg (D. C.) 133 Fed. 845, 13 Am. Bankr. Rep. 343, the petition read that:

"The said Louis Blumberg, trading as L. Blumberg & Co., while insolvent, within four months next preceding the date of this petition, committed an act of bankruptcy, and that during the months of August and September, 1904, he transferred, while insolvent, some of the moneys received by him from the improper sale of said merchandise unto the Tradesmen's National Bank of the City of Philadelphia, with intent to prefer said bank, and the indorsers and makers of promissory notes held by the bank, and relieve them from further liability to said bank over and above his other creditors."

Upon demurrer this petition was held insufficient. The court said:

"I think, also, that the facts concerning the payments to the Tradesmen's National Bank should be set out more specifically. As the petition stands, no amount is named, nor is it even averred, except by inference, that the payments were made upon the bankrupt's promissory notes, to say nothing of the vagueness of the reference to 'the indorsers and makers of promissory notes held by said bank,' whom the bankrupt is charged with intending to prefer."

General averments as to acts of bankruptcy are not sufficient. In re Rosenblatt, 193 Fed. 638, 113 C. C. A. 506, 28 Am. Bankr. Rep. 401; In re Comdon, 209 Fed. 800, 126 C. C. A. 524, 31 Am. Bankr. Rep. 754; In re Halin (D. C.) 199 Fed. 806, 28 Am. Bankr. Rep. 708; In re Pressed Steel Goods Co. (D. C.) 193 Fed. 811, 27 Am. Bankr. Rep. 44.

The court has permitted a continuance of this business by the receiver, and we must assume that this is for the benefit of the creditors. An adjudication in bankruptcy would add expense to the estate and confusion to the carrying on of the business. I think this inadvisable in the absence of a clear and definite statement of acts of bankruptcy which would give the creditors an adjudication in bankruptcy as a matter of right. The petitioners stand upon their petition, and do not ask for leave to amend, so therefore leave to amend is not granted

The motion to dismiss the petition is granted.

LUTZ et al. v. CITY OF NEW ORLEANS.

(District Court, E. D. Louisiana, May 29, 1916.)

No. 15456.

1. Courts \$\infty 322(2)\$—Federal Courts—Jurisdiction.

Where a verified bill alleged diversity of citizenship and that the amount involved as to each plaintiff exceeded \$3,000, the federal district court must, no counter affidavit having been offered, be deemed to have jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 878, 879; Dec. Dig. \$\sigma 322(2).]

2. Courts €=365—Precedents—State Courts.

The decision of a state court construing a local municipal ordinance must be followed by the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971; Dec. Dig. €=365.]

3. MUNICIPAL CORPORATIONS \$\infty 703(1)\rightarrow Regulations \rightarrow Discrimination.

A New Orleans ordinance, requiring the operators of jitney busses and street cars to furnish a surety bond in the sum of \$5,000 for each vehicle operated, is not invalid as being a discrimination in favor of street car companies, though the protection afforded by the bond is, in view of the larger number of passengers carried by street cars, less than in the case of jitney busses.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1509; Dec. Dig. &—703(1).]

 CONSTITUTIONAL LAW \$=274—RIGHTS OF CITIZEN—FOURTEENTH AMEND-MENT.

Const. Amend. 14, does not create any right in citizens to use public property, as streets, in defiance of the state laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 726; Dec. Dig. ←=274.]

5. MUNICIPAL CORPORATIONS \$\iiint 703(1) \to Streets \to Regulation \to Common Carriers.

A municipality may regulate the use of streets by common carriers, no one having a vested right to use them for that purpose; and, as absolute liability for injuries may be imposed, hence an ordinance, requiring a common carrier by jitney busses to furnish a bond of \$5,000 for each vehicle operated, for the protection of passengers or persons injured, is not invalid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1509; Dec. Dig. \$\sim 703(1).]

6. MUNICIPAL CORPORATIONS \$\infty 703(1)\$—STREETS—POLICE POWER.

Under its police power, a city may require those operating jitney busses as common carriers of passengers to furnish a surety bond in the sum of \$5,000 for the protection of any one injured, for the requirement of the bond necessarily tends to promote the public safety by requiring the carrier to exercise greater care.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1509: Dec. Dig. & 703(1).]

company, is not invalid because of that requirement, particularly where those objecting did not show they could have obtained individual sureties. [Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1509; Dec. Dig. ©703(1).]

8. TREATIES \$\infty Rights-Nature of Treaty Rights.

It is settled that the rights of property protected by a treaty are such as are capable of a sale or transfer, and not such as are purely personal, as the right to operate a jitney bus, as a common carrier, on the streets of a municipality.

[Ed. Note.—For other cases, see Treaties, Cent. Dig. § 8; Dec. Dig.

In Equity. Bill by Felix Lutz and others against the City of New Orleans. Application for preliminary injunction. Application denied.

C. C. Friedrichs and Harold A. Moise, both of New Orleans, La., for plaintiffs.

I. D. Moore, City Atty., Jno. J. Reilley, Asst. City Atty., and J. F. C. Waldo, Asst. City Atty., all of New Orleans, La., for defendant.

FOSTER, District Judge. This is a suit to enjoin the city of New Orleans from putting into operation certain provisions of Ordinance 2346 adopted by the commission council April 27, 1915, for the purpose of regulating what are popularly known as "jitneys," the term being used to designate an automobile carrying passengers for five cent

fares, very much the same as the ancient omnibus.

The material facts, set out in the bill and either admitted by the answer or not rebutted, are these: Plaintiffs are each the owner of an automobile personally operated by him in the transportation of passengers for a uniform fare over designated routes in the city of New Orleans. They have paid for, and have received, licenses from the city to so operate for the year 1916, and have complied with all the provisions of the said city ordinance except section 2 thereof, which provides that no one shall operate an automobile, as is being done by the plaintiffs, without first having filed with the commissioner of public safety a bond, executed by a surety company authorized to do business in the state of Louisiana, in the sum of \$5,000 for each vehicle operated, payable to the city of New Orleans, for the benefit of any person who may be damaged in his person or property by the fault of the automobile operator. The section further requires the bond to be approved by the commission council, and by section 3 of the ordinance a failure to comply with the ordinance is made punishable by a fine of not less than \$10 or more than \$25, or imprisonment for not more than 30 days, or both, and each day's violation is declared a separate offense. It is impossible for the plaintiffs to comply with the provisions of section 2, because no surety company will execute the bond required unless the principal deposits with it \$5,000 in cash, or collateral security, and they are unable to make such deposit.

Upon these facts the plaintiffs complain and say that the said section of the ordinance violates section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it deprives them of

Egr other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

liberty and property without due process of law, and deprives them of

the equal protection of the law.

[1] The answer of the city challenges the jurisdiction of the court. The bill alleges the amount as to each plaintiff exceeds \$3,500, based on the destruction of his business, to say nothing of the fines that may be imposed, and, in addition to the federal questions presented, shows diversity of citizenship. A case of jurisdiction is thereby made out, the bill is sworn to, and no counter affidavit has been offered. For the purposes of this application I must assume the court has jurisdiction.

[2] The plaintiffs complain only of section 2 of the ordinance. As to this they contend that the city cannot require a bond at all as a condition precedent to their doing business; that if the bond can be required, the city cannot restrict plaintiffs to the selection of a surety company to sign it; that the amount of \$5,000 is excessive, and should a bond be furnished complying in every respect with the ordinance,

it may be arbitrarily rejected by the council.

In the case of the City of New Orleans v. Hoa Le Blanc, 71 South. 248, the Supreme Court of Louisiana considered the very questions here presented, and held that the city has the right to impose conditions on a common carrier for hire using the street of New Orleans, such as the plaintiffs, and also that the commission council cannot arbitrarily reject a bond complying with the ordinance. To this extent, at least, I am bound to follow that decision. The court also held the provisions of the ordinance to be in every respect necessary and reasonable and a valid exercise of the police power of the city. The decision is persuasive on the other points involved, and is entitled to great weight as construing the local law, notwithstanding it was rendered by a divided court. And it does not stand alone, as other courts of high authority have expressed similar views in construing other ordinances of the same tenor. See Nolen v. Riechman (D. C.) 225 Fed. 812; Ex parte Cardinal, 170 Cal. 519, 150 Pac. 348, L. R. A. 1915F, 850; Greene v. San Antonio (Tex. Civ. App.) 178 S. W. 6; Ex parte Sullivan (Tex. Cr. App.) 178 S. W. 537; State ex rel. Ryals v. Memphis (Tenn.) 179 S. W. 635; Ex parte Dickey (W. Va.) 85 S. E. 781, L. R. A. 1915F, 840.

Considering the Le Blanc Case, supra, the only questions left open for decision by this court are whether the ordinance: (a) Deprives plaintiffs of the equal protection of the laws; (b) is confiscatory of the plaintiffs' property; and (c) denies them liberty of contract.

[3] The first question may be easily disposed of. It is contended that the purpose of the ordinance is to discriminate against the jitneys in favor of the street cars. Various provisions of the ordinance are pointed out as sustaining this, but plaintiffs are not complaining of the whole ordinance. The bill alleges compliance by them with every part of the ordinance except section 2, and this section imposes exactly the same burden on all. While it may be easier for the street cars to comply with the ordinance than for plaintiffs to do so, and by a mathematical calculation it may be shown that the security required is more for each passenger carried in the case of the jitneys, these facts would

not make the provision so unequal as to deprive plaintiffs of their con-

stitutional rights in this regard.

[4-6] Is the provision requiring a bond signed by a surety company so unreasonable as to be confiscatory of plaintiffs' property in violation of the Constitution of the United States? As to this it is at once evident the only property plaintiffs could be deprived of is the right to use the streets as common carriers. Plaintiffs have paid their licenses for the current year, but, even if these licenses could not be, in effect, revoked by subsequent legislation, it suffices to say they were issued after the adoption of the ordinance. Plaintiffs, however, do not pretend to have a franchise to use the streets, but rely upon their general rights as inhabitants of the city. It is settled that the Fourteenth Amendment does not create any right in a citizen to use the public property in defiance of the laws of the state. Davis v. Massachusetts, 167 U. S. 43, 17 Sup. Ct. 731, 42 L. Ed. 71. No one has the vested right to make the use of the streets of the city the basis of his business, such as a common carrier, regardless of what may be his rights as a citizen to otherwise use them. Statutes regulating common carriers may go to great lengths without being confiscatory. Rates and schedules may be regulated, and the absolute liability of insurers. regardless of negligence, may be imposed. See Clark v. Russell, 97 Fed. 900, 38 C. C. A. 541, and authorities there cited. Considering the financial irresponsibility of plaintiffs alleged in the bill and the dangerous nature of the business as shown by the tabulated statement of accidents filed, the requirement of a bond to indemnify passengers and others who may be injured by the carelessness of the jitney operator is well in line with other statutes for the protection of passengers such as those referred to. Aside from these considerations the city contends for the validity of the ordinance as an exercise of its police pow-In answer it is urged by the plaintiffs that the giving of bond would not tend to promote the safety of either the passengers or the The same objection was urged with regard to the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]), but the Supreme Court held that any measure that would impel the carrier to avoid or prevent negligent acts would be a proper regulation of commerce. See Second Employers' Liability Cases, 223 U. S. pp. 50, 51, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. The same reasoning applies here. There can be no doubt that the safe operation of an automobile depends largely on the caution, skill and responsibility of its driver. Any measure that will tend to secure careful, competent men as drivers of jitneys will promote the safety of passengers and the general public. It is at once apparent that the requirement of a bond would have this effect. No one would be willing to become surety for a reckless or incompetent driver, and the fact that he was under bond, with his responsibility fixed, would, of itself, make the driver more careful. It would appear, therefore, that the city could properly require the giving of a bond in the reasonable exercise of its police power.

[7] Does the requirement that the bond be signed by a surety company violate plaintiffs' liberty of contract? Assuredly not. It is shown

that a number of surety companies are authorized to do business in the state. It is not shown they exact exorbitant fees, or that the plaintiffs could procure personal surety on a better basis or at all. The only reason plaintiffs cannot procure the surety bonds in compliance with the ordinance is because they cannot deposit cash or collateral equal to the amount of the bond. Personal surety might make the same requirement. In any event the contrary is neither alleged or proved. Considering the greater desirability of corporate surety in any case, a superiority sometimes recognized by the law itself (see Bankrupt Act [Act July 1, 1898, c. 541, § 50, 30 Stat. 558 (Comp. St. 1913, § 9634)] bonds of trustees and referees), it can hardly be said that the provision that the bond must be signed by a surety company is more onerous than would be a requirement of personal surety of equal responsibility.

[8] It remains to be noticed that the plaintiffs set up the violation of certain indefinite treaty rights. This point has not been pressed in argument, but could not be material, as it is settled that the rights of property protected by treaty are such as are capable of sale or transfer, and are not such as are purely personal. Chinese Exclusion

Case, 130 U S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068.

It is plain in this case that plaintiffs cannot do business in compliance with the ordinance merely because of their financial condition. The same result might follow if the city required any one doing the jitney business to operate a certain kind of automobile costing more than \$5,000, or made some other provision as to the character of the service, and it cannot be said that such a requirement would be beyond the powers of the commission council, or would operate to deprive plaintiffs of their constitutional privileges.

The application for a preliminary injunction will be denied.

HENGST v. JOHN B. CARTER CO.

(District Court, D. New Jersey. September 18, 1916.)

CONTRACTS 231(1)—CONSTRUCTION—"REASONABLE VALUE" OF USED MACHIN-ERY.

Complainant was employed by defendant, which was a railroad contracting company, as manager of the work under a construction contract, and was to receive a monthly salary and on completion of the contract a share of the net profits. These were to be ascertained by charging to the work, in addition to the usual expenditures, the value of the plant, etc., used, which at the end of the work were to be credited back at their reasonable value to be agreed upon by the parties. These, in fact, belonged to defendant. After the contract was completed, a settlement was made, and two other jobs were taken and performed under the contract. Held, in a suit for account under the last contract, that the "reasonable value" of the plant at the completion of the work was not what it might bring at a sale as secondhand equipment, but its utility value to one who, like defendant, made use of it, and that as the parties in settlement under the two preceding contracts had agreed that such value was cost, less depreciation from use, such basis would be adopted by the court. Also, held, that defendant was not entitled to charge against the work interest on the

capital invested or the salary of its president; there being no provision therefor in the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1046, 1047, 1048–1050, 1052; Dec. Dig. ⇔231(1).

For other definitions, see Words and Phrases, Second Series, Reasonable Value.]

In Equity. Suit by Robert Graham Hengst against the John B. Carter Company. On exceptions to master's report. Confirmed.

Lindabury, Depue & Faulks and J. Edward Ashmead, all of Newark, N. J., for plaintiff.

Collins & Corbin, of Jersey City, N. J., for defendant.

RELLSTAB, District Judge. This is a suit for an accounting. On February 27, 1909, the plaintiff and the defendant entered into a written agreement, whereby the former became the manager of the latter in carrying on certain work in connection with the construction of the railway of the Lake Erie & Pittsburg Railway Company. A summary of the provisions of the contract, pertinent to the present controversy, is as follows: The plaintiff was to receive monthly the sum of \$250 as an advance, together with his necessary traveling expenses in connection with said employment. On completion of said contract and payment to the defendant of the amount due it for said work, an accounting to ascertain the profits of such construction work was to be had, and, after deducting said monthly advances and other obligations owing by plaintiff to defendant, the latter was to pay the former onethird of said profits. In ascertaining said profits, the contract was to be debited with all machinery, tools, supplies, plant, and other articles purchased by the defendant for said work, and said contract was to be credited with all payments made on account of the sale of any of said machinery, etc. The plant was not to be considered as a permanent investment of the defendant, but as an expense on account of such work, and in ascertaining said profits the parties were to "agree upon the reasonable value of the plant." The defendant was to endeavor to secure work to keep said plant continuously employed, in which event said contract was to cover such new work. Each new contract was to "be charged with the reasonable value of the plant as the same may have been fixed on completion of the preceding contract." If plaintiff abandoned the work before its completion, said monthly payments were to be full payment of his services; but, in the event of his death or disablement prior to said completion, he or his heirs, etc., were to receive one-third of the accumulated profits "to be computed as near as may be to the date of his death or disability, after deducting therefrom so much of the monthly advances of two hundred fifty dollars (\$250.00) and any other obligations then owing by the second party (plaintiff) to the construction company (defendant)."

Two other pieces of construction work were secured, and said contract was extended to cover them. The first of these additional constructions was for the Chicago, Burlington & Quincy Railroad, and the second for the Cincinnati, Hamilton & Dayton Railroad. The extension of said contract over the first of these additional works was

accomplished by correspondence without any change of terms. In extending said contract to the last construction, a supplemental agreement, dated March 21, 1910, was entered into, a summary of the pertinent provisions of which is as follows: If, on completion of said work and the rendition of the final accounting, the defendant shall have secured other work upon which to use said plant, and the plaintiff shall desire to continue in defendant's service and enter upon such work, he shall be credited upon the defendant's books with the amount earned by him on said work, less advances made to him and his obligations to the defendant; that so long as said employment continued the amount carried by him, less said advances, should remain with the defendant "on plant account until such time as the parties mutually agree"; the monthly advances were increased to \$300, and, if amount earned by plaintiff did not amount to said advances, the plaintiff on demand was to repay the difference to the defendant.

The plaintiff continued in the defendant's employment until the construction work in said three contracts was finished, and, upon their failure to agree as to the results of the last work, the present suit was instituted to recover alleged profits of \$22,159.53. The defendant answered that the last construction had resulted in a loss to an amount in excess of \$30,000 and sought by counterclaim to recover the advances made to plaintiff during the progress of the work. On reference the master found that there was due the plaintiff the sum of \$20,917.67, with interest from April 1, 1913. Both parties filed exceptions to the master's report. The main controversies raised by these exceptions are over the interest claimed by the defendant on the capital invested by it in furthering said work, the payment by it of certain salaries, and the value of the plant on hand when the work on the Cincinnati, Hamilton & Dayton contract was completed.

The plaintiff contends that "the reasonable value of the plant" means that the several items making up the plant used should be valued at their fair worth to the owner, that the cost less depreciation was the valuation adopted by the parties upon the termination of the previous jobs, and that in the present accounting the valuation of plant should be made on the same basis. The defendant contends that "reasonable value" means market value, and that, as at the conclusion of such construction work the plant was "secondhand," market value means "the

fair selling value as secondhand materials."

The master adopted the plaintiff's theory of valuation. I agree with the master. If the business relations between these parties had ended with the completion of the work which called the first contract into being, and the parties had failed to agree upon the meaning of the term "reasonable value," I should be loath to accept the interpretation suggested by the defendant, in view of the fact that it was in the construction business generally and continued therein after the contractual relations between it and the plaintiff ceased, and had use for that kind of material. The price at which property is bid in at public sale is no criterion of value. Martinett v. Maczkewicz, 59 N. J. Law, 11, 35 Atl. 662; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618, affirmed 82 N. J. Eq. 364, 91 Atl. 1069; In re

Mary E. McAusland, 235 Fed. 173. And the price that a dealer in or user of secondhand material is willing to give for it is usually as misleading as a test of its value. But the question of interpreting the "reasonable value" comes before the court in a less restricted form. The business relations of the parties did not end with the completion of the work specifically named in the contract. New work, as contemplated by said contract, was entered upon under it, and a valuation of the used plant and materials to be charged against the new contracts was agreed upon by the parties.

At the time the original contract was made, the defendant was already engaged in the construction business. It did not come into existence for the particular job mentioned in such contract. It had a construction plant on hand. More would probably be required. All would be secondhand as soon as use was made of it. Some portions, through such use, would become worthless; others would depreciate in utility, and therefore in value; and still others would remain efficiently serviceable after the particular construction was finished.

As the contract reflects that the defendant contemplated continuing in the construction business with or without the aid of the plaintiff after the Lake Erie & Pittsburg Railway Company's work was finished, and as the ownership of the plant was in the defendant, it would not be in the power of the plaintiff to force the defendant to dispose of it at the conclusion of such work, that an accounting of profits might be The defendant would have the right to retain such plant for any use it desired, being chargeable only with its "reasonable value." Secondhand construction plant and materials are usually sold below cost, but not always. It is not an impossible supposition that there may be such a demand for immediate use of such kind of machinery as to induce the giving of a price even in excess of the original cost. Because a business condition of that character prevailed would not entitle the plaintiff to insist that the machinery be sold or valued at such an extraordinary price in order to swell the profits of the work. Such an insistence would not be reasonable. Nor would such price constitute "reasonable value" of the plant. Nor would it be reasonable to permit the defendant while continuing in the construction business in which he had use for such plant, in order to lessen the profits of a particular job, to insist that it be sold at public sale, at which directly or indirectly it could become the purchaser at a low figure; nor to compel the plaintiff to accept a valuation put upon it by dealers in seccondhand machinery.

When the time came to make an accounting for the work done for the Cincinnati, Hamilton & Dayton Railroad, the parties had already finished two other jobs under this contract, and they had agreed upon the value to be placed upon the "plant" used in said constructions. The basis for their valuation was cost less depreciation; the depreciation running from 5 to 15 per cent. This agreed basis was satisfactory to the only parties interested in said work, and, in the absence of express agreement, an exceptionally good reason would have to exist to justify this court in adopting a different one. No such reason appears. When the contractual relations between these parties terminated, the

work.

defendant was under no necessity to sell the plant. As noted, the bulk of the plant used in the construction of the Cincinnati, Hamilton & Dayton work was taken by the defendant and used in similar work. In such circumstances, "utility value" rather than "market value" of such secondhand materials is "reasonable value" within the meaning of said contract, and such value rather than market value should be credited to said contract in ascertaining the profits of said work. As cost less depreciation was the basis of valuation adopted by the parties in reaching the value of the used plant after the completion of the earlier jobs, that basis should be adopted in determining the value of the plant for the purpose of the present accounting.

With reference to the charges of interest on capital invested and salary of John B. Carter, president of the defendant, the contract does not, in terms, authorize either charge, and, in the absence of any express provision to the contrary, the financing of the work and the rendition of any service by the executive officer of the defendant, in relation to such work, must be held to be a part of the defendant's contribution to the enterprise, and chargeable only to the defendant's share of profits. No charge for like interest, or for president's salary, was made on account of the first two jobs under this contract, and none should be allowed on the Cincinnati, Hamilton & Dayton Railroad

On these main disputes, as well as all others which do not relate to alleged clerical, mathematical, or inadvertent errors, the master's findings are affirmed. The master having made at least one mathematical error (see item No. 26 of his "schedule of plant"), and as others, which may be classed as clerical, mathematical, or inadvertent errors, are alleged, the report will be sent back to him to correct any mistakes of that character that may exist.

McCLELLAN v. SCHMIDT. Sheriff.

(District Court, D. New Jersey, September 20, 1916.)

1. BANKRUPTCY \$\igsim 424\to Debts Released by Discharge\to "Willful and Malicious Injury to Person."

To constitute a "willful and malicious injury to the person or property of another," within Bankr. Act July 1, 1898, c. 541, § 17(2), 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (Comp. St. 1913, § 9601), which provides that liability for such an injury shall not be released by a discharge in bankruptcy, something more than mere negligence is necessary; there must be an intent to commit a wrong either through actual malice or from which malice will be implied.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787, 818; Dec. Dig. €=3424.]

2. Bankruptcy \$\infty 424\to Debts Released by Discharge\to "Willful and Malicious Injury to Person."

Petitioner built a fire in the street to burn leaves, and, after he had left it as dead, the clothes of a boy five or six years old, who was throwing leaves thereon, caught fire, and he was seriously burned, for which injury a judgment was obtained against petitioner. There was no intent

on his part to injure the child. Petitioner was afterward discharged in bankruptcy. *Held*, that the judgment was not for a "willful and malicious injury to the person," and that he was released therefrom by his discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787, 818; Dec. Dig. \$\sim 424.]

Petition by Douglas Y. McClellan against Ralph B. Schmidt, Sheriff of Essex County, N. J., for writ of habeas corpus. These proceedings were instituted for the discharge of the relator in default of payment of judgment obtained against him for tort on the ground that the judgment is released by a discharge in bankruptcy and does not come within the exception of section 17 (2) of the Bankruptcy Act of 1898. Writ granted.

Lum, Tamblyn & Colyer, of Newark, N. J., for relator. Terry Parker, of East Orange, N. J., for respondent.

DAVIS, District Judge. William A. Davenport, by his next friend, William E. Davenport, obtained judgment April 22, 1916, against the relator in the Supreme Court of New Jersey, for the sum of \$4,000 and costs, in an action at law for a tort committed by the relator. In default of payment, execution was issued against his person and he was committed to the Essex county jail on June 3, 1916. The relator filed a voluntary petition in bankruptcy in this court and duly scheduled the said judgment and was adjudicated a bankrupt on May 19, 1916. He filed a petition for writ of habeas corpus, and the cause is before this court upon the return of said writ.

[1, 2] The proofs submitted establish the following facts: The relator built a fire in South Clinton street, East Orange, on November 4, 1911, for the purpose of burning leaves which he had collected in a pile about two feet wide and three feet long. In reply to the question, "What time did you build this fire?" the relator said, "Half past eight to half past nine." And in reply to the question, "What was its (fire) condition when you left?" relator replied, "It was dead." It does not appear how long the fire burned. The reply of the relator refers, as I take it, to the time when he built the fire, and not to the period during which it burned. The fire was evidently not entirely "dead" when the relator left it, for some time afterward the clothes of the plaintiff, a boy five or six years of age, caught fire while he was throwing leaves thereon and he was seriously burned. The fire either appeared to be "dead" when the relator left it and was rekindled, or he was mistaken as to the condition thereof when he left it.

The question to be determined by this court is whether or not a discharge in bankruptcy of the relator releases the said judgment. Section 17 of the Bankruptcy Act of 1898 provides that:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another." Comp. St. 1913, § 9601.

If the liability represented by this judgment was for "willful and malicious injuries to the person" of the plaintiff, within the meaning

of said section of the Bankruptcy Act, the liability is not released. If, on the other hand, the liability is not for "willful and malicious injuries to the person" of the plaintiff, the debt is released and the prisoner should be discharged. The determination of the question depends upon the meaning of the words "willful and malicious" as used in the act. It is illuminating to observe how similar provisions have been construed in the Bankruptcy Acts of 1841 and 1867.

The act of 1841 exempted from discharge debts "created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity." Act Aug. 19, 1841, c. 9, § 1, 5 Stat. 441. The Supreme Court held, in the case of Chapman v. Forsyth et al., 2 How. 202, 208 (11 L. Ed. 236), that the trusts referred to by the act "are not cases of implied but special trusts, and the 'other fiduciary capacity' mentioned must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract."

The act of 1867 provided that:

"No debt created by * * * fraud or embezzlement * * * or by * * * defalcation as a public officer, or while acting in" a fiduciary capacity, "shall be discharged under this act." Act March 2, 1867, c. 176, § 33, 14 Stat. 533.

The Supreme Court, applying the rule that the coupling of words shows that they are to be understood in the same sense, held that "fraud," as used in this section, meant "positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality." Neal v. Clark, 95 U. S. 704, 24 L. Ed. 586.

Lord Bacon, in Broom's Legal Maxims, p. 450, said:

"Where the meaning of any particular word is doubtful or obscure, * * * the intention of the party who has made use of it may frequently be ascertained and carried unto effect by looking at the adjoining words."

Again, on page 455, he says:

"In the construction of statutes, likewise, the rule noscitur a sociis is very frequently applied; the meaning of a word, and consequently the intention of the Legislature, being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are in fact ejusdem generis, and referable to the same subject-matter."

Section 17(2) provides that liability for the following class of cases is not released by a discharge in bankruptcy: (a) Obtaining property by false pretenses or false representations; (b) willful and malicious injury to the person or property of another; (c) for alimony due or to become due; (d) for seduction of an unmarried female; (f) for criminal conversation. Alimony, maintenance, or support of a wife or child on the ground of humanity and public policy are not released. In each of the other cases—false pretenses, false representations, seduction of an unmarried female, criminal conversation—the acts are wrong in themselves and exhibit a "malignant spirit or a specific intention to hurt a particular person." They show a "depraved inclination," moral turpitude, and reckless indifference to the rights of others. The

application of the principle of Lord Bacon justifies the conclusion that the words "willful and malicious" do not have the general, broad, legal significance, but that they are used in a more narrow and specific sense, implying actual malice and "willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally." It is not necessary that "malice," as used in the phrase "willful and malicious injuries to the person," should be shown toward a particular individual. In acts of a certain character, the law will imply malice. Mr. Justice Peckham said, in Tinker v. Colwell, 193 U. S. 473, 489, 490, 24 Sup. Ct. 505, 510 (48 L. Ed. 754):

"The judgment here mentioned comes, as we think, within the language of the statute reasonably construed. The injury (criminal conversation with the wife whose husband had secured judgment against defendant) for which it was recovered is one of the grossest which can be inflicted upon the husband, and the person who perpetrates it knows it is an offense of the most aggravated character; that it is a wrong for which no adequate compensation can be made, and hence personal and particular malice towards the husband as an individual need not be shown for the law implies that there must be malice in the very act itself, and we think Congress did not intend to permit such an injury to be released by a discharge in bankruptcy."

In the case of Flanders v. Mullin, 80 Vt. 124, 127, 66 Atl. 789, 18 Am. Bankr. Rep. 708, 710 (12 Ann. Cas. 1010), Judge Munson said:

"But the petitioner contends that the malice meant by the federal laws is actual malice, and not malice in the broadest sense, recognized in passing upon the right to a close jail certificate, and that a mere adjudication of malice in the words of our statute does not bring the case within the exception relied upon. It seems clear that the federal provision contemplates something more restricted than malice in the broader sense. * * * We have found no satisfactory ground upon which to give a broader meaning to the word as used in the present Bankruptcy Act, although the possibility of this is suggested in Tinker v. Colwell, 193 U. S. 473 [24 Sup. Ct. 505, 48 L. Ed. 54]. * * * The acts there (judgment recovered in case of seduction and criminal conversation) were wrongful in themselves, and afforded a basis for the deduction of malice not found in the charge involved here."

The case of Tinker v. Colwell, supra, makes it clear, however, that there must be something more than mere negligence. Mr. Justice Peckham, speaking for the court, on page 489 (24 Sup. Ct. 510, 48 L. Ed. 754), said:

"It is not necessary in the construction we give to the language of the exception in the statute to hold that every willful act which is wrong implies malice. One who negligently drives through a crowded thoroughfare and negligently runs over an individual would not, as we suppose, be within the exception. True, he drives negligently, and that is a wrongful act; but he does not intentionally drive over the individual. If he intentionally did drive over him, it would certainly be malicious."

In the case at bar, we have a question of pure negligence. There is an entire absence of specific, intentional, or willful wrongdoing. There is no hint of moral turpitude. As the case stands, it is parallel with the illustration given above by Mr. Justice Peckham of one who, while negligently driving through a crowded thoroughfare, runs over an individual, but does not do it willfully. If, in addition to making a fire in the street, a negligent act, the relator intended to burn or in-

jure the plaintiff thereby, the act would then be both willful and malicious and would correspond with the second illustration given by Mr. Justice Peckham. Such an act would come within the exception, and consequently would not be released by a discharge in bankruptcy. By stipulation the testimony taken in the Supreme Court of New Jersey, wherein the relator was defendant and William A. Davenport was plaintiff, constitutes the testimony to be considered by this court upon the hearing on the return of the writ. The testimony shows conclusively that the relator had no malice against the plaintiff or his parents, and the act itself does not show such a "depraved inclination" or "reckless indifference" as will justify the implication of such malice as would bring it within the exception of section 17 (2) of the Bankruptcy Act.

Upon a review of the whole case, I am satisfied that the imprisonment is illegal and the prisoner should be discharged. An order

will accordingly be entered.

UNITED STATES ex rel. CAVANAUGH v. HOWE, Commissioner of Immigration.

(District Court, S. D. New York, October 9, 1916.)

1. HABEAS CORPUS \$==113(12)-Scope of Writ-Review.

Where an alien who was excluded from the United States on the ground that she was likely to become a public charge brought habeas corpus, the finding of the commissioner of immigration must be upheld if there is any evidence, however slight, to support his decision, for the weight of the evidence cannot be reviewed on habeas corpus, but, if there is no evidence to support his finding, the alien may be ordered released and admitted.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 114; Dec. Dig. &—113(12); Appeal and Error, Cent. Dig. § 3400.]

2. ALIENS \$\igstrightarrow\$54\toproperate Admission to United States\toproperate Public Charge\toproperate Evidence.

On habeas corpus to secure the release of an alien excluded from the United States by the commissioner of immigration on the ground that she was likely to become a public charge, held, that there was no evidence to support the commissioner's finding; all the evidence tending to show that the alien was not likely to become a public charge.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ≥ 54]

8. ALIENS 54-ADMISSION TO UNITED STATES-EXCLUSION.

Where an alien was refused admission to the United States on the ground that she was likely to become a public charge, the question of whether she was immoral cannot be considered, nor is her immorality ground for sustaining the exclusion.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. 54.]

At Law. Application by the United States, on relation of Hilda Rose Cavanaugh, for a writ of habeas corpus against Frederic C. Howe, Commissioner of Immigration at the Port of New York. Writ issued, and relator permitted to enter the United States.

Edward M. Stanton, Asst. U. S. Atty., and Jonah J. Goldstein, of New York City, for the immigrant.

MANTON, District Judge. This is an application for the release of Hilda Rose Cavanaugh, an immigrant from Great Britain, who was ordered deported by the Department of Labor. Born in Ireland, she spent much of her time in England and immigrated to this country once before, where she remained for some months, returning to England, and has now sought re-entry to this country. She has had full hearing before the commissioners, and, after an adverse decision, appealed to the Secretary of Labor at Washington, where the decision of the Board of Inquiry was affirmed and her deportation ordered.

[1] There were two grounds urged at the proceedings before the Board of Inquiry for her deportation: First, that of immoral character, since abandoned; and, the second, that she might become a public charge. She has been ordered deported upon the latter. The court, under the authorities, cannot disturb this finding if there is evidence, however slight, to support a finding that there is danger of the immigrant becoming a public charge. U. S. v. Ju Toy, 198 U. S. 260, 25 Sup. Ct. 644, 49 L. Ed. 1040; Ex parte Fong Yim (D. C.) 134 Fed. 938.

It was said in Ex parte Petterson (D. C.) 166 Fed. 539:

"A preliminary question has been suggested which must first be considered: Has this court authority in a habeas corpus case to examine the record of the proceedings before the immigrant inspector, for the purpose of ascertaining whether the Assistant Secretary of Commerce and Labor, in issuing his warrant for deportation, acted with respect to a matter over which he had jurisdiction? It is, of course, well settled by abundant authority that the writ of habeas corpus cannot be employed to perform the function of a writ of error or an appeal. There are, however, several recent decisions of the Supreme Court holding that the courts of the United States have jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of a department, when the evidence adduced before such official, and upon which he assumes to act, is wholly uncontradicted, and shows beyond any room for dispute or doubt that the case in any view is beyond the statutes, and not covered or provided for by them. Gonzales v. Williams, 192 U. S. 1 [24 Sup. Ct. 177, 48 L. Ed. 317]; Amer. School of Mag. Heal. v. McAnnulty, 187 U. S. 94 [23 Sup. Ct. 33, 47 L. Ed. 90].

"Upon the authority of these cases—and many others might be cited—there can be no room for question that this court has authority to examine the record and the evidence upon which the Assistant Secretary of Commerce and Labor predicated his authority to issue his warrant for the deportation of the petitioner, for the sole purpose of ascertaining whether the evidence before that official, and upon which he assumed to act, showed beyond any room for dispute or doubt that this case is beyond the purview of the immigration stat-

utes of the United States, and not covered or provided for by them."

But when there is nothing to support a charge such as the charge in question, the court may rightfully hold that the detention and deportation of the immigrant is an abuse of power. Frick v. Lewis, 195 Fed. 696, 115 C. C. A. 493.

In Gegiow v. Uhl, 239 U. S. 9, 36 Sup. Ct. 3, 60 L. Ed. 114, Judge Holmes said:

"The courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the act. The statute, by enumerating the conditions upon which the allowance to land may

be denied, prohibits the denial in other cases. And when the record shows that a Commissioner of Immigration is exceeding his power, the alien may demand his release upon habeas corpus. The conclusiveness of the decisions of immigration officers under section 25 is conclusiveness upon matters of fact. This was implied in Nishimura Ekiu v. U. S., 142 U. S. 651 [12 Sup. Ct. 336, 35 L. Ed. 1146], relied on by the government. As was said in Gonzales v. Williams, 192 U. S. 1, 15 [24 Sup. Ct. 177, 180 (48 L. Ed. 317)]: 'As Gonzales did not come within the act of 1891, the commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary.' Such a case stands no better than a decision without a fair hearing, which has been held to be bad. Chin Yow v. U. S., 208 U. S. 8 [28 Sup. Ct. 201, 52 L. Ed. 369]. See, further, Zaknaite v. Wolf, 226 U. S. 272 [33 Sup. Ct. 31, 57 L. Ed. 218]; Lewis v. Frick, 233 U. S. 291, 297 [34 Sup. Ct. 488, 58 L. Ed. 967]."

Bearing in mind these principles to which the court is confined in determining the questions involved on this application, I am of the opinion that the writ should be sustained and the immigrant released.

[2, 3] I have examined the testimony taken before the Board of Inquiry and do not find even slight evidence to support the finding which has resulted in the order of deportation on a charge of the danger of the immigrant becoming a public charge. The immigrant was apparently held or stopped in her passage to this country as a result of an anonymous letter written to the authorities, and which had to do with the morality of the immigrant and her relations with one Clarence D. Levy, with whom she had some sort of an association on her last visit. However meritorious this claim may have been, it is out of the case now, since the finding, as shown by the return, indicates that she is not being held for deportation because of this charge. I fear that uppermost in the consideration of those who have passed upon the case before has been an influence wielded against the applicant for admission because of her alleged relations with Levy. The Board of Inquiry properly held that there was no evidence to support the charge in view of what the record shows. Innuendo, surmise, or guess of immorality will not suffice. The case must therefore be considered within the principles of law herein referred to and upon the record, and that alone, to ascertain whether or not there is evidence, even slight, to hold the applicant for deportation.

It is regrettable that a reading of the testimony shows many contradictions and inconsistencies between the testimony of the immigrant and Levy. But the record fairly shows that the immigrant, 22 years of age, unmarried, and an actress by profession, arrived as a secondcabin passenger with \$35 in American money and about 20 pounds in baggage. She had a friend in this country in Clarence D. Levy, whom she was going to visit, and whom, it appears later on in the testimony, she intended to marry. Her specialty on the stage was dancing and singing, and she also testified that she is a typist. Levy says he has an income of \$7,000 a year which he inherited and real estate valued at \$14,000, and that he is engaged in the business of appraising property, from which he derives an income of some \$10,000 a year. He offered, on the hearing, to become bondsman in any amount the government may require, and this is permissible under the immigration law. There is no testimony in contradiction of these facts, and I cannot see how it can be said that this evidence is even slight evidence

of the immigrant being unable to support herself or to become a public charge. Much was said on the argument and in the memorandum submitted by the learned United States assistant attorney as to what the immigrant did on the occasion of her last visit here. I think, howeger, that that is not pertinent, for we are only interested in what she can or may do on the occasion of this arrival in this country. If Levy and the immigrant are honest in their intentions and Levy marries her, she has the prospect of comfort and luxury in this country. If she is a singer, dancer, and typist, she has the prospect of employment here, and, since she enjoys good health and is but entering into the stage of womanhood, I cannot see how she can become a public charge here. Her experience in the country before, where she lived for some months, would negative any such idea. While insinuations are made in an anonymous letter (letters which usually find a fitting place in the scrap basket) as to her intimacy with Levy while here before, I cannot see how that can be the subject of inquiry or influence the court's judgment now, in view of the return which indicates the one ground for which she is being detained. The fact that she has no relatives here should not weigh against her to the extent of excluding her, for she speaks the English language and perhaps finds herself in common with a great many other useful residents of the United States.

In the Gegiow Case, referred to above, two Russians who spoke only a foreign tongue, with \$40 and \$25, respectively, bound for Portland, Or., were admitted into the country against the finding of a similar Board of Inquiry. I think that this case comes well within the

rule of the case just mentioned where it said:

"Such a case stands no better than a decision without a fair hearing which has been held to be bad."

In Frick v. Lewis, supra, the court said:

"Where there is nothing to support a charge, we agree that the department cannot rightfully issue a warrant to deport; for that would be a clear abuse of power."

I find nothing in the statutory enactment which specifies the amount an immigrant must have upon entry into this country, and under the particular circumstances of this case on the showing made by the immigrant, as to her ability to care for herself, if she fails in marriage with Levy, and particularly where she has not had the advantage of rule 20, that is to say, an opportunity to give a bond to insure the government against her becoming a public charge, I feel it my duty to sustain the writ and permit her to enter the United States.

235 F.—63

In re CORSI.

(District Court, S. D. New York. January 9, 1912.)

1. Customs Duties \$\infty\$=60\frac{1}{2}\$, New, vol. 24 Key-No. Series—Brokers—Licens—Es—Revocation.

Under Act June 10, 1910, c. 283, 36 Stat. 464 (Comp. St. 1913, §§ 5550–5554), relating to the revocation of the licenses of customs brokers, and providing that the collector may at any time for good and sufficient reasons serve notice in writing upon any custom house broker to show cause why the license shall not be revoked, which notice shall be in the form of a statement specifically setting forth the grounds of the complaint, it is unnecessary for the notice to set forth the case with legal certainty, and, while a notice charging that the broker had been guilty of misconduct in fraudulently converting to his own use a government refund check is sufficient, the allegations of conversion are unnecessary.

2. Customs Duties \$\infty\$60\frac{1}{2}\$, New, vol. 24 Key-No. Series—Brokers—Licens-es—Revocation.

In a proceeding to forfeit the license of a customs broker, the fact that the notice required under Act of June 10, 1910, made unnecessary use of technical legal phrases charging an offense which was not established as charged, is no ground, where the broker is guilty of an offense warranting revocation of his license, for denying revocation.

3. Customs Duties \$\infty\$=60\frac{1}{2}\$, New, vol. 24 Key-No. Series—Brokers—Licenses—Revocation.

A customs broker was a member of a corporation engaged in importing. The corporation made entry of merchandise for a customer, and, the customer being entitled to a refund, a government refund check was drawn to the order of the corporation which had made the entry. The broker, though not authorized, signed the check as treasurer of the corporation and deposited the proceeds to his own account. It appeared that he and the president of the company whose signature was required on all firm checks were having difficulties, though the broker contended that he appropriated the money to compel the customer of the corporation to pay him an individual debt. Upon the customer making inquiries at the custom house, the broker returned the money. Held, that he was guilty of misconduct warranting revocation of his license as customs broker.

4. Customs Duties \$\sim 60\frac{1}{2}\$, New, vol. 24 Key-No. Series—Brokers—License—Revocation—Proof.

In such case, where the complaint of the collector charged the broker with fraudulent conversion of the refund check, proof of the above facts was sufficient to establish the fraudulent conversion.

5. Customs Duties \$\infty\$60\frac{1}{2}, New, vol. 24 Key-No. Series—Brokers—License—Revocation—Finding of Collector.

In a proceeding to revoke the license of a customs broker, the finding of the collector on questions of fact should be treated as a verdict and should not be disturbed either by the Secretary of the Treasury or the courts when there is evidence to support it.

In the matter of the license of Frank Corsi as a customs broker. Application under Act June 10, 1910, § 3, for review of the decision of the Secretary of the Treasury revoking Frank Corsi's license as a customs broker. Revocation confirmed.

Samuel F. Frank, of New York City, for applicant. Carl E. Whitney, Asst. U. S. Atty., of New York City, opposed.

HOUGH, District Judge. Corsi is a licensed custom house broker under the statute above referred to, and also a shareholder and officer (i. e., treasurer) of the corporation of Corsi, Zumsteg & Co.

Zumsteg was likewise a large shareholder in the corporation, and (with borrowed money) contributed the company's capital; Corsi

putting in his good will and labor.

Like most small corporations, the business seems to have been actually carried on as if it were a partnership, but still the company has by-laws, which, among other things, required Corsi as treasurer to deposit all the checks drawn to the order of the company in the

company's bank account.

There were dissensions in this business between Corsi and Zumsteg, and Corsi, who was the only licensed broker connected with the concern, seems to have regarded the custom house business of the company as his own. He acted as broker for one Piero in the importation of certain merchandise in which the custom house business assumed such shape that on September 14, 1911, a refund check was ready for delivery, drawn to the order of Corsi, Zumsteg & Co., which means that the corporation had made the entry and were, so far as

the custom house knew, the importers of the merchandise.

On September 14th, Corsi took this refund check for \$113.70, indorsed it as treasurer, and deposited it in his own private bank account. He has himself stated that he did this because he "wanted to be sure" that Piero got his money: Piero being the ultimate consignee of the goods out of which the rebate grew. It is argued by counsel that the principal reason for Corsi's action was his guarrel with Zumsteg and his fear that money put into the corporate account might be held up by Zumsteg, whose signature as president was required by the by-laws on all firm checks; but there is nothing to show that any unjust, dishonest, or unlawful claims were advanced or threatened by the corporation against Piero, and no reason appears from Corsi's own testimony as to why the check should not have pursued the proper and normal course. It is, however testified by Mr. Shaw, of the legal force of the custom house, that Corsi stated to him that he had taken this particular check of \$113.70 because Piero owed him (Corsi) about \$60, and he wanted to get that debt paid out of the rebate found.

[1, 2] As matter of fact, Piero evidently knew perfectly well that he had imported his merchandise through Corsi, Zumsteg & Co., for on or about September 20, 1911, he wrote a letter to the collector stating that fact and complaining that there was such delay in the payment of rebates. He had inquired of the corporation and been told that the rebate check had not been received. The custom house advised him of the payment of the check and its delivery to Corsi, and thereupon, and subsequent to September 25, 1911, Corsi paid Piero the full amount. Thereupon the collector had served upon Corsi a notice requiring him to show cause why his custom house license should not be revoked, because "you have been guilty of misconduct in your practice as custom house broker, in that you on or about September 14, 1910, fraudulently converted to your own use a certain government refund check for \$113.70." Of this charge Corsi was found guilty by the collector and the finding confirmed by the Secretary of the Treasury.

The act of Congress does not specify what acts or conduct shall be deemed of such turpitude as to justify revocation of license; indeed, there is nothing in the statute requiring turpitude or positive wrongdoing as a prerequisite for revocation of license. The sole limitation upon the collector's authority is that the notice to be given in respect of any threatened revocation shall "be in the form of a statement specifically setting forth the grounds of complaint."

Undoubtedly, the complaint above quoted complies with this statute, and the record herein raises as the first question of law to be considered an inquiry whether the allegations of the notice must correspond to the proof contained in the record with the strictness of

a criminal proceeding.

In my judgment, such accuracy is not necessary. This is a statute for the regulation of business men, to be administered by business men, and, whenever the substance of the complaint is fairly shown to be proved, punishment should not be aborted by the incautious or unnecessary use of technical legal phrases in the notice of hearing. Thus, if, in this case, the notice had avoided the use of the words "fraudulently converted," and merely stated the uncontradicted facts, it would in my judgment have been a sufficient complaint. Therefore in my opinion the prime inquiry is, not whether there was a technical conversion of the check, but whether Corsi was guilty of misconduct as a custom house broker in doing what he is shown to have done.

[3] In my judgment he was guilty of misconduct, and on this

ground alone the proceedings should be confirmed.

[4, 5] But even if it be held that, since fraudulent conversion is charged, fraudulent conversion must be proved with the strictness of criminal proceedings, I am of opinion that it is well proved, unless this court is to assume under the statute to differ in questions of fact with the collector as the trial officer. As to this, it is my judgment that in practice under this statute the finding of the collector on all questions of fact should be treated like the verdict of a jury, and neither the Secretary of the Treasury nor this court should vary or disturb such findings if there be any evidence in support thereof. Applying this test to the proceeding, there is certainly evidence from which it may well be inferred that Corsi took this check for the purpose of getting out of it a private debt of his own, whereas, the money should have gone through the corporation books and been subject only to offsets justly advanced by the corporation; and on this view there was a conversion of something belonging to Corsi, Zumsteg & Co.

There is also evidence from which it might well be inferred that Corsi wanted money for his own purposes, that Piero did not owe him anything, and that his real intent was to withhold payment from Piero as long as possible in order to supply his immediate (and it is hoped temporary) necessities. If this be the truth, then it is a fair inference of fact that there was a conversion of something that belonged to Piero.

It is therefore concluded:

(1) That this charge is laid with unnecessary particularity.

(2) That improper conduct by Corsi is abundantly proven.

(3) That even if the charge must be proven as laid by legal evidence and "without variance" as that expression is used in the criminal law, there is enough evidence to warrant the submission of a charge of fraudulent conversion to a jury.

(4) The collector having found against Corsi on sufficient evidence,

this court will not disturb the collector's finding of fact.

(5) On this record, however, if I were sitting as a trial judge I would come to the same conclusion as did the collector.

The revocation of license is confirmed.

GASQUET v. FENNER et al.

(District Court, E. D. Louisiana. July 21, 1916.)

No. 15244.

1. JUDGMENT \$\infty 822(3)\$—FULL FAITH AND CREDIT—POWERS—EFFECT.

One adjudged insane in Louisiana, against whom an interdiction was rendered, departed from the state and acquired a domicile in Tennessee, and by the Tennessee courts he was adjudged sane. Civ. Code La. arts. 420, 421, provide that, an interdiction having once been declared, the person interdicted cannot resume the exercise of his rights until after a definitive judgment repealing the interdiction. Held, that despite the full faith and credit clause of the federal Constitution, the Tennessee judgment, has no extraterritorial effect and is not conclusive of complainant's right to relief in Louisiana as a person compos mentis, particularly where the interdiction was also based on complainant's incompetency because of excessive use of drugs and alcohol.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1500; Dec. Dig. \$22(3).]

2. Courts \$\infty 343-Federal Courts-Jurisdiction of.

Where, under the state practice, complainant could not, in Louisiana, maintain a suit for partition of an estate in which he was interested, the interdiction on account of his incompetency not having been removed, he cannot maintain a bill for partition in the federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 915, 916, 919, 920; Dec. Dig. \$\simega 343.]

In Equity. Bill by Ferdinand Vaughan Gasquet against Charles Payne Fenner, testamentary executor of Mrs. Louise Lapeyre Gasquet, and others. Bill dismissed without prejudice.

J. C. & Thos. Gilmore and Wm. Winans Wall, all of New Orleans, La., for plaintiff.

Denegre, Leovy & Chaffe, of New Orleans, La. (Geo. Denegre, of New Orleans, La., of counsel), for defendants.

FOSTER, District Judge. In this case the bill alleges that plaintiff, Ferdinand Vaughan Gasquet, is a citizen of Tennessee and sui juris; that he and his two sisters, Martha Gasquet, wife of George G. Westfeldt, and Evelyn Gasquet, wife of Charles Payne Fenner, are the sole heirs and residuary legatees of their mother, Mrs. Louise

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Lapevre Gasquet; that Charles Payne Fenner is the executor of his mother's will and in full possession of her estate under orders of the civil district court for the parish of Orleans, La.; that the estate amounts to more than \$600,000, and has been fully administered; that he is unwilling to own the residuum in indivision with his sisters, and is entitled to have one-third of said estate turned over to him. On these allegations he prays for an accounting from the executor and for a partition as against his coheirs. The answer sets up the interdiction of plaintiff, denies he is a citizen of Tennessee, and that he is sui juris. It admits the value of the estate and plaintiff's interest in same, and that the debts have been paid and special legacies delivered, but denies the estate has been fully administered, on the ground that the executor cannot file his account because no curator has been appointed to the plaintiff. The answer denies that plaintiff has the right or capacity to demand an accounting and a partition.

The material facts are these: Plaintiff was charged with willfully shooting and wounding his mother's coachman. Because of his alleged insanity, the grand jury refused to indict him, and in a proceeding before the criminal district court for the parish of Orleans, La., he was adjudged insane and committed to the state insane asylum, but remained in the custody of the sheriff and was placed in Touro Infirmary in charge of a deputy. Plaintiff's sisters and other relatives filed proceedings against him for his interdiction, alleging his insanity and also his excessive use of alcohol and narcotic drugs. After a trial, at which he was present and was represented by counsel, there was a judgment as follows:

"It is ordered, adjudged, and decreed that there be a judgment in favor of plaintiffs and against defendant, Ferdinand Vaughan Gasquet, decreeing that said Ferdinand Vaughan Gasquet is incapable of taking care of his person and administering his estate, and pronouncing his interdiction."

From this judgment he appealed to the Supreme Court of Louisiana. While the appeal was pending he applied to the court of appeal for the parish of Orleans for a writ of habeas corpus. The writ was granted, and he was released from custody. On appeal the judgment of interdiction was affirmed (136 La. 957, 68 South, 89), the Supreme Court incidentally holding that the court of appeal was without jurisdiction to set aside the commitment of the criminal district court. Plaintiff then sued out a writ of error to the Supreme Court of the United States, and this is still pending. Early in the proceedings, on his own motion, an administrator pro tempore was appointed. This officer, in Louisiana, has the temporary administration of affairs of one against whom interdiction proceedings are pending, but not the custody of his person. After the final judgment of the Supreme Court of Louisiana, application was made by his relatives for the appointment of a curator to the plaintiff, but this he successfully resisted because of the writ of error pending in the United States Supreme Court. While the case was pending in the Supreme Court of Louisiana, on an application for a rehearing, plaintiff moved to Memphis, Tenn., and filed an ex parte petition in the probate court of Shelby county, praying for a jury to determine his sanity. On this petition, after reciting the proceedings in the courts of Louisiana, a judgment was rendered as follows:

"It is therefore ordered, adjudged, and decreed that said verdict of the jury be, and the same is hereby, confirmed, and it is further adjudged, decreed, and declared by the court that said Ferdinand Vaughan Gasquet is a person of sound mind and capable and competent to control himself and his property, and that he is entitled to settlement from any and all persons having control, charge, or management of any part of his estate, real or personal; any disability of the said Gasquet by reason of the proceedings against him hereinbefore mentioned being hereby removed."

[1, 2] It is contended by the plaintiff that he was not insane when he removed to Tennessee, and that he acquired a domicile in that state; that the Tennessee court had jurisdiction, and its judgment, declaring him to be a person of sound mind, is entitled to full faith and credit, and is conclusive of his right to stand in judgment in this case. The defendants rely with equal confidence on the judgment of the Louisiana court. The question presented is perplexing, to say the least, and neither the adjudged cases nor the text-writers throw any appreciable light on the subject. There are cases holding that an interdict may acquire a new domicile, and probably plaintiff had sufficient mental capacity at times to do so. If he did acquire a domicile in Tennessee, the probate court of Shelby county apparently had jurisdiction to declare him sane. But in the view I take of the case, these questions are immaterial, and I do not pretend to decide them. Conceding, for the sake of argument, that the plaintiff had acquired a domicile in Tennessee, and that the probate court of Shelby county had jurisdiction over his person and authority under the law of Tennessee to declare him sane, nevertheless his capacity to sue in Louisiana is not completely established by the judgment rendered. The law of Louisiana recognizes that insanity may be only temporary, but yet provides that, interdiction having been once decreed, a person interdicted cannot resume the exercise of his rights until after a definitive judgment, repealing the interdiction. Articles 420, 421, Civil Code. Apparently the Supreme Court of Louisiana has had no occasion to construe these articles, which is not surprising, in view of their plain terms. The situation, therefore, is this: The plaintiff is judicially sui juris in Tennessee and not sui juris in Louisiana. One judgment has as much force and effect as the other; for, no matter what faith and credit the Tennessee judgment is entitled to as declaring plaintiff of sound mind, it could not have the extraterritorial effect of annulling the Louisiana judgment of interdiction, and a proceeding will be necessary in the court that pronounced the interdiction to set it aside. Again conceding, for the sake of argument, but without so deciding, that the Tennessee judgment is conclusive proof of plaintiff's sanity, it is apparent that the Supreme Court of Louisiana affirmed the judgment of interdiction on the theory that plaintiff was incapable of taking care of himself and his estate because of his excessive use of drugs and alcohol. With regard to this aspect of his case, he might be considered sane, and yet, under the law of Louisiana, subject to interdiction. There is no dispute as to plaintiff's interest in his mother's succession and the amount due him.

and therefore nothing for the court to pass upon in that respect. Partitions in matters of this kind, in Louisiana, are usually made by notarial act through a notary appointed by the court. This could not take place until the executor had filed his account. It is not alleged or suggested that the executor has been guilty of any breach of trust. or even negligence, in performing his duties. The executor, the defendant herein, is an officer of the Louisiana probate court, and that court is the proper tribunal to require him to file an account of his administration. The administration is not ended, and there is some doubt as to the jurisdiction of this court to entertain this suit at this time. Waterman v. Canal Bank, 215 U. S. 45, 30 Sup. Ct. 10, 54 L. Ed. 80. But be that as it may, it is well settled that in matters of this kind, federal courts administer the laws of the states and are bound by the same rules that govern the state tribunals. Security Trust Company v. National Bank, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147.

Plaintiff would have no standing in the state courts, though his sanity be conceded, either to require an accounting or to demand a partition, until the judgment of interdiction had been set aside in the proper proceeding in the court which rendered it.

The bill will be dismissed without prejudice.

UNITED STATES v. DUNKLEY.

(District Court, N. D. California, First Division. September 28, 1916.)
No. 5906.

1. Bankruptcy ⇐==488, New, vol. 24 Key-No. Series—Offenses—Statutes—"Extort."

Under Bankruptcy Act, July 1, 1898, c. 541, § 29b, 30 Stat. 554 (Comp. St. 1913, § 9613), providing for punishment upon conviction of the offense of having knowingly or fraudulently attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings, the word "extort" in view of other statutes, is not restricted to the unlawful taking as an officer, by color of his office, any money or thing of value not due him, but must be understood as including the taking or obtaining of anything from another by compulsion or exaction, whether by an officer or otherwise, and hence an attorney for a trustee in bankruptcy, who first opposed acceptance of a bid for the stock of the bankrupt and then forced the bidder to pay him a sum of money as a condition to his advising acceptance, is guilty of extortion within the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extort.]

2. Bankruptoy \$\iff 488\$, New, vol. 24 Key-No. Series—Offenses—Statutes.

The fact that the attorney for the trustee was lawfully entitled to use his influence with the referee in the matter is no defense; the statute denouncing the offense of extorting money for acting or forbearing to act in bankruptcy proceedings regardless of the illegality of the action.

Louis P. Dunkley was indicted for a violation of the Bankruptcy Act, and he demurred. Demurrer overruled.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

Herbert Choynski and James R. Kelly, both of San Francisco, Cal.,

for defendant.

DOOLING, District Judge. [1] Defendant, an attorney, is charged with a violation of the following provision of subdivision "b" of section 29 of the Bankruptcy Act:

"b. A person shall be punished, * * * upon conviction of the offense

of having knowingly and fraudulently. * * *

"5. Extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings."

The indictment alleges the following facts:

"That Capital Paint Company was adjudicated a bankrupt by this court and the proceedings referred to J. F. Pullen, referee; that H. T. Hobson was elected trustee, and defendant was his attorney in said bankruptcy proceedings; that before the referee there was pending on September 22, 1915, a petition filed by said Hobson, as trustee, through defendant as his attorney, asking that a sale be ordered of all the stock of said bankrupt; that such order of sale was made, and said sale was set for September 22, 1915, to be had before said referee; that at said time all of the bankrupt's stock was offered for sale; that the highest and best bid therefor was the sum of \$1,500, and such sum was offered by one Sam Hersch; that when said bid was made the defendant, acting as the attorney for the trustee, protested, and advised the referee against the acceptance of said bid, and stated to said referee that said sum of \$1,500 was an inadequate price for said goods, and requested that said sale be continued to the following morning, September 23, 1915; that pursuant to said request the said referee did continue said sale until said date, at which time defendant appeared before said referee and advised and persuaded him to accept said bid, and approve the same as the highest and best bid that could be obtained for said property; that following the continuance of the sale on September 22d, and before the sale thereof on September 23d, the defendant, by reason of his position as attorney for said trustee, did demand and receive from the persons of Sam Hersch and R. L. Scott the sum of \$50 as a consideration for his acting in said bankruptcy proceedings in using his influence in causing the said referee to confirm the said sale, and accept said sum of \$1,500 bid and offered by said Sam Hersch on September 22d; that said sum of \$50 so demanded and received by said defendant was in further consideration of his forbearing to act in said bankruptcy proceedings, by making no effort to secure bids from persons other than the said Sam Hersch; that defendant was not entitled to said money, and the same was paid unwillingly, and under the fear that unless it was paid, the said property of the bankrupt would be sold to other parties; and that no part of said sum was accounted for by defendant or the said trustee in the bankruptcy proceedings."

It is then formally averred that defendant, in the manner and form aforesaid—

"did willfully, unlawfully, knowingly, and fraudulently extort money, to wit, the sum of \$50 from the persons of Sam Hersch and R. L. Scott, as a consideration for his acting and forbearing to act in the bankruptcy proceedings of the Capital Paint Company, as hereinabove particularly set forth."

The sufficiency of the indictment is challenged by demurrer on the ground that it states no offense, the claim being that the word "extort" as used in the statute means "to take unlawfully, as an officer, by color of his office, any money or thing of value, that is not due, or more than

is due, or before it is due," and there is no allegation that defendant was an officer. It is quite true that at common law extortion was the unlawful taking by an officer, by color of his office, from any man any money or thing of value that is not due to him, or more than is due, or before it is due, and so the offense is defined by Blackstone. But the word "extort" has come to have a much wider meaning than this, and, as generally understood, it means the wrongful exaction of money or property; the taking or obtaining of anything from another by compulsion or oppressive exaction, whether by an officer or otherwise. The statutes too of most of the states have so enlarged the definition of extortion that the common-law meaning of the word is but one of many embraced therein. The Penal Code of this state, for example (section 518) defines extortion to be:

"The obtaining of property from another with his consent, induced by a wrongful use of force, or fear, or under color of official right."

And in the Code D. C. § 819, we find the provision that:

"Whoever verbally or in writing accuses or threatens to accuse any other person of a crime or any conduct which, if true, would tend to disgrace such other person, or in any way subject him to the ridicule or contempt of society, or threatens to expose or publish any of his infirmities or failings, with intent to extort from such other person anything of value or any pecuniary advantage whatever, * * * shall be imprisoned," etc.

Here manifestly Congress used the word "extort" in its wider meaning, and without any reference to official malfeasance, and it was held under this section that the intent of a bill collector to collect a debt due his principal by posting cards conspicuously on the debtor's door, having on them the collector's name and business and written demand for payment, was an attempt to extort money from the debtor. Slater v. Taylor, 31 App. D. C. 100, 18 L. R. A. (N. S.) 77.

I am of the opinion that in the Bankruptcy Act Congress did not intend that the provision in question should apply to officers alone, but to all persons who exacted money or property from any one as a consideration for acting or forbearing to act in bankruptcy proceed-

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[2] It is further urged that as defendant was legally entitled to use his influence with the referee to cause him to accept the bid in question, and was legally entitled to forbear to make any effort to secure other bidders, he could commit no offense in demanding and receiving money for the exercise of these rights. I cannot agree to this contention. The statute in question does not say that one shall not extort money from another as a consideration for acting or forbearing to act unlawfully, but for acting or forbearing to act at all. A creditor has the undoubted lawful right to oppose or to refrain from opposing a bankrupt's discharge, but if he should exact money from the bankrupt as a consideration for his forbearing to oppose such discharge, he would be guilty of the offense denounced by this section.

Here the trustee had the right to oppose the confirmation of the sale in question, and if the sum bid was inadequate it was his duty to do so. He was not bound to go about seeking bidders, nor was he bound to refrain therefrom, but these facts did not authorize his at-

torney so to take advantage of his position as attorney to demand and receive money from the bidders as a consideration, either for supporting the sale, or refraining from seeking other bidders, and if he did so, as the indictment avers, he violated the section of the Bankruptcy Act under which he is charged.

The demurrer to the indictment will therefore be overruled.

In re BRASH.

(District Court, W. D. Washington, N. D. September 5, 1916.) No. 2890.

ALIENS \$==62-NATURALIZATION-RESIDENCE.

An alien, who located in the United States in the territory of Washington in 1875, declared his intention in 1880 of becoming a citizen. After filing his declaration of intention and taking the required oath he became an elector, voting at territorial elections, and on the admission of the territory to statehood continued to exercise the franchise. About 1894 the alien was employed by a San Francisco company, and required to move to British Columbia, where he resided until 1915, maintaining a home there and no home in Washington. Held, that though the alien had been advised by the United States District Attorney, after the admission of the territory as a state, that he need take no further steps to becoming a citizen, nevertheless his application in 1915 for citizenship must be denied, the alien not having resided within the United States for 5 years next before his application.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123–125; Dec. Dig. ६ 2-62.]

At Law. In the matter of the petition of Charles Brash, an alien, for citizenship. Application denied.

Will H. Thompson, of Seattle, Wash., for applicant.

John Speed Smith, Chief Naturalization Examiner, of Seattle, Wash., for the Government.

NETERER, District Judge. Charles Brash, an alien, came to the United States October 13, 1875, and to the territory of Washington, October 21, 1880, on which day he declared his intention to become a citizen. In his petition, filed June 21, 1915, he alleges continuous residence in the United States since June 20, 1910, or 5 years preceding the date of the filing of the petition. Applicant, after filing his declaration of intention and taking the oath referred to, and after residence of six months, became an elector of the territory (section 3050, Code Wash. Ter.) and voted at the elections thereafter, and on admission of the territory November 11, 1889, by constitutional provision this franchise was continued (section 1, art. 6, State Const.) and he on oath states that he was advised by the then United States District Attorney, after the admission of the territory as a state, that he possessed all the rights which naturalization would give, and that it was unnecessary to pursue his naturalization further, and believed himself to be a citizen. About 21 years ago the applicant was employed by

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a concern in San Francisco, and required to move to Victoria. B. C., and with his family, consisting of wife and several children, removed to Victoria, B. C., where he resided with his family during the entire time until 1915. He secured and furnished his home; his children grew to maturity. No residence of any kind or character or place of residence was maintained in Washington or the United States. He did not leave any personal effects in the United States. He acquired some real estate in the United States, which he still holds. He never exercised the rights of franchise in Washington after his removal to Victoria; nor did he exercise any such rights in Victoria. He was frequently called to Portland, San Francisco, and Seattle on business. On the death of President McKinley he joined with United States citizens in Victoria in memorial exercises. On the Fourth of July he would decorate his residence with the United States flag, as would citizens of the United States. I am satisfied that the petitioner is a man of good moral character and attached to the principles of the Constitution of the United States.

Objection is made by the Chief Examiner to his admission on the ground that he has not resided within the United States for 5 years next preceding his admission. Section 2170, Rev. St. (Comp. St. 1913, § 4360), provides that no alien shall be admitted to become a citizen who has not, for a continued term of 5 years next preceding his admission, resided within the United States. For the applicant, it is contended that he believed himself to be a citizen of the United States, and always held his allegiance to the Constitution of the United States, and that it was his intention to return to the United States when the business in which he was engaged was ended, and that pursuant to such determination he did return to the United States, and this mental condition or determination should be the controlling factor. In re Deans (D. C.) 208 Fed. 1018, and U. S. v. Deans (C. C. A.) 230 Fed. 957, are cited to the court as sustaining this view, as well as a number of other authorities bearing upon legal, as contradistinguished from actual, residence, which I do not think have application here. I think this case is clearly distinguishable from the Deans Case, in this, that Deans was only absent from the United States two months when he was in Scotland and four months when he was employed in the Panama Canal Zone, where he was discharged because he was not a citizen, and the court in that case, and I think properly, held that the residence contemplated by the act of Congress was not interrupted by the absence under the circumstances detailed. The court in that case merely held that it was not the intention of Congress that an alien must be actually and physically within the United States, actually present every day for the five-year period. Precedent and reason show that each case must be determined upon its own facts, and that temporary residence of short intervals does not destroy the continuity of residence, constructively, at least, continued. In the instant case the applicant was actually absent from the United States with his family, maintaining his home, his residence, his habitat, in a foreign domain, for the period of 20 years or more, and has only been a resident of the United States for one year immediately preceding the filing

of this application. The court cannot, from the facts in this case, say that the applicant maintained a legal residence in the United States for any purpose, and his actual residence was beyond question in British Columbia. This conclusion is fully sustained in the opinion of Circuit Judge Rogers for the Circuit Court of Appeals for the Second Circuit. U. S. v. Patrick Mulvey, 232 Fed. 513.

Application is denied.

CONTINENTAL GIN CO. v. STOCKER et al.

(District Court, E. D. Oklahoma. September 11, 1916.)

EVIDENCE 441(11)-PAROL EVIDENCE RULE-EXCEPTIONS.

Where the payee of a note agreed that, if sureties would sign, the proceeds of a mortgage given by the principal should, in case of default, be first applied upon the notes, the admission of evidence of the agreement, default having occurred, is not a violation of the parol evidence rule, where the mortgage had been foreclosed and the proceeds were in the hands of the payee, for such evidence did not tend to vary the terms of the note.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1793-1812, 2043, 2044; Dec. Dig. \$\sim 441(11).]

At Law. Action by the Continental Gin Company against W. L. Stocker and J. Oscar Howard. There was a judgment for plaintiff denying part of the relief sought, and plaintiff moved for a new trial. Motion overruled.

Gibson & Hull, of Muskogee, Okl., for plaintiff. Ramsey, de Meules & Rosser, of Muskogee, Okl., for defendants

WADE, District Judge. Defendants were sued as sureties upon a promissory note executed to the plaintiff. Their defense, so far as presented for consideration upon this motion for a new trial, was that certain notes, including those in suit, upon which defendants are sureties, were given for a cotton gin; that a mortgage was also executed to the plaintiff as security for the purchase price of the gin; that, at the time of the purchase of the gin and the execution of the notes signed by the defendants, it was agreed that, in case of default and foreclosure of the mortgage, the money derived from the sale of the property should be first applied upon the notes signed by the defendants, and that there was default, and foreclosure, and sale of the property, which netted \$2,711, but that plaintiff failed to apply it upon the notes signed by the defendants, but applied it upon other notes, and the defendants contended upon the trial that they were entitled to have this \$2,711 credited upon the notes which they signed, in accordance with the agreement made.

The jury having found that the contract was made as claimed, we have this situation:

For the purpose of this motion, it must be conceded that the plaintiff made a solemn agreement with the defendants that, if they would sign these notes, they would also take a mortgage securing these and

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other notes, but that, in case of foreclosure, the money derived therefrom would be first applied in payment of these notes signed by the defendants; and it is not disputed that there was foreclosure and sale, and the receipt by plaintiff of \$2,711, which, in violation of its contract, it applied upon other notes, and that the plaintiff is now seeking to recover the full amount of the notes signed by the defendants.

Counsel for plaintiff place great stress upon the parol evidence rule, and insist that evidence of this agreement should not have been admitted, and, if admitted, that it should not be considered.

The rule which holds that parol evidence is inadmissible "to vary, alter, control, or contradict, the terms of a written instrument in an action founded upon such writing," is a salutary one; but it should not be extended to include cases where the reason of the rule does not obtain. In the application of the rule, sometimes injustice has been done, and to avoid injustice, and at the same time to sustain the rule, courts have in many cases given recognition to exceptions, which have almost destroyed the rule itself. These exceptions have been fully considered in Gandy v. Weckerly, 220 Pa. 285, 69 Atl. 858, 123 Am. St. Rep. 691, 18 L. R. A. (N. S.) 434, and extensive note therein.

But in my judgment the rule has no application here. The defendants do not seek to alter, or change, or modify the contracts signed by them; they admit their liability, but they plead facts from which they contend that the debt has been partly paid.

"A defense, by a surety, as to an improper application of payments by the creditor, has frequently been upheld in a law action." Columbia Digger Co. v. Rector, 215 Fed. 618.

"Payment to the creditor of collateral held as surety for the debt, or a sale of it, and the appropriation of the proceeds by the creditor, operates as a satisfaction of the debt, and, where the amount received is less than the debt, it will be considered as satisfaction pro tanto." 30 Cyc. 1193.

There is no rule of law which prohibits the making of a contract, at the time notes are signed, that in case money is received from a certain source it shall be applied upon the notes, provided that, before suit is brought upon the notes, the money has been actualy received.

The rule contended for by counsel for plaintiff would apply in full force if the money had not been actually received by the plaintiff; but, having been received, the court will give force to the contract and compel the application in accordance with the agreement of the parties. Any other rule would give legal recognition to positive fraud, and no rule should be applied where such would be the result, except under the most compelling circumstances.

The following cases tend to sustain the foregoing: Hansen v. Rounsavell, 74 Ill. 238; Hughes v. McDougle, 17 Ind. 399; Carson v. Cook County Liquor Co., 37 Okl. 12, 130 Pac. 303, Ann. Cas. 1915B, 695; Bross v. McNicholas, 66 Or. 42, 133 Pac. 782, Ann. Cas. 1915B, 1272; United States v. American Bonding Co., 89 Fed. 925, 32 C. C. A. 420; Ross v. Crane, 74 Iowa, 375, 37 N. W. 959; Bennett v. Tillmon, 18 Mont. 28, 44 Pac. 80; and Roe v. Bank, 167 Mo. 406, 67 S.

W. 303.

Counsel also insist that the agreement, if made, was not by a duly authorized agent; but this question was submitted to the jury under instructions, which are not complained of, and I feel satisfied that the evidence was sufficient to sustain the verdict.

The motion for a new trial will be overruled.

THE FAIRHOPE.

(District Court, E. D. Louisiana. July 13, 1916.)

No. 15194.

1. MARITIME LIENS \$=44-RIGHT TO LIENS.

Under Act Cong. June 23, 1910, c. 373, 36 Stat. 604 (Comp. St. 1913, §§ 7783-7787), declaring that any person furnishing repairs, supplies, or other necessaries to a vessel upon the order of the owner shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and that it shall not be necessary to allege or prove that credit was given to the vessel, one making repairs on and furnishing necessary supplies to a vessel on order of the owner is entitled to a lien, although the owner gave his note therefor, due in four months, and a mortgage on the vessel to secure it.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 83; Dec. Dig. \$244.]

2. MARITIME LIENS \$\sim 43\$\text{-Waiver-Taking Note for Amount.}

That one who made repairs upon and furnished supplies for a vessel retained the note of the owner therefor is no ground for denying him a maritime lien as against other lien claimants; the owner not making objection to the retention of the note.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 82; Dec. Dig. ⇐ 43.]

In Admiralty. Libel by Mose Kruger and others against the steamer Fairhope, in which the Slidell Dock Yard & Shipbuilding Company intervened. The intervener's claim was rejected by the commissioner, and it filed objections to his report. Exception sustained, and decree entered in favor of intervener.

William H. Pascoe, of New Orleans, La., for libelants.

John D. Grace, of New Orleans, La., for interveners Cahaba Red Ash Coal Co. and others.

J. D. Dresner, of New Orleans, La., for intervener Madisonville Saw & Planing Mill.

Jas. E. Zunts, of New Orleans, La., for intervener Robt. P. Hyams Coal Co.

Denegre, Leovy & Chaffe and Harry McCall, all of New Orleans, La., for intervener Ollinger & Bruce Dry-Dock Co. and others.

Andrew M. Buchmann, of New Orleans, La., for intervener Alex. Dussel Iron Works.

McCloskey & Benedict, of New Orleans, La., for intervener New Orleans Railway & Light Co.

Gustave Lemle, W. Catesby Jones, and Arthur A. Moreno, all of New Orleans, La., for intervener Slidell Dry Dock & Ship Building Co.

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. Henry L. Garland, for interveners Naul and Williams.

Dart, Kernan & Dart, of New Orleans, La., for intervener Dr. E. T. Newell.

Farrar, Jonas, Goldsborough & Goldberg and Al. C. Kammer, all of New Orleans, La., for intervener Texas Oil Co.

FOSTER, District Judge. In this matter Mose Kruger and other seamen filed a libel against the steamer Fairhope for wages. Admiralty process issued against the vessel, and she was seized and sold. Various materialmen having intervened, the matter was referred to a commissioner, who in due course reported. His report is immaterial except as to the claim of the Slidell Dry Dock & Shipbuilding Company. This claim he rejected, and naturally, that company ob-

iects to the report.

[1] The facts are as follows: The steamer Fairhope was owned by D. H. Newell, a resident citizen of Louisiana, and was enrolled at New Orleans. In December, 1914, the Slidell Dry Dock & Shipbuilding Company, a Louisiana corporation conducting a shipyard at Slidell, La., made repairs and furnished necessary supplies to the Fairhope, amounting to \$1,020.63. On the conclusion of the repairs, the owner executed his note, dated December 12, 1914, due in four months, for an amount slightly exceeding the claim now made, and also executed a mortgage on the vessel in the usual form to secure the note. The libel filed made no mention of the note or the mortgage, and declared on the original admiralty lien. The note has not been surrendered. The testimony of A. D. Canulette, general manager of the shipbuilding company, establishes the correctness of the account sued on, that the bills were approved by the captain, and that the repairs were made and the supplies furnished on the credit of the vessel. His testimony is not rebutted. The vessel speedily got into financial difficulties after being repaired, and the original libel herein was filed on January 11, 1915, within less than one month after the note was signed.

It is contended that by taking the note and mortgage, intervener has waived his lien, and emphasis is placed on the fact that the note has not been surrendered. Intervener's right to recover depends, of course, on the act of Congress of June 23, 1910. That statute crystalizes what has always been the general admiralty law, and makes it applicable to foreign and domestic ships alike. Under the general maritime law, if the repairs and supplies were necessary and furnished in good faith, the presumption would be that they were furnished on the credit of the ship. The statute recognizes this rule, and goes a step further, perhaps, in declaring that it shall not be necessary to allege or prove that credit was given to the ship. The presumption would not be overcome by showing that the owner was present and ordered the repairs. The Kalorama, 10 Wall. 204, 19 L. Ed. 941. And the taking of the note and mortgage would not waive the lien unless it was so intended. The St. Lawrence, 1 Black, 522, 17 L. Ed. 180; The B. D. Steelman (D. C.) 48 Fed. 580; The Theodore Perry, Fed. Cas. No. 13,879. The terms of the mortgage in this case do not indicate an intention to waive the lien. Nothing whatever is said about the maritime lien, but the credit is only for four months, well within the term of prescription of the lien under the local law, which the parties probably had in mind when the mortgage was executed, and the act provides for the instant maturity of the note in the event of a libel being filed against the boat. Such testimony as is in the record tends to show that the supplies and repairs were furnished on the credit of the vessel, and there is nothing to indicate that the lien was waived.

[2] It is insisted, however, that the claim cannot be allowed because the note has not been surrendered. In several cases the Supreme Court has adverted to the fact that the note has, or has not, been surrendered, and more or less significance attached to the fact, but, so far as I am advised, the question has never been fully discussed by that court. However, in the case of The Theodore Perry, supra, Mr. Justice Brown, when on the district bench, held that the objection was personal to the maker of the note. This is in accord with sound reason, and is consistent with the decision of the Supreme Court in the case of The Custer, 10 Wall. at page 218, 19 L. Ed. 944, wherein it was held that the pendency of a common-law action against the owner did not prevent the assertion of the lien against the ship.

In this case all the liens are practically contemporaneous. The repairs furnished by the Slidell Dry Dock & Shipbuilding Company were probably of benefit to the other claimants, as no doubt value was added to the vessel, and it would be inequitable to deprive intervener

of sharing in the fund.

The exception to the commissioner's report will be maintained, and a decree entered in accordance with this opinion.

FIDELITY TRUST CO. v. ELBERTON & E. RY. CO.

(District Court, N. D. Georgia. September 25, 1916.)

No. 22.

1. Railroads €== 188—Mortgages—Foreclosure—Intervention.

In a suit to foreclose a mortgage or deed of trust given to secure bonds issued by railroad company, stockholders seeking to intervene cannot inject by their answer issues as to whether some of the stockholders had paid for the stock held by them.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 618-621; Dec. Dig. ⇐ 188.]

2. Railroads \$\infty\$=183-Mortgages-Foreclosure-Defenses.

Where a contractor, having constructed a line of railroad, disposed of part of the bonds given for the purchase price, foreclosure of the mortgage securing the bonds cannot be denied because of the contractor's breach of contract damaging the corporation, but the claim should, after the mortgage has been foreclosed, and the money paid into court, be urged as against the interest of the contractor in the proceeds, so an intervention setting up the contractor's breach should be denied.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 612; Dec. Dig. ===183.]

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 235 F.—64

3. RAILBOADS \$\instructure{\

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 615, 616; Dec. Dig. \$\simes 186.]

In Equity. Suit by the Fidelity Trust Company against the Elberton & Eastern Railway Company. On application by stockholders for leave to intervene. Application denied.

W. A. Slaton, of Washington, Ga., and S. G. McLendon, of Atlanta, Ga., for interveners.

King & Spalding, of Atlanta, Ga., for respondent.

NEWMAN, District Judge. This is a suit brought by the Fidelity Trust Company, as the trustee under a mortgage or deed of trust to secure certain bonds, to foreclose the mortgage. Application was made for the appointment of receiver. A temporary receiver was appointed,

and his appointment was subsequently made permanent.

[1] This application to intervene is on behalf of certain stockholders. Attached to the application to intervene in the case and become parties defendant is the draft of an answer which would be filed if leave to intervene were granted. This answer sets up certain things which are matters affecting the internal organization and management of the corporation, which clearly could not be set up as a defense to this foreclosure suit. It also sets out that the stock owned by certain stockholders was not paid for. That is a matter which, of course, cannot be set up as a defense to this foreclosure proceeding.

[2] The bonds which were issued under the mortgage sought to be foreclosed were given to the Fidelity & Deposit Company to pay it, as the ultimate contractor, for the building of the railroad. There is no question raised about this. It is asserted by the plaintiff, the Fidelity Trust Company, that one-half of these bonds went to and are now held by the J. F. Cogen Company of New York; the other \$150,000 being the property of the Fidelity & Deposit Company.

There is a question made in the intervention as to the fact that the road was not finished within the specified time, and certain damages are claimed for that, as well as interest on fifty thousand dollars claimed to have been deposited with the Fidelity & Deposit Company to secure it for going on the bond of the McCord Company, the original contractor.

At all events, all that seems to be claimed here of a substantial character is against the Fidelity & Deposit Company, there being certain allegations in the intervention to the effect that the Fidelity Trust Company, the plaintiff, is so connected with the Fidelity & Deposit Company as that they are one and the same in law and in legal effect.

I have come to this conclusion about the right to intervene in this case: That, so far as the interveners represent the corporation and

can set up any rights against the Fidelity & Deposit Company, that can be done hereafter. The bonds represented by the plaintiff and secured by the deed of trust should be brought into court and the owners of the same should be named. If, as claimed by the plaintiff, one-half of these bonds are still in the hands of the Fidelity & Deposit Company, any claim against that company can be brought, if at all, at that time, and certainly should not be interposed now to prevent a decree of foreclosure of the mortgage. When the property is sold and the money brought into court, it seems to me that all matters that exist between the corporation and the Fidelity & Deposit Company

can be readily ascertained and determined.

[3] It appears from an answer filed by the respondent here, and by the exhibit to the court of a copy of the proceeding, that a suit has been brought by the trustee in bankruptcy of the McCord Contracting Company, the original contractor to build the Elberton & Eastern Railroad, against the Fidelity & Deposit Company and the Elberton & Eastern Railway Company, in the United States District Court for the Southern District of New York, and is there now pending; the object of the suit being to recover the money deposited with the Fidelity & Deposit Company. It is stated by this answer that in that suit the Elberton & Eastern Railway Company has pleaded; so that the fact that the matter is pending in another court of competent jurisdiction, in which the right of the Fidelity & Deposit Company to retain the money in its hands is at issue, would be an additional reason for denying the right of the interveners to come into this court as to that part of their case.

In the case of Dickerman v. Northern Trust Company, 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423, in concluding a very interesting opinion, which, taken altogether, is very strongly against the right to intervene in cases like this, Mr. Justice Brown, delivering the opinion

of the court, says:

"This is a decree ordering a foreclosure and sale of the property to pay the bonds, to which the bondholders are clearly entitled. It finds that all the bonds were duly issued, negotiated, and sold, and that they are outstanding and valid obligations of the company, and that they are now held by a large number of persons who have become the owners thereof for a valuable consideration. These bonds must ultimately be presented for redemption from the proceeds of sale, and we see nothing in the decree appealed from to prevent an inquiry being instituted as to their validity in the hands of their present holders. We are clearly of opinion that, so far as they were purchased for a valuable consideration by innocent holders, they are not subject to the set-off claimed. The question whether, so far as they are held by parties cognizant of the alleged fraud, they are subject to a set-off, is not one which properly arises in this case, where the bonds must be treated as an entirety, but is a defense applicable to each individual bondholder."

It seems to me perfectly clear that all that can be properly claimed, if that can be, is the set-off against the bonds in the hands of the Fidelity & Deposit Company, when it shall present those bonds for payment.

That and the additional fact that the matter of the right of the Fidelity & Deposit Company to retain this \$50,000 is now pending in another court, seem to be ample grounds for denying the right to intervene as to that matter.

If there be any right on the part of the corporation to recover against certain stockholders, that is a matter to which the court, through its receiver, can give proper attention.

The application for leave to intervene is denied.

UNITED STATES v. JUNG YOU.

(District Court, E. D. Pennsylvania, October 11, 1916.)

No. 2.

1. Aliens \$\sim 32(5)\$—Deportation—Burden of Proof.

In a proceeding for the deportation of an alien, the burden of establishing his right to remain in the country is imposed on the alien by reason of the practical necessities of the case.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. 32(5).]

2. ALIENS \$\infty 32(8) - Deportation - Chinese Persons - Evidence.

In a proceeding for the deportation of defendant, a Chinese person, on the theory that he was unlawfully within the country, evidence *held* to establish that defendant was lawfully within the country and to show that the order for his deportation was improper.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⊕32(8).]

Proceedings by the United States against Jung You for his deportation. From an order of the Commissioner directing deportation of defendant, he appeals. Order revoked, and defendant directed released.

Edwin S. Kremp, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

Frank G. Butler, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. [1] The duty of the court to give effect to the policy declared in and sought to be enforced by the acts of Congress, which apply to this case, is recognized. At the same time, no one can shut his eyes to the wrong done a defendant who is, through an error of judgment of the facts, ordered to be deported. The difficulties which encompass a searcher for the truth are many and obvious. The burden placed upon defendants in such cases is without doubt a heavy one, but it is justified by the practical necessities. Heavy as it is, the defendant must meet it, and the only question in the case is: Has this defendant done so? Such a question divides itself into several minor ones. Is there evidence to support a finding of the required fact? Does the evidence, if credited, justify such finding? It is admitted that these latter questions must be answered affirmatively. There is evidence which, if given credence, establishes the The query then shifts and partakes of a somewhat different and negative form: Is there anything in the case to justify disbelief or to support a refusal to give it credence? A multitude of smaller questions at once arise. The attitude of a mind intent upon getting

at the truth is described in the request, "Tell me all about the case and everything bearing upon the question." One helpful fact is how the question came to arise, because this involves the degree of the strength of the proofs which may properly be exacted. Every one upon whom a burden of proof rests may fairly be required to produce, not only evidence, but the best evidence, which he could reasonably be

expected to supply.

[2] We learn, in this case, that two men, known as Chinamen, left the ship upon which they came to this country as part of the crew. In the search for them the defendant was found and was taken into custody as one of the deserters. Had he been one of them and resisted deportation by the assertion of American birth, the most clear and convincing proofs might have been very properly required of him. All suspicion even of this is out of the case, and the proceeding against him has been turned into a test of his ability to prove his right to remain in this country. This test he must meet, and the question recurs of whether he has done so successfully. American birth would naturally raise the expectation of his presence here, if not for his whole life, at least for some part of it. If the fact of birth here was the only fact averred, the proof to be convincing must be clear or accompanied with some satisfying explanation of the fact of absence. If both birth and continuous residence here were averred, technical fullness of proofs of the fact of birth might not be exacted, but satisfying evidence of residence would be expected and demanded. This demand for fullness and clearness in the proofs would be strong for the later years, but would properly lessen as the time receded. The very character of the evidence adduced might challenge our credulity and justify disbelief. If a man charged with surreptitious entrance within the past two or three years defended deportation proceedings by averring that he was born and had lived all his life in America, and the only credible witnesses he was able to produce had known him to be here for but two years, credence might be refused to his claim of birth in spite of the fact that he offered the positive and direct testimony of those who said they were present and eye witnesses of the physical fact of his birth. The reason for the disbelief would lie in the fact that the proofs were significantly weak where they could reasonably be expected to be strong, and suspiciously strong where they would be expected to be weak,

No such reason exists for discrediting the defense set up in this case. The defendant has shown by evidence admittedly convincing his continuous residence here for half a generation. The fact of his birth has been attested in the only way short of the production of an official record in which such a fact can be established, and the absence of an official record is accounted for by the fact that its production is admittedly impossible. To deny credence to evidence which carries conviction is merely to refuse to believe, and the refusal is neither softened nor justified by demanding a kind of proof which admittedly is beyond the possibility of production. Truth which is to be discovered from the testimony of witnesses and other evidence is to be found by following the conscientious convictions of the tribunal which

passes upon the testimony.

The Commissioner followed his convictions in issuing the order of deportation, and by the like command we follow ours in sustaining the appeal, revoking the order, and directing that the defendant be released from custody.

Ex parte CHOW JUYAN.

(District Court, S. D. California, N. D. First Division. September 11, 1916.) Nos. 15907–15910.

Physicians and Surgeons == 2-Statute Regulating Practice-Constitutionality.

Act Cal. June 2, 1913 (St. 1913, p. 722), regulating the practice of medicine, *held* not invalid as in violation of the Constitution of the United States.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 2; Dec. Dig. ⊕ 2.]

Petitions for writs of habeas corpus by Chow Juyan, Tom J. Chong, Chow Juyan and Chow Let, and Yak Q. Gine. On demurrers. Writs denied.

Philaletha Michelsen and Twain Michelsen, of San Francisco, Cal., for petitioners.

Charles M. Fickert, Dist. Atty., of San Francisco, Cal., for respondent.

DOOLING, District Judge. These petitions, involving the same questions, were heard together. The petitioners are Chinese who practice the art of healing by the use of herbs. They were convicted in the state courts for practicing without the medical certificate which is required in California by the Act of June 2, 1913 (Stats. of Cal. 1913, p. 722). This conviction having been upheld by the District Court of Appeals, and an application to the Supreme Court of the State of California for a writ of habeas corpus having been denied, a similar application was made to this court, and an order to show cause thereupon issued.

The sufficiency of the petition is now challenged by demurrer. The basis of the petition is the alleged unconstitutionality of the act above mentioned. This act, it is claimed, is unconstitutional for a number of reasons. It is claimed that the title is defective; but such defect, if it exist, is one solely under the state Constitution, and the courts of the state have held the act to be valid.

It is further urged that the act is unconstitutional because of its provisions regulating drugless healers, in that it defines the drugless practitioner as one who treats diseases without the use of drugs and without in any manner severing or penetrating any of the tissues of human beings except the severing of the umbilical cord. The argument is that such practitioners do continually by manipulation and adjustment sever the tissues of human beings in using their particular mode of treatment. The District Court of Appeals disposes of

this contention by the statement that it is evident from the whole context that the word "sever" as therein used means a severance by cutting. In addition, it may be said that petitioners are not drugless practitioners, and the provision in question does not affect them. It is also urged that the act is unconstitutional as applied to petitioners because it gives to the board of medical examiners the power arbitrarily to determine the fitness of applicants for certificates and the standard of colleges as a matter of mere personal approval, without regard to any standard fixed by the Legislature itself, and that such delegation of power is unconstitutional. But such delegation, even if conceded, contravenes no provision of the Constitution of the United States, nor any law of Congress, that has been called to my attention. Whether or no it contravenes a provision of the state Constitution is a matter within the cognizance of the courts of the state, and they have held that it does not. It is also urged that the act interferes with interstate commerce because it prohibits or unduly burdens the sale of imported herbs. But it does not prohibit the sale of such herbs, and, if it burdens such sale, it is only because the seller, in addition to selling the herbs, acts also as a physician in prescribing their use, and the prescribing is burdened to the extent that the prescriber must have the medical certificate required. It is not Chinese herbalists alone who must secure such certificate, but all herbalists; that is to say, all persons who treat others by the use of drugs, whether exclusively herbal drugs, or otherwise.

There appears no reason why this court should interfere with the enforcement of the act in question, and the demurrers are therefore sustained, and the petitions for writ of habeas corpus are denied, and such order will be entered in each case.

UNITED STATES v. FAIR et al.

(District Court, N. D. California, First Division, September 13, 1916.)

No. 5807.

Costs \$\iff 2461/2\)—Suits in Forma Pauperis—Construction of Statute.

Act July 20, 1892, c. 209, § 1, 27 Stat. 252, as amended by Act June 25, 1910, c. 435, 36 Stat. 866 (Comp. St. 1913, § 1626), authorizing citizens to maintain or defend suits or writs of error or appeals in civil or criminal cases without prepayment of fees or costs on the filing of an affidavit of poverty and requiring officers of the court to perform duties in such cases, does not give a District Court power to order its reporter, who is not an officer of the court, to furnish a transcript for error proceedings to the defendant in a criminal case without compensation, or at the expense of the government.

[Ed. Note.—For other cases, see Costs, Dec. Dig. 2461/2.]

Criminal prosecution by the United States against John Fair and others. On motion by defendants for order requiring reporter to make transcript. Denied.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

J. G. Reisner and L. H. Honey, both of San Francisco, Cal., for defendants.

DOOLING, District Judge. The defendant, having been convicted of using the mails in furtherance of a scheme to defraud, now moves the court for an order "directing the reporter in this court to transcribe the testimony heretofore taken upon the trial of the above-entitled cause, at the expense of the government." The motion is based, upon the affidavits of defendant and his counsel, on the ground that defendant is in indigent circumstances, and because of his poverty cannot pay for such transcript or give security for the same, and such transcript is absolutely necessary to perfect the record upon a writ of error which he intends and desires to sue out.

The application is made under section 1 of the act of July 20, 1892, as amended June 25, 1910 (Stats. 1910, c. 435, 36 Stat. L. 866), which is as follows:

"That any citizen of the United States entitled to commence or defend any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the Circuit Court of Appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal."

Section 3 (Comp. St. 1913, § 1628) of the same act provides:

"That the officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases."

Section 5 (Comp. St. 1913, § 1630) is as follows:

"That judgment may be rendered for costs at the conclusion of the suit as in other cases: Provided, that the United States shall not be liable for any of the costs thus incurred."

This statute as originally enacted applied only to plaintiffs in a civil action, and the provisions last quoted were not changed when the act was amended in 1910 to include defendants in suits or actions both civil and criminal. But one thing is quite apparent, and that is that Congress did not intend that the United States should be liable for any of the costs incurred under the provisions of the act. So that in any event the court is without power to order, as requested, "the transcription of the testimony at the expense of the government." I am convinced, too, that the court is equally without power to order such transcription at the expense of the reporter. The act evidently applies only to such fees as those of the clerk or marshal, or some other officer

of the court. The reporter is not such an officer. Indeed, the reporter of this court is such by contract with the Department of Justice. This contract does not require him to perform, without compensation, the services now sought to be imposed; nor does it provide that he should be paid therefor by the government.

It is very desirable that a defendant have every opportunity, in making his defense or perfecting his appeal, to safeguard all of his rights; but such safeguarding may not be had at the expense of the reporter.

I have considered this application on its merits, although the affidavits do not show that defendant is a citizen of the United States, or that a writ of error has already been sued out; and it is apparent that when such writ is sued out the application to prosecute it without the payment of fees or costs must be made, if at all, to the Circuit Court of Appeals.

The motion to order the reporter to transcribe the testimony must

be denied, and it is so ordered.

In re LEWIS SHOE CO.

(District Court, D. Massachusetts. October 27, 1908.)

No. 13534.

- 1. Bankruptcy \$\simes 84\$—Involuntary Proceedings—Amendment of Petition.

 Permission will not be given to amend a petition in involuntary bankruptcy several years after it was filed by alleging as an additional act of bankruptcy a preferential transfer of property, where it is not alleged what the property was or when or to whom it was transferred.
 - [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 126–129; Dec. Dig. \$≥84.]
- 2. Bankbuptcy \$\infty\$ 84—Involuntary Proceedings—Amendment of Petition.

 A petition in involuntary bankruptcy cannot be amended by alleging a preferential transfer of property more than four months before the application to amend was made, although less than four months before the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 126–129; Dec. Dig. ६—84.]

In the matter of Lewis Shoe Company, alleged bankrupt. On motion to amend petition. Denied.

Edward C. Clark, of Boston, Mass., for petitioning creditor. Allen & Barnes, of Boston, Mass., for alleged bankrupt.

DODGE, District Judge. This involuntary petition against Lewis Shoe Company was filed March 25, 1908, by three alleged creditors. The only act of bankruptcy alleged was the making of a general assignment to George L. Barnes of Weymouth. An answer to the petition was filed, and the case is before the referee for ascertainment of the facts and report, under an order made April 27, 1908.

The present application is for leave to amend the petition by adding

to it allegations of still other acts of bankruptcy.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

[1] The first allegation which it is desired to add is that within four months preceding the filing of the petition the alleged bankrupt conveyed, transferred, concealed, or removed "a portion of its property" with intent to hinder, delay, and defraud creditors, or permitted this to be done. What property was then dealt with, and when, or to whom it was transferred, if to any one, is not alleged. It is stated that a more particular description of the property, and of the time of the alleged act, are "unknown to your petitioners."

A former petition to amend, which sought to add to the original petition a similarly unspecific and indefinite allegation of a preferential transfer, was denied May 4, 1908. The same disposition must be made of the present request. If the petitioners, after their original petition, containing no such allegation, has been on file for some weeks, are unable to state when the transfer they now desire to rely on was made, or to whom, or what the property was, the inference is strong that they are proceeding upon conjecture or suspicion alone. No reasons for a belief that what they allege is true are set forth, nor any reasons for the fact that they are unable to be specific in their allegations if what they allege is true. The alleged bankrupt ought not to be compelled to meet allegations made upon the mere anticipation that something of the kind may perhaps be disclosed in the course of the hearing now ordered before the referee. The reference was not for the purpose of finding out whether some act of bankruptcy may not have been committed, but to give the petitioning creditors the opportunity to prove, if they can, that a certain definite act of bankruptcy has been committed.

It is true that petitions charging acts of bankruptcy in terms no more specific and definite than these are sometimes filed, and, if no objection is raised, are sometimes acted upon by the court. Against objection, however, the bankrupt cannot be required to answer such allegations. In re Cliffe (D. C.) 94 Fed. 354; In re Nelson (D. C.) 98 Fed. 76; In re Pure Milk Co. (D. C.) 154 Fed. 682. Their introduction into these proceedings at the present stage cannot be permitted.

[2] The second allegation sought to be added to the petition is that \$50 was preferentially transferred by the bankrupt to William M. Staples of Weymouth on February 28, 1908. This is specific enough, and the allegation might be allowed as an amendment but for the fact that February 28, 1908, is more than four months before the application to set it up in these proceedings is made, though less than four months before the filing of the original petition. Under these circumstances, the amendment cannot be allowed. In re Haff, 136 Fed. 78, 80, 68 C. C. A. 646, and the authorities there cited; In re Pure Milk Company (D. C.) 154 Fed. 682.

The petition to amend is denied.

UNITED STATES v. KENOFSKEY.

(District Court, E. D. Louisiana. July 25, 1916.)

No. 3001.

Post Office 35-Offenses-Use of Mails to Defraud.

An agent of an insurance company whose duty it was to identify remains and obtain certificates of death of persons insured, devised a scheme to defraud the insurance company by presenting to it fraudulent death claims, supported by false certificates. He knew that the claims required approval by the home office of the insurance company in another state, and that they were sent by the local office to the home office by mail, but his connection with the fraudulent claims ended when they were presented to the superintendent of the local office. Held, that though the superintendent of the local office sent such fraudulent claims through the mail, the agent is not guilty of the offense of using the mails in connection with the scheme to defraud denounced by Pen. Code, § 215 (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1913, § 10385]).

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⇒35.]

At Law. Solomon Kenofskey was indicted for postal offenses denounced by Pen. Code, § 215, and he demurs. Demurrer sustained.

Joseph W. Montgomery, Asst. U. S. Atty., of New Orleans, La. Henriques & Otero and H. N. Gautier, all of New Orleans, La., for defendant.

FOSTER, District Judge. In this case the indictment sets up a scheme to defraud by use of the mail, in violation of section 215 of the Penal Code. The facts charged upon which the overt act is predicated are as follows: Kenofskey was an agent and assistant superintendent of the Life Insurance Company of Virginia at New Orleans, and it was part of his duty to view and identify the remains and obtain certificates of deaths of the persons insured. He devised a scheme to defraud the insurance company by presenting to it fraudulent death claims supported by false certificates. He knew all such claims required approval by the home office of the company at Richmond, Va., before payment, and were sent by mail from the local office to the home office. In pursuance of the scheme he handed certain false documents to the local superintendent at New Orleans, and he in turn approved them without knowledge of their fraudulent character, and deposited them in the mail for transmission to the home office in Richmond.

It is alleged the defendant knew the documents would be sent by mail, and intended that they should be. The depositing of the letter in the mail for the purpose of executing the scheme is the crime. The defendant did not mail the letter, and the local superintendent of the insurance company was not his agent. It is not charged it was the duty of the defendant either to prepare for mailing or to actually mail the papers. He is sought to be held on the theory that as he knew the claim would be mailed to the home office, in the usual course of

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the business, for approval before payment, he knowingly caused it to be deposited. This theory is too far-fetched to be tenable. Furthermore, in order to constitute a crime, the mailing of the letter must have been a step in the execution of the fraudulent scheme. The scheme devised by defendant was completely executed when he handed the false claim to the local agent at New Orleans.

However desirable it may be from the viewpoint of the victim to try all perpetrators of fraudulent schemes in the federal courts, this court

cannot assume jurisdiction, except in clear cases.

The demurrer will be sustained.

In re BETSEKAS.

(District Court, N. D. California, S. D., First Division. October 9, 1916.)
No. 10321.

BANKRUPTCY 5-196-CREDITORS-RESTRAINING ORDER.

A judgment creditor levied execution on property which was claimed by third persons to whom the bankrupt had conveyed it, whereupon the execution was released. More than four months before the institution of the bankruptcy proceeding, the judgment creditor sued the bankrupt and such third persons, and secured a decree that the conveyances were void as to him. Such decree was entered within four months of institution of the proceedings, whereupon the judgment creditor caused execution to be issued on the original judgment, and the property was sold as the property of the bankrupt. Held, that a restraining order should not be issued against the judgment creditor in favor of creditors who had not participated in the suit to set aside the conveyances, notwithstanding the judgment creditor was proceeding only by virtue of the latter decree.

[Ed. Note.—For other cases, see Bankruptcy. Cent. Dig. §§ 306-316; Dec. Dig. \$\simes 196.]

In Bankruptcy. In the matter of the involuntary bankruptcy of John Betsekas. On motion to dissolve restraining order. Motion granted.

C. A. Shuey and J. A. Bacigalupi, both of San Francisco, Cal., for petitioning creditors.

G. C. Halsey, of San Francisco, Cal., for alleged bankrupt.

Devoto, Richardson & Devoto, of San Francisco, Cal., for G. Sbragia.

DOOLING, District Judge. Sbragia, the moving party, has been for some months pursuing certain property as the property of the bankrupt in order to satisfy a judgment against him. He first levied an execution on the property, but it was claimed by third parties to whom the bankrupt had conveyed it, and the execution was released. Then more than four months before the bankruptcy proceedings he brought action against the bankrupt and these third parties, and secured a decree that the conveyances were void as to him. This decree was entered within the four months. Having procured this decree, he caused execution to be issued on the original judgment, and the prop-

erty was sold as the property of the bankrupt, the third parties apparently not making any claim to it. It is this latter execution that the restraining order in question is directed against. Whether he execute the original judgment or the latter decree does not seem to me to be very material, as it is only by virtue of the latter decree that he is permitted by the claimants of the property to proceed against it. He is, in effect, enforcing the lien secured in the second action. Having taken all these proceedings to secure his money, he should not be deprived of the fruits of his litigation at the last moment by creditors who have done nothing.

The motion to dissolve the restraining order is granted, and said

order is dissolved.

BYERLY v. SUN CO.

(District Court, E. D. Pennsylvania. September 18, 1916.)

No. 201 Oct. Sess., 1908.

EQUITY 394-MASTERS-COMPENSATION.

The compensation allowed a master by a district court under Equity Rule 68 (198 Fed. xxxviii, 115 C. C. A. xxxviii) must be fixed under the rules applicable to costs, to be measured by the time employed "having regard to all the circumstances" of the case.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 857-859; Dec. Dig. ⊕⇒394.]

In Equity. Suit by Francis A. Byerly, executor, etc., against the Sun Company. On motion for order fixing compensation of master. See, also, 226 Fed. 759.

Francis S. McIlhenny, of Philadelphia, Pa., for objector.

DICKINSON, District Judge. The services actually rendered by the master in this case, viewed from the standpoint of their value, were such as would command the highest rate of compensation had they been rendered as professional services. Such admeasurement, however, could be made only by the parties themselves. We have clung to the hope that the compensation of the master in this case would be fixed by agreement. It is apparent that this will not be done. The compensation must therefore be fixed by the court by virtue of the directions of Rule 68 (198 Fed, xxxviii, 115 C. C. A. xxxviii). In so fixing it, we are fixing costs and must be governed by some rule of compensation which applies to other items of costs. The reasons for this are obvious. The only rule of measurement with which we are by analogy supplied is that of the time employed. This is the rule applied by all rules of court and statutes fixing like compensation. This is because of necessity. As a rule of general application, as all true rules are, it is the best to be had, if not always satisfactory. The further attempt which is sometimes written into rules and statutes to fix a common rate of compensation for services of an entirely different character is the feature which often results in what is recognized as grossly excessive or inadequate compensation. Rule 68 avoids this by permitting of a time measurement based upon a rate of compensation fixed in the language of the rule in view of "all the circumstances of the case."

Adopting and adhering to the rule of compensation suggested, we have, as accurately as the record of the case enables us to do, found the time employed by the master in the performance of his duties, and, allowing as large a per diem rate as would be just, and having regard to the circumstance that a part of the inquiries of the master involved him in expense, the compensation of the master (including this expense) is fixed at \$6,000, charged upon and to be borne by the defendant. Viewed from the standpoint of costs to be paid by the unsuccessful party and taxed by what the record discloses was the time consumed, this is the compensation which Rule 68 contemplates. It is by no means intended to measure the value of the work which the master put into this case. The duration and intensity of effort put into such work and the value of the service rendered is one thing. It varies often in accordance with the experience and training of the servitor and the facility with which he performs his task. The taxation of the compensation as costs to be paid by a litigant is another thing. This must be based upon a rule of general application. The one indicated is the only one with which we have been provided.

THE ROANOKE.

(District Court, N. D. California, S. D., First Division. September 11, 1916.)

No. 15669.

SHIPPING \$\infty 86(2)\$—LIABILITY OF VESSELS—COLLISION WITH BEACON.

The destruction of a beacon in the harbor of San Pedro, Cal., by a steamer, held due solely to the negligent handling of the vessel.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 356, 357; Dec. Dig. ⊕=86(2).]

In Admiralty. Suit by the United States against the steamship Roanoke. Decree for libelant.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for libelant.

Charles H. Sooy and Courtney L. Moore, both of San Francisco, Cal., for respondent.

DOOLING, District Judge. The steamer Roanoke collided with and destroyed a government beacon in San Pedro Harbor on May 7, 1912. I have little difficulty in deciding that the cause of the collision was the negligent handling of the steamer, and that she is responsible for the damage occasioned thereby. It is not so easy to determine from the evidence the amount of such damage. Practically the only evidence upon this question is that the beacon which was destroyed was built in 1909 at a cost not stated; that it was purchased by the govern-

ment on June 30, 1911, for the sum of \$350; and that a new beacon has been erected at a cost to the government of \$450, the actual contract price, with some charges for superintendence which bring the total cost up to \$502.50. There is some conflicting evidence as to the condition of the piles upon which the destroyed beacon rested; libelant's witnesses testifying that they were sound, and respondent's witnesses testifying that they were badly eaten by teredos. There is some suggestion, too, that the life of a pile in the San Pedro Harbor is three

years.

In this state of the record, respondent contends that the court has not sufficient evidence before it to warrant a finding as to the amount of damage sustained by libelant. Libelant contends that a decree should be entered for \$502.50, the amount expended by libelant in the erection of a new beacon. But the measure of damage is not the cost of a new beacon, but the reasonable value of the old one at the time that it was destroyed. This value is hard to determine from the evidence submitted. It is certain that libelant has suffered damage to some extent, as the destroyed beacon was serviceable and actually in service. It does not seem just that respondent should escape all liability for the damage caused by it, for the sole reason that in the nature of things the actual money value of the beacon was not and probably could not be testified to. But the beacon, having already been in use for two years, cost libelant \$350 a year before its destruction. There is testimony that the piles were sound. A similar beacon has been erected since at the contract price of \$450. In this latter structure were some articles of greater cost than in the former one. This excess cost was about \$70, so that the cost of a new beacon, like the old, would have been in the neighborhood of \$380. Failing evidence to show the amount of deterioration of the old beacon during the year after its purchase by the government, and taking \$350, the amount paid therefor, to be a fair value, in the absence of any showing to the contrary, and considering that it would cost by contract about \$380 to replace it, I am of the opinion that the value of the beacon at the time of its destruction may be fairly held to be the \$350, its original cost to libelant.

A decree will be entered for that amount, without interest, but with costs.

END OF CASES IN VOL. 235